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MARMARA ÜNİVERSİTESİ

AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

EU AND TURKISH COMPETITION LAW:

A COMPARISON

Yüksek Lisans Tezi

BAHAR TÜRKER

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Danışman: DOÇ. DR. MUSTAFA TAYYAR KARAYİĞİT

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ONAY SAYFASI

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ABSTRACT

The objective of this study is to analyse the European Union and Turkish legal structures within the light of competition law and define similarities, as well as differences in between these regimes together with their historical backgrounds.

The subject of this study is not only to identify the application methods of both sistems and to define the level of harmonization in between these two likely regimes, but also to forsee possible improvements to enhance the coherence in European Union and Turkish legal acquis.

Therefore this thesis aims to present possible solutions to enrich the harmonization of the European Union and Turkish competition systems.

Key words: EU, Turkey, competition, concentrations, state aid

ÖZET

Bu tezin amacı Avrupa Birliği ve Türkiye'deki hukuk sistemlerini rekabet hukuku ışığında incelemek ve bu iki sistemin benzerlikleri ile farklılıklarını hukuki ve tarihsel arka planları da göz önünde bulundurarak ortaya koymaktır.

Bu tezin konusu yalnızca her iki hukuk sisteminin uygulama yöntemleri ve birbiri ile uyumluluk seviyesini ortaya çıkarmak değil, aynı zamanda aralarındaki uyumluluğu arttırabilmek adına hayata geçirilebilecek yenilikleri de öngörebilmektir.

Dolayısıyla bu tez, Avrupa Birliği ve Türkiye'deki rekabet hukuku sistemlerinin birbiri ile uyumunu iyileştirmeye yönelik çözüm önerilerini de sunmayı amaçlamaktadır.

Anahtar Kelimeler: Avrupa Birliği, Türkiye, Rekabet, Birleşme, Devlet Yardımları

CONTENT

ABBREVIATIONS

CJEU Court of Justice of European Union

CPC Code on the Protection of Competition

CU Customs Union

EC European Community

ECN European Competition Network

ECSC European Coal and Steel Community

EEC European Economic Community

EGC General Court of the European Union

EU European Union

Ibid Above mentioned reference

NCA National Competition Authorities

OECD Organisation for Economic Co-Operation and Development

OJ Official Journal Of The European Union

op. cit. Previously mentioned reference

para. Paragraph

p. Pages

SEP standard essential patent

SGK Turkish Social Security Institution

TCC Turkish Commercial Code

TCO Turkish Code of Obligations

TEB Turkish Pharmacists Association

TEU Treaty on European Union

TFEU Treaty on Functioning of the European Union

TICO Toyota Industries Corporation

TR The Republic of Turkey

US The United States of America

INTRODUCTION

The goal of competition, within the sense of demand and supply relation of the economy, is to create a system of actions in which two or more players in the mutual economical market struggle to be the ultimate preference of customers with regard to a certain product, as well as a service. In such sense, lower prices, higher quality, bigger quantity or such similar attractive elements of the relevant product or service make the choice more beneficial for the customers. Such competitive atmosphere grants a fair trade structure to the markets, allows consumers to gain profit from this structure and promotes new innovations within the market.

Competition law on the other hand aims to regulate and sustain this complex mechanism. Due to the high importance of this mechanism within the internal and external markets, it has always been an important matter for the European continent, even before the establishment of the European Union. The topic itself gained great attention by the end of Second World War; since it was seen that without agreeing on a mutual decision to grant economic settlement, there is no possibility for the countries to provide and preserve the peace atmosphere either. Therefore by the 1950s, the idea of a mutual market and an active economic cooperation between the states of European continent took great importance and as a result of the process, a mutual competition policy started to develop.

Another reason why the European continent needed to have a new game plan within the competition field is the fact that meanwhile they were still negotiating with each other about their conflicting interests and issues; their mutual trade partner at the other side of the Atlantic was much more familiar and globally involved to the competition matters. It was recognized then, that unless reconciling on a mutual action plan, it was not easy at all to compete with the United States of America (the US).

Indeed the first relevant competition act was enacted in the US in 1890 with the Sherman Act. The process evolved with the Clayton Act in 1914 in order to regulate the merger control system as well and the merger control regime got even better by Celler-

Kefauver Act in 1950; meanwhile the European continent was still struggling with the debates on creating a mutual action plan in 1950s.

In order to reduce the historical lack of practice within the competition law field of the European continent in comparison to the American continent, to become a strong global actor within the international trade market, moreover to be able to catch up with and even to compete with the American competitors; it was necessary for the European countries to adopt a course of action to enact a mutual competition code to be able to keep up with the legal requirements of the international market. Therefore the existence of a mutual competition policy has been an essential and indispensable part of European Union law.

As a matter of fact, due to the decades of experience of the US competition regime, even today the innovative approaches with regard to the competition practices are mostly arising from the US case law and the European Union competition policy takes such new perceptions as examples of influence to continue broadening and deepening its own competition regime to a possibly better level.

However regulating the competition matters is not such an old concept for the oldest official candidate country of the European Union, the Republic of Turkey. In fact the Republic of Turkey has signed the first Association Agreement with the European Union (back then European Economic Community) to become a member state in 1963, became an official candidate state in 1999 and the first official competition act was accepted only in 1994, with regard to a part of its responsibilities of adopting the acquis, in order to have the possibility of switching its status from being a candidate to being a member state of the European Union. Since the concept of competition law may still be assumed as young and new for the Turkish case law experience in comparison to the European Union's competition law practices, the adaptation process with the European competition acquis is still ongoing for the Republic of Turkey.

With regard to this fragmentary process of harmonization, this study aims to compare both European and Turkish competition law systems with regard to the historical backgrounds, legal bases, scholar views, as well as case law examples.

The first chapter is explaining the historical evolution process of competition law within the European and Turkish legal systems with regard to the different types of domestic legislations. The historical background also highlights the adaptation process of the Republic of Turkey, with regard to complying with the competition acquis of European Union.

Second chapter aims to compare the current competition law principles within the European Union and Republic of Turkey. Within this chapter, the similarities and differences between these two legal systems are expressed. Moreover, the chapter gives a glance about the possible improvements of the harmonization process of Republic of Turkey with the guidance of the new draft Turkish competition act.

After the detailed summary of current status of the application procedures, the study also aims to analyse the ongoing state of the process and highlight the necessities of the current situation to improve harmonization between these legal orders.

CHAPTER 1: HISTORICAL EVOLUTION OF COMPETITION LAW IN THE EUROPEAN UNION AND THE REPUBLIC OF TURKEY

1. IN THE EU

In the aftermath of two massively devastating world wars, it was agreed that there was a quite urgent necessity for European countries to find a way to cooperate instead of conflict, which would be the solution for an everlasting peace and convergence. Moreover in order to become a strong global player within the international trade market and compete with the quite older player of this market, United States of America, it was agreed that they need each other as team partners and the existence of a mutual action plan was necessary, while mutual competition policy was indeed a big part of this purpose. With regard to this aim, the French Foreign Minister Robert Schuman stated on the 9th of May in 1950 that a new and mutual economic approach would

"*provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war.*"[1]

According to this idea, economic integrity would encourage the political integration and as a result, a new European identity would be created, so it would preserve the peace and support them within the international field.

1.1 The European Coal and Steel Community

Within the purpose of economic and political integrity, the French government came up with an idea in 1950 to combine French and German coal and steel market and

[1] Robert Schuman, "Declaration", reprinted in **Building European Union: A Documentary History and Analysis**, Trevor Salmon & Sir William Nicoll, 1997, p.44.

possibly include a few other European countries.[2] The great efforts that arose from this aim have led France, Italy, Belgium, the Netherlands, Luxembourg and Germany to create the European Coal and Steal Community (ECSC) in the 18th of April In 1951. Establishment of the ECSC was aimed to focus on two important matters; first of all the transfer of decision making authority to a supranational body, High Authority, which is independent from the Member States of the community and secondly dealing and regulating important economical practices in between the Community Members.[3] As a result of these aims, the community was mainly based on economic integration and therefore competition issues took great importance on the ECSC Treaty. For instance, Article 65 of the ECSC Treaty forbids

"*all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices which would tend, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market.*"[4]

Article 66 was also regulating the issues related to concentrations and dominant positions of firms. A few years later, Articles 65 and 66 have correspondingly led to Articles 85 and 86 of the Treaty of Rome[5] which established the European Economic Community (EEC) in 1957.

Even though the ECSC Treaty created a strong framework to implement the purposes of the Member States and gave the jurisdiction to a supranational body to get fair and independent decisions; the practices of the High Authority was highly criticized for being dominated by the interests of the Member States and concluding its decisions in a way which is dependent on such influences[6]. Therefore the lack of independence

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[2] Sigrid Quack and Marie-Laure Djelic, "Adaptation, Recombination and Reinforcement: The Story of Antitrust and Competition Law in Germany and Europe", in Wolfang Streeck and Kathleen Thelen, **Beyond Continuity: Institutional Change in Advanced Political Economies**, Oxford University Press, 2005, 255-281, p.10.

[3] Laurent Warlauzet, "The Rise of European Competition Policy, 1950-1991: A Cross-Diciplinary Survey of a Contested Policy Sphere", European University Institute Publications, **EUI Working Paper RSCAS 2010/80**, October 2010, p. 7.

[4] ECSC Treaty, art. 65(1).

[5] Treaty Establishing the European Economic Community, arts. 85-86, 1957, 298 U.N.T.S. 11 (now TFEU arts. 101-02), hereinafter *"*EEC Treaty*"*.

[6] Warlauzet, op.cit. 3, p. 8.

led the Community in a few years to the creation of the EEC.

1.2. The European Economic Community

In the EEC Treaty, the single market integration was the main objective and the competition policy was seen as a principle concern of this process[7], especially after the EEC became European Union (EU) in 1992[8]. It is stated in the Article 2 of the EEC Treaty that the European Community would establish "a common market and progressively approximating the economic policies of Member States, to promote through the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it." Article 85 of the EEC Treaty prohibited anti-competitive agreements and Article 86 banned the abuse of a dominant position. Article 90 had provisions about public undertakings, while Article 92 had provisions about the topic of state aids. On the other hand the EEC Treaty did not contain provisions about the control of mergers because of the conflict of Members of the Community with regard to this issue.

Along with the certain intention of creating a European mutual single market, providing fair competition environment was one of the envisaged tools. According to this idea, market integration would promote the competition and an effective competition would enhance the market integration as well.[9] Likewise to this argument, the Commission explicitly stated on its First Report on Competition Policy in 1972 that, the economic integration would never been accomplished unless the anti-competitive agreements and concerted practices are resolutely opposed.[10] Furthermore, the Commission made a statement about the merger control policy and in one of the later reports, it was clarified that,

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[7] Andreas Weitbrecht, "From Freiburg to Chicago and Beyond – The First Fifty Years of European Competition Law", Issue 2, Sweet & Maxwell And Contributors, E.C.L.R. 2008, p. 82.

[8] Quack and Djelic, op. cit. 2, p. 10-13.

[9] Alexander Schaub, "Competition Policy Objectives, in European Competition Law Annual 1997: Objectives Of Competition Policy", Hart Publishing, 1998, page 126.

[10] Commission of the European Communities, "First Report on Competition Policy", page 13, 1972.

"*Although many such mergers have not posed any problems from the competition point of view, it must be ensured that they do not in the long run jeopardize the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market*."[11]

With regard to the aim of building a fair and competitive market, the next task was to unite the currencies to intensify the competitive process.[12] It is also stated by some scholars that monetary union within the EU has helped competition rules to evolve better, since product comparison was quite tough when the same goods and services are submitted to the mutual market with different currencies and therefore the adaptation of "Euro" has supplied transparency to the market prices which has led competition rules to be applied better.[13]

Along with the certain intentions to build a fairly competitive market, the growing nature of the European economy and moreover the expanding geographic territories of the EU itself multiplied the workload and pressure of the Commission and it was eventually unable to handle everything by itself. At this point, the National Competition Authorities (NCAs) began to grow in a rapid and sophisticated way which challenged the central domination of the Commission and therefore led the Commission to generate a new strategy[14] to decentralize the implementation process of the competition rules. However; it is controversial for some scholars that the EU competition policy is in a stage that is potentially unstable because of the fact that not only Commission but also the Member States and their NCAs are recently included to the decision making process which is extending the negotiations in between each one and dragging the final decisions being questionable.[15]

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[11] Commission of the European Communities, "Nineteenth Report on Competition Policy", page 33-34, 1989.

[12] European Commission, "Twenty-Seventh Report on Competition Policy", page 5, 1997.

[13] R. Whish and D. Bailey, "Competition Law", 7th edition, Oxford University Press 2012, p.52.

[14] 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.

[15] H. Wallace, W. Wallace and M. A. Pollack, "Policy Making in the European Union", 5th Edition , Oxford University Press 2005, page 113-114.

However within the decentralization process, the Commission nevertheless remains as an important figure of the enforcement system while cooperating with the newly created European Competition Network (ECN), which consisted of 28 competition authorities within the European Union and the Directorate General for Competition of the European Commission and which exchanges information between the NCAs and preserves the compatibility of the system. The Commission drew the outline of this system in 2004 by publishing the Commission Notice on Cooperation within the Network of Competition Authorities.[16] Therefore since May 2004, all the NCAs and Member State courts have the jurisdiction to enforce the provisions of the Treaty of Rome (now Treaty on the Functioning of the European Union).

1.3. The European Union

Thereafter these new developments, the process kept on evolving in 2007 when the Treaty on European Union (TEU), as well as the Treaty on the Functioning of the European Union (TFEU) entered into force. The importance of the establishment of an internal market is highlighted within the Article 3(3) of TEU and it is also stated within the same Article that

"*sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*."

Moreover Protocol 27 on the Internal Market and Competition[17] gives attention to having a system to ensure that the competition remains undistorted.

According to these, traditionally the first aim of competition law remained as to upgrade the market efficiency, while traditional economic theory assumes that the most efficient production of services and goods would occur where the opponents

[16] Commission Notice on Cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2004, p. 43-53

[17] Protocol (no 27) on Internal Market and Competition, OJ C 115, 9.5.2008, p. 309-309.

compete with each other the most[18], and also the protection of consumers and small firms from the great market power of large entities is essential to avoid the possible monopolies which seek to unfairly control the market share.[19] Additionally, the third main aim of the competition law is still to enhance the single market objective, since the Commission declared single market again as one of the 'EU's biggest assets'[20] to be protected.[21] The importance of single market is also emphasized again by the Court of Justice in the Case of *GlaxoSmithKline Services*.[22]

With the enforcement of the TFEU, the Commission has the power to apply all the rules that are set out by the Treaty and may also impose fines on undertakings which infringes the laid down rules. NCAs are also empowered to enforce Articles 101 and 102 while National Courts may likewise apply them. Meanwhile the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts and also cooperates with national courts to preserve the coherent application of EU competition rules.[23]

2. IN THE REBUPLIC OF TURKEY

The Republic of Turkey (TR), as an official candidate state of the EU, has the obligation to adapt its domestic law to the European acquis, in order to have a possibility to become an official member state of the EU, and this liability arises from several agreements. The first agreement that established an association between TR and

[18] F. Scherer and D. Ross, "Industrial Market Structure and Economic Performance", Houghton Mifflin 3rd edition, 1990; S. Bishop and M. Walker, "The Economics of the EC Competition Law: Concepts, Application and Measurement", Sweet & Maxwell, 3rd edition, 2010.

[19] P. Craig and G. de Búrca, "EU Law: Text, Cases, and Materials", 5th edition, Oxford University Press, 2011, p. 960

[20] See the Commission's Report on Competition Policy, 2009, para 9.

[21] See eg Commission's Guidelines on Vertical Restraints OJ 2010 C 130/1, para 7, on the Commission's approach to vertical agreements see ch 16, '*The methodology for the analysis of vertical agreements in the Commission's Vertical guidelines'*, pp 631–637.

[22] Cases C-501/06 P etc, *GlaxoSmithKline Services and Others v Commission and Others*, EU:C:2009:610, paras 59–61.

[23] European Commission, Antitrust Policy Overview, http://ec.europa.eu/competition/antitrust/overview_en.html, (last access: 05.12.2017).

the EEC is Ankara Agreement[24], which was signed in 1963. The process has proceeded in 1970 with the Additional Protocol[25] on the application methods of the Ankara Agreement, in 1996 with the Decision 1/95[26], which established the Customs Union (CU) between the EC and TR, and in 2001 with the Council decision[27] on the accession partnership with the TR, which was updated in 2003, 2006 and 2008. The liabilities about the competition law matters are various and arising from all of these agreements.[28]

2.1. Responsibilities of the TR in order to comply with EU Competition Law

2.1.1. Article 16 of the Ankara Agreement

Article 16 of the Ankara agreement gives the responsibility to the contracting parties to comply with the provisions of the Treaty establishing the Community on competition matters in their relations within the Association.

2.1.2. Article 43 of the Additional Protocol

Article 43 of the Additional Protocol gives the authority to the Council of Association to adopt the conditions and rules for the application of the principles laid down in Articles 85, 86, 90 and 92 of the Treaty establishing the Community, within the first six years, beginning from the entry into force of this protocol.

2.1.3. Articles 32 and 43 of the 1/95 Decision

Articles 32 and 33 of the 1/95 Decision have the similar principles with Articles 101 and 102 of the TFEU by forbidding the agreements, decisions and concerted practices of undertakings which have as their object or effect the prevention,

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[24] EEC-Turkey Association Agreement (1963) Official Journal No 217 of 29.12.1964

[25] Additional Protocol (1970) OJ L 293/72 P, 23.11.1970, hereinafter "Additional Protocol".

[26] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union - Official Journal L 035 , 13/02/1996 P. 0001 – 0047, hereinafter *"*1/95 Decision*"*.

[27] Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85, 24.03.2001, p. 13-23, hereinafter "Accession Partnership Document".

[28] Deniz Yıldızoğlu, "Türkiye'nin Avrupa Topluluğu Rekabet Politikası Alanında Muhtemel Müzakere Süreci İçin Uyum Durumu, Bu Alanda İzlenen Politikalar", The Secretariat General of Turkey for European Union Affairs, Single Market and Competition Chamber, May 2004, p. 21.

restriction or distortion of competition, as well as forbidding the abuses by one or more undertakings of a dominant position within the customs union borders.

Article 34(1) determines and restrains state aid matters. The same article grants exception to this restriction within the five years beginning from the entry into force of the decision, which would be applied to the less developed regions of the TR, as long as the concerned state aid does not harm the commercial activities between TR and the Community. Article 34(3) states that the aids that are granted to the areas where life standards are very low or unemployment rates are quite high shall be consistent with the Community with regard to supporting economic development. Moreover the aids that are aimed to provide the structural harmony with TR and the Community within the terms of CU would be acknowledged as consistent with the Community for the five years beginning from the entry into force of the decision.

Article 39 gives the TC the responsibility to comply with the competition rules of the Community and to construct a judicial body for competition matters. TR was also obliged to determine its aids within the competition rules of the Community and to notify the Community about new aid programs.

The TR would apply the Community norms within the first year beginning from the entry into force of the CU, with regard to Article 41, while within the two years beginning from the entry into force of the CU, would the supply and delivery mechanisms work the same for other Member States as well, with regard to Article 42.

2.1.4. The Accession Partnership Document

The document was published in 2001[29] and was updated in 2003[30], 2006[31] and 2008.[32] The competition section of the first document aims to approximate the domestic

[29] Accession Partnership Document, 08 March 2001, http://www.ab.gov.tr/files/AB_Iliskileri/AdaylikSureci/Kob/Turkiye_Kat_Ort_Belg_2001.pdf , (last access: 05.12.2017).

[30] Accession Partnership Document, 19. May 2003, http://www.ab.gov.tr/files/AB_Iliskileri/AdaylikSureci/Kob/Turkiye_Kat_Ort_Belg_2003.pdf , (last access: 05.12.2017).

legal rules with the Community rules, with regard to the transparency of state aid, as well as the control and responsibility mechanisms. It also seeks to comply with the rules of the Community, with regard to the matters that are arising from monopolies and the undertakings which enjoy exclusive rights.

The updated version in 2003 aims to construct a domestic mechanism to supervise the state aids. Moreover it pursues to complete the approximation process with the Community rules as well as the secondary legislation.

The update in 2006 still aims to construct the domestic state aid control mechanism, as well as complying with the related Community rules, pursuing to provide transparency and information sharing systems about the competition and state aid matters, as well as rising the awareness about them.

On the other hand, the update in 2008 aims to constitute a state aid legislation and construct an independent control mechanism, in order to control and supervise the state aids. It also aims to comply with the secondary legislation of the Community in competition matters, as well as providing transparency in state aid and notification of such aids to the Community.

2.2. Domestic Competition Legislation of the TR

Constitution of the TR is the primary legislation, which is the base of the competition rules as well. The Constitution, which was published in 1982 (Constitution 1982), does not specifically refer to competition law, however Article 167 states that

The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services, and shall prevent the formation of monopolies and cartels in the markets, emerged in practice or by agreement.

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[31] Accession Partnership Document, 23 January 2006, http://www.ab.gov.tr/files/AB_Iliskileri/AdaylikSureci/Kob/Turkiye_Kat_Ort_Belg_2006.pdf , (last access: 05.12.2017).

[32] Accession Partnership Document, 18 February 2008, http://www.ab.gov.tr/files/AB_Iliskileri/AdaylikSureci/Kob/Turkiye_Kat_Ort_Belg_2007.pdf , (last access: 05.12.2017).

In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce additional financial impositions on imports, exports and other foreign trade transactions, except taxes and similar impositions, or to lift them.[33]

According to this article, the Constitution 1982 has obliged the state to arrange necessary measurements in order to supply and protect the free competition environment and preserve the mutual public interests. On the other hand, the measurements that aim to prevent the unfair competition between natural or private persons are held by Turkish Commercial Code[34] (TCC) and Turkish Code of Obligations (TCO).[35]

Even though Constitution 1982, TCC and TCO had provisions to provide and preserve free competition; the necessity of a new code was still highlighted by Article 167 of the Constitution 1982 and therefore Code on the Protection of Competition[36] (CPC) came into force in 1994.

Similarly to related competition provisions of the TFEU, CPC prohibits the agreements, decisions and concerted practices of the undertakings that restrain or have the potential of restraining the free competition, forbids the abuse of dominant position within the market and determines the rules of mergers and acquisitions:[37]

The CPC has been updated in 2003[38], 2004[39], 2005[40], 2006[41], 2008[42], 2011[43],

[33] Constitution of Republic of Turkey, Article 167, https://global.tbmm.gov.tr/docs/constitution_en.pdf , (last access: 05.12.2017).

[34] "Türk Ticaret Kanunu" with the Act No. 6762, 29.06.1956, consolidated version is "Türk Ticaret Kanunu" with the Act No. 6102, 14.02.2011, hereinafter "TCC".

[35] "Borçlar Kanunu" with the Act No. 818, in 22.04.1926, consolidated version is "Türk Borçlar Kanunu" with the Act No. 698, 04.02.2011, hereinafter "TCO".

[36] "Rekabetin Korunması Hakkında Kanun" with the Act No. 4054, 07.12.1994, hereinafter "CPC", English translations of the CPC are made by World Intellectual Property Organization, hereinafter "WIPO", http://www.wipo.int/wipolex/en/text.jsp?file_id=245123 , (last access: 05.12.2017).

[37] İsmail Yılmaz Aslan, "Rekabet Hukuku Dersleri", Ekin Publications, consolidated 4th edition, 2014, p.17.

[38] Act No. 4971, 01.08.2003.

[39] Act No. 5234, 17.09.2004.

[40] Act No. 5388, 02.07.2005.

[41] Act No. 5538, 01.07.2006.

as well as 2012[44] and is also planned to be updated again with the *Draft* Act[45], in order to comply with the latest form of the EU competition law.

[42] Act No. 5728, 23.01.2008.
[43] Statutory Decree No. 661, 02.11.2011.
[44] Act No. 6352, 02.07.2012.
[45]Rekabetin Korunması Hakkında Kanunda Değişiklik Yapılmasına İlişkin Kanun Tasarısı" with the Draft No. 31853594-101-886-571, 23.01.2014, hereinafter "*Draft*".

CHAPTER 2: COMPETITION PROVISIONS WITHIN THE TFEU AND CPC

1. ARTICLE 101 OF THE TFEU IN COMPARISON WITH ARTICLES 4 AND 5 OF CPC

1.1. Article 101 of the TFEU

1.1.1. Generally

Article 101 TFEU (ex Article 81 EC) is the prime counteract tool in EU competition law to prevent the anti-competitor practices of the market dominants. It is stated that;

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings;

– any decision or category of decisions by associations of undertakings;

– any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

According to the article, even though some of the terms are mentioned in the article, they are deprived of a definition and therefore require interpretation in order to be applied; such as "undertakings", "associations of undertakings", "agreements", "decisions" and "concerted practices". With regard to the importance of these terms to perform the Article, the EU Courts and competition authorities coped with the interpretation of these terms in the context of several cases.

1.1.2. "Undertakings" and "Association of Undertakings"

The definition of "undertakings" has been discussed in many cases and as a result, a framework has been drawn by the competent authorities. The Court of Justice of European Union (CJEU) stated in *Höfner*[46] that;

"*the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is*

[46] Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH,* EU:C:1991:161, para 21.

financed."

Moreover in *Wouters*[47] it is stressed that the competition rules do not apply to such activities which;

"by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority."

An addition for the definition in *Pavlov*[48] has been made as;

"*any activity consisting in offering goods or services on a given market is an economic activity*."

With regard to the guidance of the statements mentioned above, it is clear that legal entities such as corporations, trade associations, state-owned corporations and individuals may be considered as an undertaking. However in fact, the undertaking term is not shaped according to the legal structure of the entities but instead it is shaped according to their actions, which are examined with regard to their aim and results.[49] In this respect, the actions that have a pure social aim that is utterly aside from an economic purpose[50] and the activities that are related to the actions of a public authority are not considered as within the scope of Article 101(1), since neither of them is relevant to an economic activity and therefore is not subject to the related competition law restrictions. In this respect, it is possible for a legal entity to act as an undertaking in one of its actions. However the same entity may not be classified as an undertaking in its action, in the case that the action has a pure social goal.

It is also possible for a public entity to operate as an undertaking when it has

[47]Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, EU:C:2002:98, para 57.

[48] C 180/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten,* EU:C: 2000:428, para 75.

[49] Lear, J., Mossialos, E., & Karl, B. (2010). "EU competition law and health policy" in E. Mossialos, G. Permanand, R. Baeten, & T. Hervey (eds.), **Health Systems Governance in Europe: The Role of European Union Law and Policy - Health Economics, Policy and Management**, Cambridge University Press, p.340.

[50] Craig and Búrca, op.cit. 19, p. 961.

the same kind of commercial purposes with private entities and a private body might not be considered as an undertaking while using special public powers with regard to fulfilling public interests. In order to understand whether an action is in the scope of Article 101(1), it must firstly be examined whether the action is related to public power and if not the second subject to be examined is whether the undertaking is performing commercial activity rather than social activity in the related incident.[51]

In *Poucet*[52], the CJEU concluded that the French regional social security office did not act as an undertaking, because the recipients were paying for the insurance according to their income level and the benefits that are granted were not based upon the level of contributions while surplus contributions were helping the ones who had financial struggles. However in *Fédération Française des Sociétés d'Assurance*[53], the court decided the exact opposite, since at this time the related insurance company was providing benefits to the recipients in conjunction with the amount of the contributions. In *SEL-Imperial Ltd*[54] it is stated that decisions of the associations of undertakings may also be subject to the content of Article 101(1). In this respect, even though an association does not have commercial activity, the decisions of it may fall within the scope of the article.[55]

On the other hand, Article 101(1) does not apply to the agreements when the parties are gathered to establish one economic entity. Because in that case it is not possible to see the constituting agreement as an agreement between undertakings, since the purpose of the agreement is not to prevent, restrict or distort the competition within the internal market but it is actually an agreement just to build a different mutual entity.[56] The same rule also often applies to the agreements between the parent and

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[51] Lear, Mossialos and Karl, op.cit. 49, p. 343.

[52] Cases C-159/91 and 160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, EU:C:1993:63.

[53] Case C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*, EU:C:1995:392.

[54] High Court of Justice, Chancery Division, 23 April 2010, *SEL-Imperial Ltd*, EWHC 854.

[55] Whish and Bailey, op.cit. 13, p.91

[56] Ibid, p.92.

subsidiary companies, since a subsidiary company does not act independently but instead follows the orders of its parenting company.[57]

The CJEU made statements about the title of employees as well, and decided that within the duration of the employment relationship, the workers are integrated to the entities that employ them and therefore they cannot be considered as an undertaking with regard to Article 101(1).[58] On the other hand it is possible for a former employee to be considered as an undertaking during the performing of an individual economic activity.[59] The CJEU also concluded that an agreement between the institutions that are responsible of representing the employers or employees cannot be considered as an agreement of undertakings; since such agreements seek to provide social benefits to the members and in the case that they were subject to Article 101(1), it would derogate the social objectives of such entities. Therefore these actions should be set aside from the content of Article 101(1).[60] However this exception cannot be applied to the agreements that are not about the social objectives, but instead pursued for economic interests. As an instance in *FNCBV* Case, the General Court stated that the agreements between associations that are determined to fix the prices to prevent imports of goods are subject to the provisions of Article 101(1) and therefore the related exceptions shall not be granted.[61]

As an explicit result of these examples, in order to determine the scope of Article 101(1), it is necessary to question the actions of legal entities individually case by case, with regard to the purpose and exerciser body of the related actions.

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[57] Case T-102/92, *VIHO Europe BV v Commission of the European Communities*, EU:T:1995:3 ; upheld by the CJEU, 24 October 1996, Case C-73/95 P, EU:C:1996:405.

[58] Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, EU:C:1999:419, para 26.

[59] European Commission, Decision of 17 September 1976, Official Journal L 254, p. 40-50.

[60] R. Van den Bergh and Peter D. Camesasca "Irreconcilable Principles? The Court of Justice Exempts Collective Labour Agreements from the Wrath of Antitrust*"*, 2000, **European Law Review**, vol. 25 part. 5, p. 492-508.

[61] Case T-217/03, *Fédération nationale de la coopération bétail et viande and Fédération nationale des syndicats d'exploitants agricoles and Others v Commission of the European Communities.*, EU:T:2006:391 ; upheld by CJEU, 18 December 2008, C101/07 P, EU:C:2008:741.

1.1.3. "Agreements", "Decisions" and "Concerted Practices"

In order to be able to apply Article 101(1), the presence of an action that is performed by an undertaking is necessary. In this respect, the scope of the Article not only covers the fundamental meaning of the formal agreements between the undertakings but also extends the meaning to their decisions, as well as their concerted practices. The reason of this extension is the fact that undertakings might tend to use informal methods in order to fulfill their anti-competitive purposes and therefore it is important to broaden the definitions to be able to cover the hidden practices of the anti-competitive agreements.[62] Advocate General Reischl also states that it is not necessary to differentiate an agreement from a concerted practice because they both mean almost the same thing in practice.[63]

From this perspective, it is possible to claim that there is a potential of an illegal collusion when the undertakings have any form of an agreement including the oral agreements, decision or as the simplest form, a mutual mindset. In fact, the Commission stated in *Polypropylene*[64] that even if the agreement is oral, not legally binding and no sanctions were applied in the case of disobeying, the purpose of the agreement would not change and it would remain as an anti-competitive agreement and therefore all the participants of the overall agreement, including the ones that did not attend the meetings regularly, were found guilty. It is stated later in another case that every participant of an anti-competitive agreement would have been found guilty in a situation where it is known or must have been known

"*that the collusion in which it participated ... was a part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel*."[65]

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[62] Craig and Búrca, op.cit. 19, p. 962.

[63] Case 209/78, *Heintz van Landewyck SARL and Others v Commission of the European Communities*, EU:C:1978:194.

[64] European Commission, Decision of 23 April 1986, *Polypropylene*, Official Journal L 230, p.1-66.

[65] Case T- 305/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de*

The similar statement made by the CJEU in the *Sugar Cartel* case[66] as well, where a group of sugar producers were a part of a concerted practice to protect the positions in their domestic Dutch market. They claimed that they did not intend to distort the competition but the CJEU stated that an explicit plan is not necessary to be existed, the court concluded instead that the Article 101(1) prohibits

"*any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*"[67]

Moreover the Commission states in *Guidelines on Horizontal Cooperation Agreements*[68] that the information sharing in between the undertakings may be seen as concerted practice of collusion when it undermines the '*strategic uncertainty*' of the related market.[69] The CJEU also concluded that a concerted practice may fall into the prohibited scope of Article 101(1) even if the practice did not result with an anti-competitive effect within the related market.[70] CJEU also stated in *Maschinenbau Ulm* that in a case where the goal of an agreement is to restrict the competition, it is not necessary to prove the existence of distortive effects, unless the objective of the agreement is not clear.[71]

As it is clear from such examples, in the case where a certain intention exists to restrict the competition within the market, it is not necessary to question the anti-competitive effect of the action, since Article 101(1) forbids the agreements which have as their object or effect the prevention, restriction or distortion of competition, which

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vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities, EU:T:1999:80, para 773.

[66] Case 40/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*, EU:C:1975:174.

[67] Ibid p. 425.

[68] European Commission, 14 January 2011, "Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements", Official Journal C 11/1, paras 60–63.

[69] Ibid, para 61.

[70] Cases C-199/92 P, *Hüls AG v Commission of the European Communities*, EU:C:1999:358, para 163.

[71] Case 56/65, *Socıété Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38 p. 249.

means that the object or effect are not considered cumulatively but instead they are considered as alternative elements to each other.[72] Therefore it is not necessary in such incidences to question the presence of both of them, but instead either of them is adequate to sentence undertakings as guilty with regard to the prohibited scope of Article 101(1).

However the situation might be held different in oligopolistic markets, which have proportionally less sellers, high entry barriers, provide almost the same products and are easily determinable price changes.[73] It is brought forward that this exception should be done in such markets, as the undertakings tend to use same prices not by the reason of a collusion but because in the case where one of the competitors attempt to change the price of the product, the others would act likewise in order to preserve their market shares. In this respect it is stated that if the sameness of the prices is an outcome of an oligopolistic market, then it is neither wise nor fair to punish the parties with regard to the content and purpose of Article 101(1).[74] Therefore, even if there is a parallel action between the undertakings, it is still possible for the parties to be exonerated in the case that they can reason action with something else than collusion.[75] However the general burden of proof is on the Commission, because of the presence of the exception, it is the responsibility of the parties in this case to prove the absence of collusion.

It is also stated that in some certain situations, the restriction of the competition might be promotive as well for different actors of the market. With regard to this possibility, it is stated in *Remia* that anti-competitive clauses might not fall into the scope of Article 101(1), if in the absence of a restrictive clause; the supplier with his specific knowledge about the related product could easily turn the situation for his own

[72] Whish and Bailey, op.cit. 13, p.118
[73] Craig and Búrca, op.cit. 19, p. 965.
[74] Ibid.
[75] Cases 29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities*, EU:C:1984:130.

benefit.[76] It is also stated in *Almelo*[77] that it is permissible to suspend the competition rules in order to provide financial stability of the undertakings while they perform their public service assignments. The similar statement was made in the *Glöckner*[78] case and it was found that it is permissible to for the undertakings to have anti-competitively exclusive rights in ambulance services since otherwise it would be a non-profit action for the undertakings to provide the emergency transportation service and it is also necessary to grant the exclusivity to provide the quality and credibility of this service. However in order to be able to limit the content of these examples, it is stated by the Court that the anti-competitive clause must be restricted by certain time and scope statements.[79] In this respect, the related restriction must be essential and also proportionate for the undertaking to fulfill its aim and in the case where there is a possibility to fulfill the same aim with less restrictive clauses, it is not permissible for the undertaking to apply the more restrictive anti-competitive clauses.[80]

1.1.4. The "De Minimis" Doctrine

Within the concept of Article 101(1), another exception from the prohibition of anti-competitive clauses is the case where an agreement does not have a significantly distorting impact on the related market or the inner-state trade.[81] This exception firstly held by CJEU within the case of *Völk v Vervaecke* and it is that

"*an agreement falls outside the prohibition in Article 101 where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question.*"[82]

Later the Commission has published a notice about this matter and has updated

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[76] Case 42/84, *Remia BV and others v Commission of the European Communities*, EU:C:1985:327, hereinafter "*Remia*" ; Case C 250/92, *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413.

[77] Case C 393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, EU:C:1994:171, hereinafter "*Almelo*".

[78] Case C 475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, EU:C:2001:577.

[79] *Remia*, op. cit. 76.

[80] Lear, Mossialos and Karl, op.cit. 49, p. 363

[81] Craig and Búrca, op.cit. 19, p. 983.

[82] Case 5/69, *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35.

the notice in 2014.[83] With regard to the related notice, the following

"…restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:

(a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors); or

(b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors). In cases where it is difficult to classify the agreement … the 10% threshold is applicable.

Where, in a relevant market, competition is restricted by the cumulative effect of (vertical) agreements … the market share thresholds … are reduced to 5%, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5% are … not considered to contribute … a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel agreements having similar effects."[84]

However, it is also stated by the CJEU that it is wrong to interpret the incidents as within the *de minimis* doctrine by solely quantitative terms.[85] In this respect in *Musique Diffusion Française*[86] case, the CJEU concluded that the concerted practice was not in the scope of the *de minimis* doctrine because even though the market shares

[83] European Commission, 30 August 2014, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union *(De Minimis Notice)*, Official Journal C 291/01.

[84] Ibid, para. 8-10.

[85] Whish and Bailey, op.cit. 13, p.143

[86] Cases 100/80, *SA Musique Diffusion française et autres contre Commission des Communautés européennes*, EU:C:1983:158.

of the parties were small, the market was still fragmented and the market shares surpassed the shares of most of the competitors.

Moreover in the highlighted notice of the Commission, it is indicated that the stated exceptions will not be applied to the agreements which have the goal of prevention, restriction or distortion of competition within the internal market.

1.1.5. Article 101(3) of the TFEU: Exemptions

1.1.5.1. Aim of Exemptions

The main aim of Articles 101(1) and 101(2) of TFEU is to preserve the competitive market and to prevent the actions that distort or may distort atmosphere. However in certain situations with regard to Article 101(3), the actions that breach the first two paragraphs of Article 101 may be esteemed as complying with the internal market. In fact the aim of Article 101(3) is to be able to allow agreements, decisions and concerted practices, even though they distort or may have the potential of distorting the free competition, with regard to their specifically positive outcomes which override the negative effect within the internal market. Such specific circumstances are listed within the third paragraph of Article 101 and the related provision grants individual or block exemptions to the listed certain actions.

1.1.5.2 Individual Exemptions

With regard to Article 101(3), it is possible to be excluded from the outcomes of performing the prohibited actions that are stated in Article 101(1) by fulfilling all four certain and cumulative conditions. In this respect, it is possible for the agreements, decisions or concerted practices which fall into the scope of Article 101(1) to gain individual exemptions in the case when the related agreement, decision or concerted practice is improving the production or distribution of goods or promoting technical or economic progress while consumers receive a fair share of the resulting benefits and also the same agreement, decision or concerted practice only restricts the indispensable actions for the attainment of the agreement's objectives and the related restriction will not cause the elimination of competition in respect of a substantial part of the products in question. The aim of this exemption is to provide a balance between pro- and anti-

competitive effects of the agreements, decisions and concerted practices.

Even though the Commission was the only competent authority before 2003 to grant exemptions under Article 101(3), it has changed with regard to the new enforcement system of competition law which lets national courts and NCAs to apply Article 101 as a whole[87] and in this respect, the Commission also drew the guidelines for the enforcement of Article 101(3)[88]. Within the related framework, the Commission states that as long as the four cumulative conditions are fulfilled, all restrictive agreements may be exempted under Article 101(3), however the agreements which by their own nature cannot fulfil all the conditions, for example if they cannot create any benefit for neither economy nor consumers, are unlikely to be able to grant the exemption of Article 101(3).[89]

As the first condition of the exemption, there has to be an efficient gain from the examined anti-competitive agreement. The benefit may appear such as cheaper costs, easier research methods, technological development or better quality of the services or products. In the *Guidelines* of the Commission, it is highlighted that the nature of the claimed efficiency should be verified while there has to be a clear link between the agreement and efficiencies which reveals the likelihood and magnitude of the related efficiency and which also shows how and when it will be succeed.[90]

The second condition is providing a fair share of resulting benefits to the consumers. It is stated in *Guidelines* that it is not obligatory for consumers to receive a share from each and every efficiency in order to fulfil the second condition but it must be sufficient to compensate the negative effect of the restrictive agreement and in this respect, the efficiency gain may not be received immediately by the consumers but if it takes a while to occur, it should also compensate the loss of the consumers that arises

[87] Council of the European Union, 16 December 2002, (EC) 1/2003, Council Regulation on The implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L1/1.

[88] European Commission, 27 April 2004, Guidelines on the application of Article 101(3) of TFEU [formerly Article 81(3) TEC], Official Journal C 101, hereinafter "*Guidelines*".

[89] Ibid.

[90] Ibid para. 51.

from the delay.[91]

Third condition questions the indispensability of the restrictive agreements. The *Guidelines* examine the issue with a two-fold test which requires the concerned agreement itself to be reasonably necessary to achieve the expected beneficial efficiencies while also the restrictive terms of that agreement must be reasonably necessary for the attainment of the related efficiencies[92]. The CJEU considers carefully in each case whether these necessities are fulfilled or not. In this respect, it is stated in *Nungesser*[93] that,

"*absolute territorial protection manifestly goes beyond what is indispensable for the improvement of production or distribution or the promotion of technical progress … (which) constituted a sufficient reason for refusing to grant an exemption under Article 85(3).*"[94]

The last condition of the individual exemptions is the proof that the restrictive agreement would not eliminate the competition in respect of a substantial part of the products that are in question. It is stated within the *Guidelines* that the aim of this condition is the protection of the competitive environment which has the priority over potential efficiencies that flow from the restrictive agreements and it is also acknowledged that the rivalry between undertakings is a core element for economic efficiency and in the case that it is underestimated, the expected efficiencies would only remain in short-term duration while longer-term losses would outweigh the short-term gains[95]. To determine the level of elimination in competition within the meaning of Article 101(3), it is important to examine the degree of competition that exists prior to the agreement and on the impact of the restrictive agreement on competition, which means the more the reduction of competition caused by the agreement, the more it is

[91] Ibid para. 86-87.
[92] Ibid para 73.
[93] Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities*, EU:C:1982:211.
[94] Ibid, para. 77-78.
[95] *Guidelines*, op. cit. 88, para. 105.

likely that competition in respect of a substantial part of the products concerned risks being eliminated[96].

1.1.5.3 Block Exemptions

Article 101(3) also gives the Commission, with regard to the authority that is given by the Council, the power to declare that the provisions of Article 101(1) would not be applicable for some certain categories of agreements. Within this type of agreements, it is not necessary to notify the Commission, which means they are legally justifiable without additional arrangements. Therefore the block exemptions can be considered as desirable legal certainty for the undertakings which at the same time desirably relieved the Commission from the duty of dealing with excessive number of notifications for individual exemption.[97] It is also stated at the *Guidelines* that an agreement within the protection of a block exemption cannot be considered as invalid by a national court and these agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority[98].

The block exemption regulations generally explain the justification of the related legislations, clarify the content of the submitted exemptions, limit the size of the undertakings in order to be able to benefit from the exemption and also determine the types of clauses which will or will not be permitted within the substance of the relevant agreement[99].

In order to be able to determine the content of block exemptions, the Council has published several regulations which give power to the Commission to stipulate the categories of agreements.

[96] Ibid para. 107.
[97] Whish and Bailey, op.cit. 13, p.169.
[98] *Guidelines*, op. cit. 88, para. 2.
[99] Craig and Búrca, op.cit. 19, p. 987.

a) Council Regulation 19/65[100]

With regard to this regulation, the Commission was authorized to regulate block exemptions for vertical agreements and some of the intellectual property rights. The regulation has led to the following Regulations of the Commission which are in force;

- Regulation 772/2004[101] on technology transfer agreements,
- Regulation 330/2010[102] on vertical agreements,
- Regulation 461/2010[103] on vertical agreements in the motor vehicle sector.

b) Council Regulation 2821/71[104]

With regard to this regulation, the Commission was authorized to regulate block exemptions for specialization, research and development agreements. The regulation has led to the following Regulations of the Commission;

- Regulation 1217/2010[105] on research and development agreements,
- Regulation 267/2010[106] on specialization agreements,

c) Council Regulation 1534/91[107]

With regard to this regulation, the Commission was authorized to regulate block exemptions for the insurance sector. The regulation has led to the Regulation

[100] Council of the European Union ,2 March 1965, Official Journal 533/65.
[101] European Commission, Commission Regulation, 27 April 2004, Official Journal, L 123.
[102] European Commission, Commission Regulation 20 April 2010, Official Journal L 102.
[103] European Commission, Commission Regulation, 27 May 2010, Official Journal L 129.
[104] Council of the European Union, Council Regulation, 20 December 1971, Official Journal L 285.
[105] European Commission, Commission Regulation, 14 December 2010, Official Journal L 335.
[106] European Commission, Commission Regulation, 24 March 2010, Official Journal L83
[107] Council of the European Union, Council Regulation, 31 May 1991, Official Journal L 143.

267/2010[108] of the Commission which has replaced the Regulation 358/2003[109].

d) Council Regulation 169/2009[110]

With regard to this regulation, block exemptions for the small and medium-sized undertakings in the road and inland waterway sectors were granted and there is no further regulation published by the Commission with regard to this regulation.

e) Council Regulation 246/2009[111]

With regard to this regulation, the Commission was authorized to regulate block exemptions for consortia between liner shipping companies. The regulation has led to the Regulation 906/2009[112] of the Commission.

f) Council Regulation 487/2009[113]

With regard to this regulation, block exemptions for specific agreement types of the air transportation sector. However there is no regulation published by the Commission with regard to this regulation.

g) The Duration of the Block Exemptions

Typically, every block exemption regulation has an expiry date which may cause confusion for the parties of the relevant agreement at the end of the assumed expiration date. In order to handle this possible confusion, the Commission determines transitional provisions for such agreements that are in force and it also examines the accomplishment of the related block exemption regulation in order to determine whether the regulation is still essential and if so, in which way it should be updated[114]. Another reason for regularly updating block exemption regulations claimed to be able to

[108] European Commission, Commission Regulation, 24 March 2010, Official Journal L 83.
[109] European Commission, Commission Regulation, 27 February 2003, Official Journal L 53.
[110] Council of the European Union, Council Regulation, 26 February 2009, Official Journal L 61.
[111] Council of the European Union, Council Regulation, 26 February 2009 Official Journal L 79.
[112] European Commission, Commission Regulation, 28 September 2009, Official Journal L 256.
[113] Council of the European Union, Council Regulation, 25 May 2009, Official Journal L 148.
[114] Whish and Bailey, op.cit. 13, p.173.

create and increase the competitiveness among the Member States of the EU[115].

1.2. Article 4 of CPC

Article 4 of the CPC is quite similar with Article 101(1) of TFEU and states that;

Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.

Such cases are, in particular, as follows:

a) Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,

b) Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,

c) Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,

d) Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,

e) Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,

f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service

[115] Dr. J. Ganesh, Dr. S. Padmanabhuni and Anandh R., "White Paper – Europe Auto: Need for OEM-dealer integration accelerated by changes in Block Exemption Regulation*"*, Infosys, 2006, p.1

supplied.

In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.

Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

As a result of this article, the agreements, decisions and concerted practices of the undertakings which may restrain the free competition are acknowledged as illegal and therefore prohibited. Along with the related article of TFEU, CPC also aims to prohibit the actions not only according to their occurred results, but also with regard to their potential of harming the competition.[116]

It is concluded within the *Booking.com*[117] decision that, the contracts between the relevant website and the accommodation facilities are falling into the restricted scope of Article 4 of CPC with regard to the "Most Favorable Customer" policy, which demands best price and quota terms.

The first difference between Article 101 of TFEU and Article 4 of CPC is the former is applied within the EU borders, whereas the latter is applied only within the borders of the TR, since it is not an official Member State of the EU.

Secondly, the term of "exclusive dealing" does not exist as an exception within the application of Article 101 of TFEU, however Article 4(e) of CPC counts it as an exception in order to apply different terms to persons with equal status for equal rights, obligations and acts. On the other hand such exceptional agreement type cannot be considered within the category of exemptions, since exemptions are granted by the

[116] Mustafa Ateş, "AB'ye Uyum Bağlamında Türk Rekabet Hukuku ve Politikasına Genel Bir Bakış*"*, Ankara Bar Journals, FMR Journal, 2009/1, p.68.

[117] Competition Board Decision, 05 January 2017, Decision Number 17-01/12-4, hereinafter "*Booking.com"*, p.92, para. 1.

Competition Board (the Board) for a limited time period and may also be withdrawn at the end of the time period or when the conditions of the exemption are no longer met. However the exemption arising from the Article 4(e) is granted by the CPC itself, which is applicable exclusively for Article 4 and therefore the scope of the exemption may not be extended for the other provisions of the CPC.[118]

Unlike the TFEU, CPC also refers to the term of "presumption" as a conclusion method, when the existence of such prohibited agreements cannot be proved[119]. In the situations where the prices or the balance of demand and supply change, or the operational areas of undertakings are similar to those markets where competition is prevented, the existence of such prohibited agreements is automatically presumed, unless one of the parties somehow prove the contrary.

Within the *International Solar Energy* case[120], it is detected that in May 2014, Aslanlar Metal Alüminyum P.V.C. Plastik İmalatı İth. İhr. San.ve Tic. Ltd. Şti. (Aslanlar-Metal) and in March 2015, Solar-San Vakumlu Cam Tüp Üretim San. ve Tic. A.Ş. (Solar-San) have sent private messages to Ortadoğu Alüminyum ve PVC Plastik İmalat San. ve Tic. Paz. Ltd. Şti. (Ortadoğu Alüminyum) in order to agree on reducing the supply of vacuumed glass tubes within the mutual market. According to the evidences within the case, it is seen that Ortadoğu Alüminyum did not react according to any of these proposals and therefore it is not a party to an agreeement with regard to the scope of Article 4 of the CPC. On the other hand even though there is a big time gap between the relevant messages, it was thought that Aslanlar-Metal and Solar-San might be handling concerted practices within the vacuumed glass tube market. Therefore the actions of these two firms have been investigated in order to detect a possible concerted practice in between them. However it is seen that the amount of stocks that both firms have used within an inverse proportion and it is deteceted that these firms cannot be acting according to a mutual practice policy. Thus it is concluded that none of the

[118] Gamze Aşçıoğlu Öz, "Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması", Rekabet Kurumu, 2000, ISBN 975-8301-16-0, Publication Number 0051, p.82.

[119] CPC Article 4(2).

[120] Competition Board Decision, 23 February 2017, Decision Number 17-08/100-43.

parties within the case are acting together and so their actions are not falling into the scope of Article 4 of CPC.[121]

Another difference is that the "*de minimis*" doctrine does not find any equivalent application within the CPC. The problem regarding to this absence is the fact that not all the anti-competitive practices have the same kind of effect on the market and it is hard to detect and deal with every single anti-competitive action without having a filter. For example the agreement of two undertakings about a product within a market with hundreds of different competitors which also produce the same product, would not harm the competitiveness of the market in the way when these two undertakings are in a market where there are only a few competitors in total. The filter to determine the difference in such situations is the *de minimis* principle, with the help of different market definitions and examinations.[122] Therefore it is seen as an important matter which should be considered in the future within the possible adjustments of the CPC.[123]

However in some exceptional cases, the Board may also decide that the anti-competitive effect of the pursued prohibited action did not occur and because of the small size of the affected relevant market and economic activities, the investigation is not necessarily the only way to solve the problem. For example in the *Internet Cafe*[124] decision, the internet service providers within the cafes in a small region, have decided to increase the service price of the internet and however they could not sufficiently apply the decision uniformly because of the lack of penalizing for the ones who do not apply the decision in practice.[125] Therefore the pursued anti-competitive result did not occur and even though the agreement itself was within the concept of Article 4 of the CPC, the Board has decided that the threatened relevant market and the economic activities are quite small and therefore it is not necessary to penalize them, but instead it is possible to give them an opinion about the ongoing risky situation with regard to

[121] Ibid, p.31-34.
[122] Emel Badur, "Türk Rekabet Hukukunda Rekabeti Sinirlayici Anlasmalar - Uyumlu Eylem ve Kararlar", Competition Board Publications, Ankara 2001, p.79.
[123] Mustafa Ateş, op.cit. 116, p.72.
[124] Competition Board Decision, Decision Number 17-08/94-41, 23.02.2017.
[125] Ibid, page 2, para 6-7.

Article 9 of the CPC[126], which allows the Board to give advice in the first step and warn such undertakings about their concerned actions and possible outcomes of maintaining such activities.

Similar situation has also occurred in *Bakers*[127] decision. In this example bakers of a small region has signed and agreement to determine the marketing prices and sale conditions of the bread that they produce. During the preliminary investigation, it was seen that even though there has been an actual agreement between the bakers to control the marketing process of the bread production, the agreement has never been applied. In fact, it was decided within the agreement that the bread would not be sold below the production costs and however, even on the first day of the agreement, bakers have sold the bread below their production costs and therefore breached the agreement. Moreover the sales conditions of each baker were differentiating from each other and no consistency was found. Accordingly it was determined during the preliminary investigation then that the agreement was deemed to be dull and inviable even from the beginning. Therefore it was decided by the Board that even though there has been an agreement to determine the market conditions of the bread, the agreement has never been applied and therefore bringing an investigation against the persons behind the related action would be unnecessary. The Board has only given opinion to the bakers of the region with regard to the Article 9 of the CPC.

Indeed as in the example, low importance level of such cases may lead to a warning instead of a direct investigation, which may be interpreted as an indirect way of applying "*de minimis*" doctrine.

However such application is also occasionally found controversial. For example the *Bakers* decision has not been determined by unanimity within the Board members but instead it had only majority of the votes. The counter voters of this decision has argued that since it has already been proven that there has been an

[126] Ibid, page 2, para 9.
[127] Competition Board Decision, Decision Number17-42/664-293, 21.12.2017.

agreement between the bakers against the 4th provision of the CPC and the bakers themselves have confessed that they indeed had the intention to control the marketing process of the produced breads; further investigation would have been necessary to determine the existence of a breach and if it did occur, it was also necessary to continue the investigation to detect the level of breach with regard to Article 4 of the CPC. Therefore it was argued that cutting the process of having such possibility by solely delivering opinion to the bakers within the preliminary investigation, without going further to the actual investigation, is undue.

Moreover it may be argued that since the forbidden agreements, decisions and concerted practices of the Article 4 of the CPC do not necessarily require the application/success of the concerned action, or the emerging affection of the competition within the relevant market; discontinuation of the investigation process by applying Article 9 of the CPC instead of Article 4 of CPC is an arbitrary application of the Board, which does not have an actual legal reference within the CPC. Accordingly, even though the effect of such concerned actions within the relevant markets are mostly quite low and investigating such matters is causing an overworkload and unnecessary time consumption for the Board and administrative tribunals, it should also be kept in mind that such arbitrariness is derogating the legal certainity of the 4th provision of the CPC and in the end even the CPC itself. In order to seperate such less important matters from more concerning actions and lessening the workload of the Board and related courts, it is necessary to improve the existing version of the CPC with new amendments, such as in the way that has been suggested by the related provision of the *Draft*.

Indeed the relevant provision is promised within the *Draft*[128] by including the *de minimis* doctrine to the CPC, in order to solve the frustration on the application of the Article 4 of the CPC and possible problems arising from the lack of a legal basis for the neglection of the Board in such small matters.

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[128] *Draft*, op. cit. 45, Article 1.

1.2.1. "De Minimis" within the Draft

The first article of the *Draft* aims to fill the absence of "*de minimis*" principle within the Turkish competition policy. According to this provision, the Board may not investigate the cases, in which the specific market power and turnover limits, which are determined by the Board, are not exceeded.

Within this adjustment of the CPC, the agreements, decisions and concerted practices which are falling within the framework of the Board may not be subject to investigation and in the meantime, the Board may focus on the more important cases which may harm the free competition deeper.[129]

However the wording of this provision is argued, because it is stated that this principle is not surely be applied to the relevant cases but only "may" be applied to some.[130] One may think from this provision that such discretion given to the Board may hinder the clarity and certainty of the law and therefore in order to regulate the system in an effective way and give the market players certainty, the rule should have been concrete and binding, even for the Board itself.

1.3. Article 5 of CPC

Along with the purpose of exemptions within the Article 101(3) of TFEU, CPC also covers similar circumstances with Article 5 of CPC, which states that;

The Board, in case all the terms listed below exist, may decide (Annulled: 02.07.2005-Article 5388/1)[1] (...) to exempt agreements, concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions of Article 4:

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

b) Benefitting the consumer from the above-mentioned,

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[129] Preamble of the *Draft*, op. cit. 45, Article 1.

[130] Ünal Tekinalp, "Rekabetin Korunması Hakkında Kanunda Güncel Gelişmeler", Thursday Conferences of the Competition Board, 2009, p.32.

c) Not eliminating competition in a significant part of the relevant market,

d) Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

(Amended: 02.07.2005-Article 5388/1)[2] Exemption may be granted for a definite period, just as the granting of exemption may be subjected to the fulfillment of particular terms and/or particular obligations. Exemption decisions are valid as of the date of concluding an agreement or committing a concerted practice or taking a decision of an association of undertakings, or fulfilling a condition if it has been tied to a condition.

In case the terms mentioned in the first paragraph are fulfilled, the Board may issue communiqués which ensure block exemptions for the types of agreements in specific subject-matters and which indicate their terms.

Article 5 of CPC has a similar content with Article 101(3) of the TFEU as seen above the provision covers only exceptional types of agreements, decisions and concerted practices. Because of the precise listing methodology of the provision, the granted exemptions are exclusive and it is not possible to read through the article with a wider interpretation, which also means that such exceptions are not applied to other provisions, which for example regulate the abuse of dominant position or concentrations.[131]

1.3.1. Conditions of Exemptions

The exclusive authority to examine the counted consecutive conditions within the exemption applications is the Board, however if the conditions are seen to be met, the decision of granting an exemption is not discretionary.[132]

The counted terms are examined privately in each case to decide whether they are fulfilled. The first two conditions are the compulsory features of the concerned

[131] TÜSIAD Journals, "4054 Sayılı Rekabetin Korunması Hakkında Kanunun Uygulama Esasları", December 1998, Publication No. TÜSIAD-T/98/12/245, p. 41.

[132] Kerem Cem Sanlı, "Rekabetin Korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Tesebbüş Birliği Kararlarının Geçersizliği", Competition Board Publications, Ankara 2000, p. 126-127.

practice that need to be fulfilled to grant the pursued exemption and therefore they are considered as "positive conditions" of the exemption, whereas the second two conditions highlight the actions which shall not be performed in order to get the same pursued exemption and therefore they are considered as "negative conditions" of the exemption.[133]

a. Positive Conditions

The positive conditions of exemption are the characteristics of the considered actions to be "useful" for the new developments and improvements in economic or technical context or for the development in the production or distribution of goods and in the provision of services, also being "beneficial for the consumers".

Usefulness of the concerned action should not be considered as the individual benefits of the undertakings but instead it is the objectively positive outcome of such actions which will be a contribution to the economy. The benefit of the consumers is also pursued in order to grant exemptions. In this sense, the definition of "consumer" is not made within the CPC, however Consumer Protection Law[134] defines consumer as "*a natural or legal person who behaves within non-commercial purpuses*".[135]

In this respect the benefit of the consumer may for example be varied products, cheaper prices, higher quality of products or better guarantee terms.

If the examined action is both useful for the economic or technical development or delivery of goods and also beneficial for the customers, the action fulfills the positive conditions of the pursued exemption.

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[133] Cemil Güner, "Rekabet Hukukunda Yasak İlkesinden Muafiyet", TBB Journals, Journal No. 71, 2007, p.150.

[134] Tüketicinin Korunması Hakkında Kanun, Act No: 6502, 28.11.2013, http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6502.pdf , (last access: 05.12.2017).

[135] Ibid, Article 3(k).

b. Negative Conditions

The negative conditions which shall not be met in order to grant an exemption are not eliminating competition in a significant part of the relevant market and not limiting competition more than what is compulsory for achieving the goals which are referred within the positive conditions.

Whereas the TFEU in order to question the eliminating level of competitiveness is the "relevant product", CPC focuses itself to the "relevant market" instead of product, in order to determine the level of elimination.[136]

On the other hand the limitation of competition shall not be stricter than the necessity in order to fulfill the positive conditions. Therefore the limitations which are unnecessary or irrelevant for achieving the pursued goal are considered as not complying with the negative conditions of the exemptions and in such cases, the Competition Board either refuses the exemption application or grants conditional exemption, which requires the irrelevant or unnecessary pressure to be removed.[137]

1.3.2. Notification

Notification is not a precondition to grant the exemption. Such exemptions may also be granted by the Board's own initiative, when the case is somehow learned by the Board and the granted exemption would be applied retrospectively, with regard to the date that concerned action of the undertakings occurred.[138]

However it is argued that, even though the notification is not a precondition for such exemptions, it is still necessary to be certain about the existence of the pursued exemption.[139] Indeed, if the Board concludes the situation as the four consecutive

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[136] Cemil Güner, op.cit. 133, p. 154.

[137] Metin Topçuoğlu, "Rekabeti Kısıtlayan Teşebbüsler Arası İşbirliği Davranışları ve Hukuki Sonuçları", Competition Board Publications, Ankara 2000, p.257.

[138] WIPO, "Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings", 07.02.2006, hereinafter "*Guidelines of Voluntary Notification*" chapter 2, http://www.wipo.int/wipolex/en/text.jsp?file_id=245520 , (last access: 05.12.2017).

[139] Mustafa Ateş, op.cit. 116, p. 69.

conditions of Article 5 are not fulfilled, the exemption will not be obtained by the related undertakings and they would even be fined.[140]

1.3.3. Types of Exemptions

a. Individual Exemptions

Individual exemptions are granted by the Board as a result of notification or as self-initiative of the Board to do so. Such exemption may be up to additional specific conditions or obligations, it may also be revoked if the conditions are not met anymore. It is concluded within the *Booking.com* decision that the compulsory conditions of individual exemptions are not entirely fulfilled and therefore the relevant website cannot grant any individual exemption for its concerned contracts with regard to Article 5 of CPC.[141]

The main difference between the individual and block exemptions is the first is granted individually for the relevant undertakings, meanwhile the latter is granted to a specific group of agreements, decisions or concerted practices, which may be carried out by any undertaking.[142]

b. Block Exemptions

The last part of Article 5 of CPC mentions the block exemptions and states that the Board may decide to grant block exemptions for the types of agreements in specific subject-matters. When such necessity occurs, the Board publishes communiqués to draw the framework of the related block exemption and it also publishes guidelines for the application terms of such communiqués.

The agreements, decisions and concerted practices which are within the terms of such communiqués automatically grant the exemptions and do not need any notifications. Therefore it is possible for the undertakings which are pursuing for

[140] *Guidelines of Voluntary Notification*, op. cit. 138, chapter 3, para. 7.
[141] *Booking.com*, op. cit. 117, p.92, para. 2.
[142] Cemil Güner, op.cit. 133, p.158.

exemptions to check the list of the Board for the agreement, decision and concerted practice types which are exempted. For example *Block Exemption Communiqué on Vertical Agreements*[143] states that,

"*Provided that they bear the conditions mentioned in this Communiqué, agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services -vertical agreements- are exempted in block from the prohibition in Article 4 of the Act. … The exemption granted by this Communiqué shall apply in the event that the market share of the provider in the relevant market in which it provides the goods or services that are the subject of the vertical agreement does not exceed 40%.''*[144]

It is concluded within the *Booking.com* that the value of the contracts between the relevant website and the accommodation facilities is beyond the market share limit of Article 2 of *Block Exemption Communiqué on Vertical Agreements* and therefore such agreements cannot grant any block exemptions with regard to Article 3 of CPC[145].

On the other hand, in *Marshall Dye*[146] case, it is concluded that the agreements between the wholesalers of Marshall Dye are falling within the exempted agreements scope of the *Block Exemption Communiqué on Vertical Agreements*, since the market share of the Marshall Dye is below the limit of %40 of the relevant dye market[147] and therefore such agreements are immune from the prohibition of Article 4 of CPC.

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[143]WIPO, "Block Exemption Communiqué on Vertical Agreements*"*, amended by the Competition Board, Communiqué No. 2002/2, hereinafter "*Block Exemption Communiqué on Vertical Agreements",* http://www.wipo.int/wipolex/en/text.jsp?file_id=245495 , (last access: 05.12.2017).

[144]Ibid Article 2.

[145] *Booking.com*, op. cit. 117 p. 92, para. 2.

[146] Competition Board Decision, 23 February 2017, Decision Number 17-08/93-40, hereinafter "*Marshall Dye decision*".

[147] Ibid, p.4, para. 16.

The Board has also published communiqués about research and development agreements[148], the motor vehicle sector[149], the transfer of technology[150], the insurance sector[151] and specialization agreements.[152]

1.3.4. Revoke of Exemptions

Article 13 of CPC declares the reasons to revoke a granted exemption and states that

Exemption and negative clearance decisions may be revoked or particular behavior of the parties may be prohibited in the following cases:

a) Change in any event constituting the basis of the decision,

b) Failure to fulfil the terms or obligations resolved,

c) Having taken the decision on the basis of incorrect or incomplete information concerning the agreement in question.

Revocation decision shall be effective as of the date of the change in sub-paragraph (a), and the date of taking the exemption or negative clearance decision in other cases.

In case incorrectness and incompleteness mentioned in sub-paragraph (c) take place by the fraud or intent of the undertaking concerned, the decision shall be deemed not to have been taken at all.

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[148] WIPO, "Block Exemption Communiqué on Research and Development Agreements", amended by the Competition Board, Communiqué No: 2003/2, http://www.wipo.int/wipolex/en/text.jsp?file_id=245494 , (last access: 05.12.2017).

[149] WIPO, "Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector", amended by the Competition Board, Communiqué No. 2005/4, http://www.wipo.int/wipolex/fr/text.jsp?file_id=245452 , (last access: 05.12.2017).

[150] WIPO, "Block Exemption Communiqué on Technology Transfer Agreements", amended by the Competition Board, Communiqué No. 2008/2, http://www.wipo.int/wipolex/en/text.jsp?file_id=245124 , (last access: 05.12.2017).

[151] WIPO, "Block Exemption Communiqué in Relation to the Insurance Sector", amended by the Competition Board, Communiqué No. 2008/3, http://www.wipo.int/wipolex/en/text.jsp?file_id=245803 , (last access: 05.12.2017).

[152] The Competition Board, "Block Exemption Communiqué in Relation to the Specialization Agreements", amended by the Competition Board, Communiqué No. 2013/3, http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fSayfalar%2fuzmanlasmateblig.pdf. , (last access: 05.12.2017).

With regard to this provision, if the basis of the exemption decision changes, or the obligations or conditions of the exemption are not met, or the exemption decision is based on incorrect or incomplete information, the exemption may be revoked by the Competition Board.[153]

For example within the *Efes&Tuborg Decision*[154], it was concluded by the Board that the group exemptions that were given to the exclusive distributorship agreements that Efes and Tuborg have concluded with KSN and ASN has to be revoked; since Efes is holding a dominant position, the entry barriers are high in the beer market and there is not active competition within the relevant market. Later with the *Tuborg Decision*[155], the Board has given Tuborg an individual exemption to be able to sign exclusive distributorship agreements, due to the fact that Tuborg has been losing its marketshare against Efes within the beer market.

Accordingly Efes has also made an individual exemption application to the Board and pursued to acquire same standards with Tuborg; however the request got rejected by the Board[156]. Efes has also requested within the same application that the individual exemption, which was granted before to Tuborg, to be revoked as well. In the end, the Board has also revoked the individual exemption of Tuborg, due to the changing conditions of the beer market and the increasing market shares of Tuborg, which were regularly growing since acquisition of the individual exemption[157]. It was also highlighted that the market shares of Tuborg has been growing independently from the exemption decision and the new position of Tuborg within the beer market is strong enough to compete with Efes, which requires the revocation of the individual exemption.

According to these decisions, it may be argued that the Board aims to grant exemptions to protect weaker competitiors, meanwhile not to allow the former weak

[153] Competition Board, "17th Annual Report", 2015, p.19.
[154] Competition Board decision, Decision Number 05-27/317-80, 22.04.2005.
[155] Competition Board decision, Decision Number 10-24/331-119, 18.03.2010.
[156] Competition Board decision, Decision Number 17-20/320-142, 03.07.2017.
[157] Competition Board decision, Decision Number 17-36/583-256, 09.11.2017.

undertakings to gain too much market shares to become the new dominant undertakings, which also means that the Board has its strategy of protecting the competitors and the competitive structure of the market at the same time.

Moreover Article 16 of CPC states that, "*Among the cases that false or misleading information or document is provided in exemption and negative clearance applications, ... the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations an administrative fine*". Therefore if the exemption is based on false or misleading information, the exemption may not only be revoked but it may also cause an administrative fine.

1.3.5. Negative Clearance Decision

It is possible for an agreement, decision or concerted practice to be exempted because of Article 5 of CPC. Another possibility to grant this opportunity is to grant a negative clearance decision, which is stated in Article 8 of CPC;

Upon the application by the undertaking or associations of undertakings concerned, the Board may, on the basis of information in hand, grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of this Act.

The Board may, after issuing such a certificate, revoke its opinion at any time, under the conditions set out in article 13. However, in this case, criminal sanction is not applied to the parties for the period until the change of opinion by the Board.

As stated above, if the undertakings want to have a proof which states that the action that they pursue is not contrary to Articles 4,6 and 7 of CPC, they may apply to the Competition Board to grant a negative clearance decision. With that decision, the action is proved to be legal.

On the other hand, negative clearance decision is not an exemption but it just

states that the pursued action of the applicant undertakings does not restrict the competition and it is complying with the provisions of CPC.[158]

1.3.6. Exemption Provisions within the Draft

1.3.6.1. Extention of Exemptions

The recent version of CPC determines the exemptions in more than one provision and the *Draft* aims to collect them all together to create clarity[159] and to review them with some new perceptions. In accordance with that, the exemptions may be granted up to some conditions to be fulfilled or the granted exemption may require some additional responsibilities to fulfill. It is also possible an exemption to be withdrawn in certain conditions, laid down by the provision.

Moreover the provision aims to review the block exemptions with an exceptional possibility, which states that if the agreements, decisions and concerted practices have "incompatible effects" within the conditions of the individual exemptions, then the Board may exclude such actions within the content of such block exemptions. However such incompatible effects are not specifically stated and therefore it needs to be explained in order to determine the aim of clarity within the exemptions.

1.3.6.2. Abolishment of Negative Clearance

The *Draft* is also going to abolish an ongoing application of the CPC. According to the *Draft*, negative clearance is no longer going to be used within the new CPC[160], which is another parallel application with regard to the recent application of the EU competition policy.

However the absence of a justification for this abolishment is also criticized[161] because the existence of such establishment is allowing the undertakings to foresee the

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[158] Cemil Güner, op.cit. 133, p.170.
[159] Preamble of the *Draft*, op. cit. 45, Article 2.
[160] *Draft*, op. cit. 45, Article 9.
[161] Ercüment Erdem, "Rekabetin Korunması Hakkında Kanun Tasarısı Yayınlandı", Erdem&Erdem Publications, January 2014, http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/rekabetin-korunmasi-hakkinda-kanun-tasarisi-yayimlandi/, (last access: 05.12.2017).

results of their actions and is guiding them to comply with the competitive market structure. Therefore it is also argued that even though theoretically the work load of the Board may be decreased by the abolishment of negative clearance certificate, the anti-competitive practices may also increase inversely correlated, which will introduce the new workload of the Board and the ultimate result may not really change the current situation in the expected way with the help of this provision.[162]

2. ARTICLE 102 OF THE TFEU IN COMPARISON WITH ARTICLE 6 OF CPC

2.1. Article 102 of the TFEU

Whereas Article 101 TFEU is aimed to prevent agreements, decisions and concerted practices which may threaten the competition, the purpose of Article 102 TFEU is to prevent undertakings from abusing their dominant position within a market. It is stated in Article 102 that;

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

[162] Ünal Tekinalp, op.cit. 130, p.33-34.

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

With regard to the application necessity of the article above, there has to be an undertaking which holds a dominant position which may arise from the product type, geographical territory or temporal factor of the relevant market[163]. From this point, the first thing to determine is the existence of an undertaking's dominant position or the collective dominance of a group of undertakings.

2.1.1. The Dominant Position

2.1.1.1. Term of "Dominant Position"

It is stated within the Article above that the first step to question the existence of an infringement with regard to Article 102 is the existence of an undertaking which holds a dominant position. Therefore detecting dominance is the pre-condition to consider an infringement as falling within the scope of Article 102.

In order to detect the dominance, it is stated that

"*the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behavior ... since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined."*[164] *In this respect, it is explained by the Commission that "the main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face."*[165]

Therefore it is necessary to distinguish the relevant market in which the

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[163] Craig and Búrca, op.cit. 19, p. 1012.

[164] Case T-61/99, *Adriatica di Navigazione SpA v Commission of the European Communities*, EU:T:2003:335, para 27.

[165] European Commission, 9 December 1997, *Commission notice on the definition of the relevant market for the purposes of Community competition law*, Official Journal C-372 hereinafter "*notice on the relevant market*., para. 2.

questioned firm and its products are offered.

2.1.1.2. Relevant Market

It is stated that within the Commission's notice[166] that the term of 'relevant market' is different from other definitions of 'market' which is used in other contexts. The term of 'market' is often used to refer to the area where an undertaking sells its products or to refer broadly to the industry or sector where it belongs. On the other hand 'relevant market' term consists of two different dimensions which are 'relevant product market' and 'relevant geographic market'. It is stated by the Commission that a relevant product market contains

"*all those products and/or services which are considered as interchangeable or substitutable by the consumers, with regard to the products' characteristics, prices and intended purpose of use*"[167]

Whereas the relevant geographic market consists of

"*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area*"[168].

2.1.1.3. Product Market

In order to specify the scope of the relevant market, the products and/or services which are recognized by the consumers as same or similar with regard to the price, features and using purpose are taken into consideration. Therefore it is important to acknowledge the competitive constraints of the market concerned that affect the undertakings. In this respect, he competitive constrains are demand substitution, supply substitution and potential competition.

[166] Ibid. para.3
[167] Ibid para.7
[168] Ibid para.8

a. Demand Substitution

In general this factor is the most important one of the competitive constraints and based on the consumers' perception over the products which are considered as substitutable by different products. In order to determine the products which are seen as substitutable, it is suggested by the Commission to slightly but significantly increase the prices of the concerned product and evaluate the responses of the consumers with regard to this price difference.[169] The aim of this experiment is to understand whether the customers would switch to another substitute product or suppliers in the case that the price of concerned product is increased. In the cases where it is difficult to understand the customer responses, the Commission and the Court may investigate different features of the concerned product. As an instance, in *United Brands*[170], the Court also considered about the taste, seeds and softness of the bananas to determine if banana has a distinctive market rather than other fruits. In *France Télécom*[171], the Court concluded that low-speed and high-speed internet markets are separated markets and could not be considered as substitutable markets for each other. It is also stated within the "*notice on the relevant market"* that if the threat of substitution products is important enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market scope and this process would continue until the set of products and geographical areas would be profitable within such that small and permanent increases in relative prices.[172]

b. Supply Substitution

The substitution of supply affects the ability of suppliers which is aimed to switch production and relevant products and to market them with a small and permanently increased price without facing significant extra costs or risks. In the case

[169] Ibid para.15

[170] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, EU:C:1978:22, hereinafter "*United Brands*".

[171] Case T-340/03, *France Télécom SA v Commission of the European Communities*, EU:T:2007:22 ; upheld by CJEU, C-202/07 P, EU:C:2009:214.

[172] "*notice on the relevant market"* , op. cit. 165, para.17

where the suppliers have this ability, the additional production will affect the market and competition between the suppliers and will have equivalent impact in terms of effectiveness and immediacy in comparison to the demand substitution effect.[173] In these terms, these products may be considered as a part of the same market.[174]

It is also stated that within the circumstances

"*when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition*".[175]

Similarly in *Michelin NV*[176], it is stated that producing car tyres and heavy vehicle tyres require different production techniques and tools in the production process and therefore it is not possible to consider these products in the same market since there is no elasticity of supply in between them.

c. Potential Competition

It is stated in the "*notice on the relevant market"* that the factor of potential competition does not have equivalent effect in comparison to the other factors with regard to the fact that the conditions of potential competition will depend on the analysis of specific factors and circumstances related to the conditions of entry and therefore generally is not tend to be considered in the process of the relevant market definition but instead this factor is considered when the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from the view of market competition.[177]

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[173] Ibid para.20

[174] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, EU:C:1975:50, hereinafter "Continental Can"; Case T-65/96, *Kish Glass & Co. Ltd v Commission of the European Communities*, EU:T:2001:261.

[175] "*notice on the relevant market"*, op. cit. 165, para.23

[176] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, hereinafter "*Michelin".*

[177] "*notice on the relevant market"*, op. cit. 165, para.24

2.1.1.4. Geographic Market

The definition of relevant geographic market is made by the Commission as,

"*The area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.*"[178]

In this respect, relevant geographic market is a territory where the competitors who produce specific products are facing the same objective and homogeneous conditions of competition.[179]

These conditions may vary, including the features of the products and/or services, market entry barriers of the territory, preferences of consumers, market shares between the neighboring territories and costs of production and transportation.[180] In this respect, the intensity and formation of the competition may also be taken into account in the case where it is notably different in comparison to the other areas. For instance, in the *Providence/Carlyle/UPC Sweden* case the Commission assumed the market of program broadcasting services as a national market due to the language homogeneity of the concerned area.[181] Also in *Napier Brown – British Sugar*[182] case, the Commission concluded that the relevant market in the production and sale of sugar is Great Britain because of the fact that the imports are quite limited and the concerned company acts as a supplement to British sugar instead of an alternative competitor.

Determining the relevant geographic market is also important in concentration cases in order to reveal the risk of impeding the competition that may arise after the

[178] Ibid para.7

[179] *United Brands*, op. cit. 170, para. 39 and 44.

[180] Council Regulation (EC) No 139/2004 of 20 January 2004 on the "Control of Concentrations between Undertakings" hereinafter "*Merger regulation*", Art. 9/7.

[181] European Commission, Decision of 2 June 2006, Case COMP/M.421, *Providence/Carlyle/UPC Sweden*.

[182] Joined Cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission of the European Communities*, EU:T:2001:185.

merger. In the case which concerned concentration would not significantly restrict the competition within the common market or substantial part of it, the concentration would be affirmed,[183] meanwhile in the case which the same kind of concentration would significantly impede the same geographic area, the concentration would be declared as incompatible within the common market.[184] In *Volvo/Scania*[185] case, the Commission stated that the reason of price variance is a result of the actions of producers that are tend to take advantage of consumers' needs in particular countries and if technical necesities in these countries were equalized, parallel trade would develop and price diversification would be decreased and therefore the Commission has come to the conclusion that the notified concentration is incompatible with the common market.

2.1.1.5. Temporal Factor

In order to determine the relevant market, temporal factors may be taken into account as well. In such cases, the features of the market change very fast, such as technological market or seasonal markets. For instance in *United Brands*, bananas were not counted within the market of peaches or grapes because they were not available for the entire year, meanwhile banana plants as non-seasonal crops can produce fruit all year-round.

It is also possible that the habits of the consumers may vary in a short time period because of technological development and in such circumstances the producers of this market may acquire more market power within this specific duration of the year.[186] Another example of this possibility is the entrance of a brand new product to a market. In this case, only a few producers will produce this significant item and until the other producers join the market of this product, the preceding producers will have the dominance of this market and because of that, the relevant market definition must also be based on this specifically determined time period.[187] Therefore temporal factor may

[183] "*Merger regulation*", op. cit. 180, Art.2/2.
[184] Ibid Art. 2/3.
[185] European Commission , Decision of 29 May 2001, Case M.1672, *Volvo/Scania*, OJ L143/74.
[186] Craig and Búrca, op.cit. 19, p. 1017.
[187] Walter Frenz, "Handbook of EU Competition Law*"*, Springer Press 1st Edition, 2016, p.685

be considered in some certain cases as a relevant factor while defining the concerned market.

2.1.1.6. Market Power

The test of dominance under Article 102 is aimed to understand the economic strength of the undertakings in relevant markets and in order to achieve this goal, it is questioned whether the concerned undertaking is able to hamper effective competition by its market power within the relevant market. In this respect, if an undertaking is able to act independently within the concerned market by raising the prices, restricting outputs and take other similar actions in order to impede the existing competitors and possible entrants with the expectation of gaining more customers, this undertaking is considered as dominant within the market that it acts. The dominance itself does not mean an infringement of competition in the concept of Article 102, however it gives the dominant undertakings special responsibilities to sustain the competence and therefore it is narrowing the action field of such undertakings.[188]

Defining the dominance is important to maintain certainty within the EU and in the case that it is not stipulated clearly, the courts and national competition authorities may not be able to enforce the article correctly which causes confusion. Correctly determining the term of "dominant position" is also crucial, since in the case that an undertaking is dominant, it has special responsibilities in order to not to impair the competition within the common market.[189] Accordingly, if the undertaking does not have the dominance within the market, its unilateral action will not prevail into the framework of the forbidden actions.

In this respect, even though the CJEU has stated that

[188] Giorgio Monti, "The Concept of Dominance in Article 82", 2006, p. 1, **European Competition Journal, Volume 2**, p. 31-52.

[189] *Michelin*, op. cit. 176.

"*Legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences*"[190]

There is no answer which is clear enough to define dominance and the problem is criticized that the definition is too wide and it "*allows a range of behavior to be captured as indicators of independence, such as foreclosing competitors, raising prices without concomitant increases in costs, reducing frequency or quality of service or reducing innovation*"[191], which creates a situation where the parties are unable to know exactly whether Article 102 will be carried out upon them or not.[192]

The definition of the dominant position was made by the CJEU as "*the position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*"[193] And with regard to this definition, it may be assumed that the CJEU considers dominant position as an economic strength. Another presumption is that there is a dominant position when the market shares of the related undertaking are large.[194]

In fact, in order to identify the market power and dominance, many factors are taken into account and the Commission's Discussion Paper[195] is aimed to give a perception about dominance. Market share of the concerned undertaking is considered as the key factor of this assessment. Therefore the more market share the undertaking has, the more it is considered as dominant. However this basic assumption might as well be controversial and highly criticized since many other factors such as entry barriers and

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[190] Case C-158/06, *Stichting ROM-projecten v Staatssecretaris van Economische Zaken*, EU:C:2007:370, para.26

[191] Gunnar Niels, Helen Jenkins and James Kavanagh, "Economics for Competition Lawyers*",* Oxford University Press, 2011, p.121

[192]Annalies Azzopardi, "'Dominant Position': A Term in Search of Meaning*",* Queen Mary University of London-Interdisciplinary Centre for Competition Law and Policy, 2015, p.8, http://www.icc.qmul.ac.uk/docs/2015/170752.pdf , (last access: 05.12.2017).

[193] *United Brands*, op. cit. 170.

[194] C-85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, hereinafter "*Hoffman-La Roche*".

[195] European Commission, December 2005, "DG Competition discussion paper on the Application of Article 82 of the Treaty to exclusionary abuses*"*, hereinafter "*Discussion Paper*".

buyer power as well affect the market power and the prejudice that is based on large market shares may lead to unfair decisions.

Actually the Commission's perception is the definition of dominance arises from substantial market power which is also the view of the Discussion Paper. Furthermore, the Commission also stated later in the Guidance Paper[196] that,

"*an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant*."[197]

With regard to this statement, it can be claimed that the idea of "*profitably increasing prices above the competitive level for a significant period of time indicates dominance*" is clearly accepted, which means that dominance equates to substantial market power.[198]

The Commission highlighted its perception about the substantial market power in *Intel* and stated that "for dominance to exist, the undertaking concerned must have substantial market power."[199] Also in *Telekomunikacja Polska* the Commission repeated its view by saying "*for a dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop*."[200] However the CJEU is not supporting this view of the Commission[201] and therefore it may be claimed that substantial market power is not yet equalized to dominance.[202]

In fact, there is no certain measurement to define dominance within the view of substantial market power, on the contrary the measuring elements vary from case to

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[196] European Commission, 24 February 2009, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*"* hereinafter *"Guidance Paper*".

[197] Ibid para.11.

[198] Annalies Azzopardi, op.cit. 192, p.22

[199] European Commission, Decision of 13 May 2009, COMP/37.990-*Intel*, hereinafter "*Intel*" para. 839.

[200] European Commission, Decision of 22 June 2011, COMP/39.525-*Telekomunikacja Polska*, para. 641.

[201] Case T-286/09, *Intel Corporation v European Commission*, EU:T:2014:547.

[202] Annalies Azzopardi, op.cit. 192, p.23

case depending on the significant features of each incident. In order to determine the existence of dominance within the market, the Commission first assesses market shares in the relevant market and then analyzes barriers to expansion and entry in the market[203] and also investigates the power of buyers.[204]

a. Market Shares

With regard to the standpoint of the Commission, market shares are often assumed as an indicator of dominant positions and in relation to this perception, it is stated within the Discussion Paper that,

"*It is very likely that very high market shares which have been held for some time indicate a dominant position. This would be the case where an undertaking holds 50 % or more of the market, provided that rivals hold a much smaller share of the market. In the case of lower market shares, dominance is more likely to be found in the market shares range of 40 % to 50 % than below 40 %, although also undertakings with market shares below 40 % could be considered to be in dominant position. However, undertakings with market shares of no more than %25 are not likely to enjoy a dominant position on the market concerned*."[205]

It is stated by the Commission in *Michelin* that Michelin tyres had 57 % to 65 % of the truck and bus tyres market while the rival companies had only 4 % to 8 % of the market and this situation was count as a clear evidence of dominance[206].

It is also stated by the Court that the existence of very high market shares is quite important during the search of a dominance within a case and (putting the exceptional cases aside) high market shares are count as an evidence of a dominant position[207] and this statement is repeated in *AKZO*[208] and *Hilti*[209] which is supporting

[203] *Intel*, op. cit. 199, para. 840.
[204] Giorgio Monti, op.cit. 188, p.4
[205] *Discussion Paper*, op. cit. 195, para. 31. (footnotes are excluded)
[206] *Michelin*, op. cit. 176.
[207] *Hoffmann-La Roche*, op. cit. 194, para 39-41.

the point of view that a market share which is above 50 % is a clear indication of the existence of a dominant position in the relevant market. In *Hoffman* case, 45 % was also able to give the company dominance since it was two times larger than its competitor. It is not impossible to have dominance in a market below a market share of 40 % or even less but as also highlighted within the Discussion Paper, it indeed is a quite rare possibility. To give an exceptional example case, the dominance was found with a market power below 40 % in *British Airways*[210], but even in that case, the percentage was 39.7.

However detecting market shares is not always simple or determinative enough when questioning the existence of dominance. For example in *Google*[211] cases, the justification of Google against the allegations about abuse of dominance is the fact that search engines provide their services free for users, which means there are no switching costs for the users to benefit from alternative search engines in the case where they are not satisfied about the service that they receive and therefore Google cannot enjoy substantial and durable market power.[212] The French Competition Authority gave opposing response to this argument with regard to the high entry barriers and other factors.[213] In fact the strongest base for finding such dominance is suggested as irrational inertia of the consumers to insist about using the same search engine even if somehow they are not satisfied with its service. However it is also claimed that this perception would have the risk to frustrate the legal certainty since irrational consumer behavior is not measurable or foreseeable.[214] Therefore in such cases, other different factors, which also affect the substantial market power, gain more importance in order to be able to detect a possible dominance.

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[208] Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, EU:C:1991:286, hereinafter "*AKZO*", para. 60.

[209] Case T-30/89, *Hilti AG v Commission of the European Communities*, EU:T:1991:70, para. 92.

[210] Case T-219/99, *British Airways plc v Commission of the European Communities*, EU:T:2003:343.

[211] There are several cases against Google, such as; France Décision n° 10-MC-01 du 30 juin 2010 relative à la demande de mesures conservatoires présentée par la société Navx; Décision n° 10-D-30 du 28 octobre 2010 relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet.

[212] Renato Nazzini, "Google and the (Ever-stretching) Boundaries of Article 102 TFEU", **Journal of European Competition Law and Practice**, 2015. Vol. 6, No. 5, p. 306.

[213] French Competition Authority, 14 December 2010, Opinion No 10-A-29 on the Competitive Operation of Online Advertising.

[214] Renato Nazzini, op.cit. 212, p.307.

b. Entry Barriers

Even at the times that the market share is large, there might not be dominance with regard to the possibility of new entrants. The Discussion Paper also gives attention to this case and states that entrance can threaten a dominant position in the case when it is at the right time and efficient.[215] On the other hand the response of the dominant undertaking also affects the possibility of an entry, since in the case where the undertaking responds aggressively to expansion or entry, it is harder for new entrants to join the market.[216] In this sense, it is easy to have market power for an undertaking with a large market share and high entry barriers but it is very hard to maintain the market power with the same percentage of market shares in a market which has very low entry barriers.[217]

It is stated by the Commission in *Michelin* case that any undertaking who has a great market power which makes the customers consider the related product as something that is necessary to buy, would give the concerned undertaking the ability of imposing unfair conditions on dealers[218] and therefore it is seen as an evidence of intending to create entry barriers for potential new entrants.[219]

c. Buyer Power

The strength of buyers may also strain the market power of suppliers in the case where there are several suppliers and the well informed purchasers have the ability to bargain with each supplier with the argument of switching from one supplier to other with substantial products.[220] In this respect, it is possible for buyers to decrease dominance abuses by preventing price increases or output reduces. The Commission highlighted this expectation in Discussion Paper by stating that strong buyers should

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[215] *Discussion Paper*, op. cit. 195, para. 35.
[216] Ibid para. 39.
[217] Office of Fair Trading, December 2004, OFT415, hereinafter "*Assessment of Market Power"*, para 5.4.
[218] *Michelin*, op. cit. 176.
[219] *Assessment of Market Power*, op. cit. 217, para. 5.25.
[220] Ibid. para 6.1 – 6.2.

protect the market as well as themselves.[221] Similarly, it is stated by the Commission in *Enso/Stora*[222] that the buyers may relocate their orders to different suppliers in order to counter anticompetitive behaviors and it is also found in *SCA/Metsa Tissue*[223] that every buyer has the ability to exercise power and therefore the dominant firm cannot perform price discrimination in between powerful and weak buyers.

However in the markets where the rival companies are weak and the strong suppliers may prevent the new entrants or there are few competitors with high entry barriers and the buyers do not have several substitutable product choices, it is unlikely to expect the buyers to have a strong response to anti-competitive and discriminative exercises of the suppliers which makes the power of buyers questionable and therefore it may not be the primary factor to effect the market power but might be supplementary factor to consider.[224]

2.1.1.7. Collective Dominance

Article 102 of the TFEU states that,

"*Any abuse by one or more undertakings of a dominant position ... shall be prohibited*."

It is clear from this statement that the dominant position may be acquired by a single undertaking, as well as by the collective action of different undertakings.

In the case where two or more firms establish an agreement, decision or concerted practice upon acting in the same way within the relevant market, this action is falling under the scope of the Article 101 of the TFEU and therefore the necessity of Article 102 upon the joint dominance abuses has been questioned.[225] In fact, even though both Articles seem like covering the same area, the scopes of them are slightly

[221] *Discussion Paper*, op. cit. 195, para. 41.
[222] European Commission, Decision of 25 November 1998, Case M.1225, *Enso/Stora*, OJ L254.
[223] European Commission, Decision of 31.01.2001, Case M.2097, *SCA/Metsa Tissue*.
[224] Giorgio Monti, op.cit. 182, p.7
[225] Silja Snäll, "Legal Test for Finding of a Collective Dominant Position under Article 102 TFEU", Lund University Faculty of Law, Master Thesis, 2012, p.4.

different. While Article 101 TFEU aims to target on the agreements and concerted practices between the undertakings, Article 102 TFEU targets the unilateral behavior of dominant undertakings, which does not necessarily require an agreement, decision or concerted practices[226] and behaviors that embody a concerted practice does not always create an abuse as well and therefore each article is considered as individual cases according to its own terms.[227]

a. Actors of Collective Dominance

In order to form a collective dominance, there might be a group of firms which are connected within the same corporate group or the firm group might be consisted of legally and economically independent firms which embody a dominant position collectively[228].

It is stated by the General Court in *Italian Flat Glass*[229] that,

"*there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers*"[230].

In *Continental Can*, the Commission found an abuse of dominance which was formed by a company group which consisted of Continental Can as the main company and its subsidiaries SLW and Europemballage, whereas in *Italian Flat Glass*, the

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[226] Alison Jones and Brenda Sufrin, "EC Competition Law*"*, 3rd ed., Oxford University Press, 2008, p.294.

[227] Whish and Bailey, op.cit. 13, p.575.

[228] Ibid p.573.

[229] Joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities*, EU:T:1992:38, hereinafter "*Italian Flat Glass".*

[230] Ibid para.358.

Commission alleged that three Italian flat glass producers enjoyed a joint dominance and abused their dominant position within the relevant market.

Later the CJEU made a more specific statement within *Almelo* to define the collective dominance and said that,

"*in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market.*"[231]

With regard to this more recent statement, the main factor to find a collective action is the existence of specific economic links that give them the opportunity to act independently of their rivals.[232]

The CJEU also stated that,

"*the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question*."[233]

With regard to this statement, it is clear that there is no need to have an agreement or similar legal links in between firms to embody a collective dominance, but instead in a market structure that allows firms to behave in a parallel attitude, it still is possible to have economic links and which leads to sharing a collective dominance.[234]

b. Criterion for Defining Dominance

There is not much difference between single entity dominance and collective dominance and yet in the latter, the market share is expected to be higher than the

[231] *Almelo*, op. Cit. 77, para. 42.
[232] Whish and Bailey, op.cit. 13, p.578.
[233] Case C-396/96, *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission of the European Communities*, EU:C:2000:132, para 45.
[234] Whish and Bailey, op.cit. 13, p.578.

previous; since in collective dominance, the group of undertakings is expected to hold the most of the relevant market to be able to grant the dominance[235]. On the other hand, similar with the single entity example, depending on only high market shares do not always indicate a dominant position either[236] and therefore the other tests of dominance as well should be applied in order to detect the collective dominance.

2.1.2. Abuse

2.1.2.1. Generally "Abuse of Dominant Position"

The CJEU has stated within the *Michelin* case that a firm which holds a dominant position within the relevant market has a "*special responsibility not to allow its conduct to impair undistorted competition.*"[237] However Article 102 does not explain what exactly is the breach of such responsibility or what prevails into the concept of abuse, but instead gives examples of abusing actions such as charging unfair prices, limiting productions[238], applying different conditions to similar transactions which causes a competitive disadvantage for the other parties or concluding the agreements with additional supplementary obligations which are not related with the main subject of the contracts. In this respect, it is obvious that these examples are not exhaustive but instead, the courts may interpret some other incidents within this concept even if they are not specifically count within Article 102.[239] As an example in *Microsoft Corp*[240], engaging one product into the discount offer of another is seen as an abuse as well since it is restricting the choice of consumers.

The main problem of this blurry situation is that it is hard to distinguish an ordinary conducting behavior from the abusive behavior, since a behavior itself is not

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[235] Silja Snäll, op.cit. 225, p. 10.

[236] Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote and Entreprise minière et chimique v Commission of the European Communities,* EU:C:1998:148, hereinafter "*France and Others*", para. 226.

[237] *Michelin*, op. cit. 176.

[238] Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, EU:C:1991:464.

[239] Whish and Bailey, op.cit. 13, p.193.

[240] Case T-201/04, *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, hereinafter "*Microsoft Corp*".

abusive when the concerned undertaking is not dominant but the same action may be seen as abusive in the case when the same undertaking is dominant. The decisions of the CJEU also sometimes create confusion since even though the first thing to determine is the existence of dominance and conduct is questioned only in the case where there is dominance, the CJEU may however decide upon the existence of dominance with regard to the conduct of the concerned undertaking.[241] For instance, in *Michelin*[242], the Court decided that price discrimination is an indicative of dominance, which means that dominance is found with the reasoning of abusive behavior and yet the behavior should have been examined after the determination of the dominance.

2.1.2.2. The Purpose of the Protection

Article 102 intends to protect consumers, competitors and market structure itself. This aim is seen clearly within the *Continental Can* by the statement that,

"*the provision is not only aimed at practices which may cause damage to the consumer directly, but also at those which are detrimental to them through their impact on an effective competition structure ... (therefore) abuse may ... occur if an undertaking in dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition.*"[243]

In relation to this statement, it is obvious that not only the behaviors that directly harm the consumers but also the behaviors that are aimed to strengthen the dominance within the relevant market may be seen as an abuse as well since it is rendering the competitive structure of the market.

2.1.2.3. Different Appearance of the Abuse

a. Abuse in Mergers

With regard to the objective of Article 102, protecting the competitive nature

[241] Craig and Búrca, op.cit. 19, p. 1022.
[242] *Michelin*, op. cit. 176.
[243] *Continental Can*, op. cit. 174, para. 26

of the market is also a reason to count specific actions as abusive actions. The Commission stated in *Continental Can* that the concerned undertaking had a dominant position in Europe and in the case where it merges with another firm, there had been an abuse which is arising from this purchase. In this respect the CJEU concluded that if a merger is harming the competitive market structure by strengthening the dominance, the merger action may be counted as an abusive action.[244]

b. Refusal to Supply

It is found from the case law that refusing to supply to the existing customers while supplying others in similar situation is counted as an abusive behavior unless there is an objective reason to do so.[245] In *Commercial Solvents*, the CJEU stated that,

"*an undertaking with a dominant position in the market in raw materials ... refuses to supply a customer ... and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position.*"[246]

Another perception with regard to the refusal of supply is the "*Essential Facilities Doctrine*". With regard to this doctrine, the General Court considers that in the case where a product is necessary and indispensable in order to manufacture a different product, the producer of the first product cannot refuse to supply the related product, even if the new product will have the risk of competing with the first product.[247] In *RTE* case, RTE, a broadcasting service provider which had an exclusive right to publish a schedule of the programs of its television channels, was found to be abusing its right because of preventing a new product to occur in the market by not sharing information of its channels with a weekly television program magazine

[244] Ibid.

[245] Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, EU:C:1978:141, para 18-23.

[246] Case 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*, EU:C:1974:18, para.25. See also: Case C-468/06 and C-478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, EU:C:2008:504.

[247] Craig and Búrca, op.cit. 19, p. 1031.

publisher that provides information about all television channels.[248]

The same situation also occurs about the standard essential patent (SEP) cases. In this sense, if a patent is necessary for an industrial standard of a product and there is no alternative patent to prove the quality of such product, the owners of the concerned patents would gain an important market power which may hinder the competition with the rivals by refusing to deal with them.[249] In *Samsung*, the Commission found the abuse of refusal to deal that Samsung has abused its SEP right by seeking injunctions against Apple who was willing to sign a license agreement and such behavior may cause higher prices and decreased product choice in the relevant market which would also end up with damage of consumers.[250]

On the contrary of such examples, in the case where the refusal to supply might be seen reasonable if the demanded product or service is not indispensable to produce the new product and exercise the concerned business.[251] In this respect, if the concerned product is substitutable, then refusal to supply is reasonable and therefore not infringing Article 102 within the scope of essential facilities doctrine.[252]

Another form of refusal to supply is the margin squeeze, which is defined as an anti-competitive behavior of a dominant firm which acts via its vertically integrated firm and aims to sell essential inputs to rivals in the downstream market with a price that would hamper the effort of rivals to effectively compete within the relevant

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[248] Case T-70/89, *British Broadcasting Corporation and BBC Enterprises Ltd v Commission of the European Communities*, EU:T:1991:40; upheld on appeal, CJEU, Cases C-241/91 and 242/91 P, *Radio Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities*, EU:C:1995:98.

[249] Romano Subiotto QC, David R. Little, Romi Lepetska, "Survey: The Application of Article 102 TFEU by the European Commission and the European Courts", Journal of European Competition Law and Practice, 2015, Vol. 6, No. 4, p. 280.

[250] European Commission, Decision of 29 April 2014, *Samsung*, Case COMP AT.39939.

[251] Case T-504/93, *Tiercé Ladbroke SA v Commission of the European Communities*, EU :T :1997:84.

[252] Cases T-374/94,375/94,384/94 and 388/94, *European Night Services Ltd, Eurostar Ltd, formerly European Passenger Services Ltd, Union internationale des chemins de fer, NV Nederlandse Spoorwegen and Société nationale des chemins de fer français v Commission of the European Communities*, EU:T:1998:198, para 208-209. See also: Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, para 43-46; *Microsoft Corp*, op. cit. 234, para.331-333.

market.[253] In this sense, there has to be a dominant firm that produces and sells an essential and economically unsubstituted product to the rivals at the downstream market and uses its own same product as well to compete within the downstream market.[254] Therefore margin squeeze abuse allows the firm to charge prices for the concerned vital product in a way that may harm the effectiveness of rival competitors significantly or even entirely within the relevant market.[255]

The difference between refusal to supply and margin squeeze is that there is no need in the latter to prove the indispensability of the related product, though it is the key element in the previous. In *Telefónica*[256], the dominant firm Telefónica argued that the Commission accused the firm with the abuse of margin squeeze without questioning whether the concerned product was indispensable for the rivals at the downstream market but the General Court declined this claim with the excuse that margin squeeze is an abuse which is apart from refusal to supply and does not necessarily require the proof of indispensability of the concerned product. Likewise in *Deutsche Bahn*[257], the Commission stated that indispensability is not a necessary component of margin squeeze but the need of both the dominant company and its rival buyers for the essential product of the upstream dominant firm to compete within the downstream market is the determinative element of the margin squeeze.[258] Therefore margin squeeze abuse requires the dominant firm to use its own product in the downstream market while competing with its rivals which are also in the need of the same product. In this sense if the indispensability is proven, it would be a clear evidence of the potential anti-competitive consequences.[259]

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[253] Organisation for Economic Co-Operation and Development (OECD) Policy Roundtables, "Margin Squeeze", 2009, DAF/COMP(2009)36, p.7.

[254] Ibid.

[255] Daniel Petzold, "Economist's Note: It is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law", **Journal of European Competition Law and Practice**, 2015, Vol. 6, No. 5, p. 346.

[256] Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v European Commission*, EU:C:2014:2062.

[257] European Commission, Decision of 18 December 2003, COMP/AT.39678-*Deutsche Bahn I*, COMP/AT.39731-*Deutsche Bahn II*.

[258] Ibid para. 43.

[259] Ibid para. 45.

c. Price Discrimination

The term "price discrimination" refers to the incidents where the products are sold with different prices irrespective of the similarity of production costs or providing products with the same price even though the production costs are different.[260] In *United Brands*, the undertaking was found to be acting discriminative because of selling the same product with different prices, even though meeting the same production costs for both deliveries.

In this respect, economically unjustified rebates may also be considered as price discrimination.[261] In *Intel*, the Commission stated that Intel has involved to an abusive conduct by forcing consumers to buy all or almost entire of their needs from Intel in order to benefit from rebates. Within the same decision, the Commission established three different types of conditional rebates, which are quantity rebates, exclusivity rebates and other conditional loyalty inducing rebates which are all abusive. In this sense, it is not necessary to prove the direct damage of consumers or a link between the damage[262] and the issued practices and the rebates by a dominant firm are still abusive even if they occur at low levels.[263]

d. Predatory Pricing

It is stated by the CJEU within the *AKZO* case that pricing below the average variable costs with the aim of reducing competitors from the market must be regarded as an abusive behavior.[264] In this respect, it is questioned whether to consider the chance of recouping the losses which arise from the predatory pricing of the concerned undertaking, in order to determine a pricing strategy as an abusive behavior or not and yet the CJEU concluded that the risk of eliminating the competition is enough to

[260] Craig and Búrca, op.cit. 19, p. 1033.
[261] Craig and Búrca, op.cit. 19, p. 1038.
[262] *Intel*, op. cit. 199, para.105.
[263] Ibid para. 108.
[264] *AKZO*, op. cit. 208, para. 71.

penalize the predation.[265]

2.1.3. Judicial Review for Articles 101 and 102 of the TFEU

The General Court and the CJEU, as the next step, have the jurisdiction to review the cases arising from competition disputes with regard to various articles of the TFEU.[266]

Article 265 of TFEU deals with the issues which are arising from failure to act. In such cases, the complainants require the Commission to review and carry out its concerned actions which should have been handled by the Commission and it somehow has failed to act.[267] Nevertheless, the decision to proceed these complaints or the type of resources to be used during the proceeding process is up the Commission, with regard to Union interests.[268] Moreover, with regard to Articles 268 and 340 of TFEU, it is also possible for the parties who face with damages as a result of such failed actions of the Commission may sue the Commission in order to request compensation of their loss.[269]

Article 263 of TFEU allows bringing an action against the Commission in order to annul a concerned decision of the Commission and Article 264 of TFEU also allows partially annulling such decisions. The plaintiffs of such cases may be natural or legal persons as long as the concerned decision is addressed to them or it is within their direct and individual concern, which allows the third parties as well, who have such concerns, to bring an action with regard to concerned decisions of the Commission under Article 263(4). Article 263(2) specifies the grounds to be reviewed in such cases by stating that the EU courts "*have jurisdiction ... on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*"

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[265] Case C-333/94, *Tetra Pak International SA v Commission of the European Communities*, EU:C:1996:436, para. 44.
[266] Whish and Bailey, op.cit. 13, p.290.
[267] Ibid.
[268] Craig and Búrca, op.cit. 19, p.1008.
[269] Whish and Bailey, op.cit. 13, p.291.

If a decision of the Commission is entirely or partially annulled with regard to these articles and there has been a loss for the plaintiffs, which is a consequence of the annulled decision, it is possible to bring a further action against the Commission in order to claim the damages and request compensation under Article 340(2).

Article 261 gives unlimited jurisdiction to CJEU, with regard to the conflicts that are arising from the penalties imposed by the Commission. It is further stated in Article 31 of Regulation 1/2003 that the CJEU may cancel, reduce or increase the fine or periodic penalty payment imposed. Article 267 on the other hand allows the parties to seek for preliminary ruling of the CJEU against the decisions of the national courts or the NCAs.[270]

2.2. Article 6 of CPC

Article 102 of the TFEU is parallel covered by Article 6 of CPC, which states that,

The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.

Abusive cases are, in particular, as follows:

a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,

b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,

c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to

[270] Craig and Búrca, op.cit. 19, p. 1008.

the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,

e) Restricting production, marketing or technical development to the prejudice of consumers.

According to the Article, holding a "dominant position" is legally permitted but it causes a special responsibility for the undertakings in order to preserve the free competition environment and therefore any action which is within the purpose of abusing such an important position is prohibited. In order to detect an abuse of dominant position, CPC refers to three conditions: The existence of one or more undertakings, the existence of its/their dominant position and lastly the abusing behaviors of such undertaking(s). In this sense, the existence of a dominant position with the effect of a monopoly is not necessary to detect an abuse.[271] The Board also published a guide[272] in order to judge the abusive actions and it is stated that in order to be able to speak about the existence of an abuse, there has to be a dominant position of an undertaking and an action with an abusive context.[273] If one of these elements are missing, the Board may not analyze the other condition and may conclude that there is no abusive action within the meaning of Article 6 of CPC.[274]

For example within the *Marshall Dye* decision, the Board has concluded that in order to be able to decide on the existence of an abuse, first there has to be a dominant

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[271] Dilek Karaman, "Avrupa Birliğinin İşleyisine Dair Anlaşmanın 102 ve Türkiye'nin 4054 Sayılı Rekabetin Korunmasi Hakkında Kanununun 6. Maddeleri Açısından Bağlama Anlaşmaları*"*, Selcuk University Social Sciences Institution Journal, 34/2015, 15.09.2015, p. 65.

[272] Competition Board, "Guide on the Judgement of the Dominant Undertakings and Their Actions within the Feature of Eliminative Abuses*"*, 14-05/97-RM (1), 29.01.2014, hereinafter "*Abusive Actions Guide*".

[273] Ibid, para. 7.

[274] Competition Board, *Decision of Domino's Pizza*, Decision No. 10-69/1458-557, 04.11.2010 ; Ankara 11th Administrative Court, *Decision of Turkish Airlines and Pegasus Airlines*, 11.07.2013, E.2012/1727, K.2013/1083; Ankara 13th Administrative Court, *Decision of Avea, Turkcell and Vodafone*, 03.07.2015, E.2014/1326, K. 2015/1103 ; The courts have decided that if there is no dominant position, there is no necessity to question the abusive actions.

position, which should be more than %40 of the relevant market and since the market share of Marshall Dye within the relevant dye market is below the limit of %40, it is not therefore necessary to investigate the existence of an abuse.[275]

On the other hand it is argued that avoiding the proper dominant position test because of the hard determination process and concluding the case with the statement of "*there is no need to question the existence of an abuse, since there is no dominant position*" might not be lawful as well, if the related case might actually contain abusive actions with a better examination of the dominant position.[276]

As an example decision to this reverse point of view, in *ALCON Laboratory*[277] case the Board decided to determine the existence of the alleged abusive actions first, instead of determining the existence of a dominant position.[278] It is concluded within the case that the alleged actions of ALCON Laboratory are not discriminative or eliminating towards the plaintiff and therefore there is no abuse of dominance or infringement of Article 6 of CPC either.[279]

Within the light of both perceptions, it is possible to say that the Board may decide on which point of the view to start in order to determine the existence of an infringement within the framework of Article 6 of CPC. Even though determining the existence of a dominant position as the first step is more common within the case law of the Board, it is also possible in exceptional cases to determine the abusive feature of the relevant actions first and then examine the dominance as the latter element within the case.

2.2.1. The Scope of Undertakings

The CPC defines undertakings as:

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[275] *Marshall Dye* decision, op. cit. 146, p. 5, para. 23.

[276] Ahmet Fatih Özkan, "Tavuk-Yumurta Paradoksunun Rekabet Hukukundaki Görünümü: Hakim Durum ve Hakim Durumun Kötüye Kullanılması", 11.07.2016, https://pazarlardanhaberler.com/2016/07/11/tavuk-yumurta-paradoksunun-rekabet-hukukundaki-gorunumu/

[277] Competition Board Decision, Decision Number 17-02/72-31, 16.02.2017.

[278] Ibid, p. 14, para. 30.

[279] Ibid, p. 18, para. 45.

"*Natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole*".[280]

In this sense, there is no doubt as if it is applied to the private natural and legal persons who fulfill the stated conditions of the definition. However the CPC has not made any specification yet about the public corporations. Principally there is no clear rule to understand whether Article 6 of CPC is applied to the public corporations, since the definition of undertaking does not necessarily highlight the public or private nature of the undertakings, however it is possible to interpret the situation in parallel with the purpose of CPC and within the sense of Article 167 of the Constitution 1982.

The purpose of CPC is:

"*to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition*"[281.]

Moreover Article 167 of the Constitution 1982 introduces the necessity of taking measures to ensure and promote properly functioning structure of the market, as well as preventing monopolies and cartels. With regard to the mutual sense of both statements, it is clearly necessary to also include public corporations within the application scope of the CPC to ensure and preserve the competitive market structure by preventing and restricting anti-competitive actions which distort the free competition.[282]

2.2.2. The Concept of the Dominant Position

The meaning of the term of "dominant position" is very similar in CPC and the TFEU. The CPC explains the dominant position as

[280] CPC, Article 3.
[281] CPC, Article 1.
[282] Gamze Aşçıoğlu Öz, op.cit. 118, p.85.

"The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers."[283]

Dominant position is to be determined with many tests, such as related geographic market, product market, market shares, number of other producers, potential competition and entry barriers, which are used similarly within the dominance tests of the Commission. The Competition Board investigates every relevant case to determine whether such conditions are met to detect a dominant position.

2.2.3. Abuse

Article 6 of the CPC not only gives the definition of the prohibition within the scope of dominant position abuses, but also gives several examples to the actions which may cause such abuses. Moreover these actions are not counted within the numerous clauses principle and so not exhaustive. Therefore any action pursuing to abuse a dominant position may fall within the scope of this provision, even though related action is not counted within the article. It is stated that the core element that is searched within the investigation of abuses is the existence of an infringing action with an economic perspective and therefore it is not necessary for an action to suit one of the examples that are counted within Article 6 of CPC, in order to be considered as an abusive action.[284]

It was alleged within the *Marshall Dye* decision that Marshall Dye abuses its dominant position by applying different discount rates to wholesalers and eventually discriminating them. It is concluded by the Board that Marshall Dye is not holding a dominant position within the dye market and therefore it is not possible to talk about the existence of an abusive action but even within the assumption of it was holding a dominant position in the relevant market; its discount rates towards its wholesalers are

[283] CPC, Article 3.
[284] *Abusive Actions Guide*, op. cit. 272, para. 5.

depending on the purchase amount of the wholesalers and therefore it would still not be considered as a discriminating action.[285]

On the other hand, determination of such abusive actions is handled within the rule of liability without fault, which means that the existence of an abusive action does not depend on the existence of an intentional action. Therefore it is possible to detect an action as an abusive action even though the related undertaking did not necessarily pursue abusive activities. Moreover even the negligence of undertakings, which cause such abuses, are considered within the restriction scope of the Article 6 of CPC.[286] In this sense, objections of the undertakings which held abusive actions with the claim of good faith would not make the prohibited action lawful. Approval of the aggrieved parties upon the questioned action would not make any difference on the decision of the Board either.[287]

However the Abusive Actions Guide also states that in the case which the accused undertaking can prove that the questioned action has valid grounds, it might be found permissible. In that sense such action must be within the legitimate and essential interest of the undertaking, which does not eliminate the competition within the entire or an important part of the relevant market.[288]

In *TEB*[289] decision, the Turkish Pharmacists Association (TEB) is the only authorized undertaking which has an agreement with the Social Security Institution (SGK) to import pharmaceutical products and sell them within the domestic market. Therefore private pharmaceutical warehouses are not authorized to make agreements with the SGK in order to grant the same opportunity and facing the market entry barriers, which leads to the conclusion that the dominance of TEB within the relevant imported medicine market is obvious.[290] Within this monopolized dominance, it is

[285] *Marshall Dye decision*, op. cit. 144, p. 6, para. 26.
[286] Dilek Karaman, op.cit. 271, p. 70.
[287] Ibid.
[288] Abusive Actions Guide, op. cit. 272, para. 30-33.
[289] Competition Board decision, Decision Number 16-42/699-313, 06.12.2016, hereinafter "*TEB decision*".
[290] *TEB decision*, op. cit. 289, p. 39, para. 211-215.

stated that TEB arranges exclusive supply agreements with foreign medicine suppliers and because of the lack of market power for the other competing undertakings, it is not possible for the competing undertakings to arrange similar agreements with the foreign suppliers, which even narrows the number of active market players and strengthens the dominance of TEB within the imported pharmaceutical products market[291].

It is stated by the Board that such exclusivity does not have to be harmful according to the Abusive Actions Guide, if it is providing development or improvement within the service delivery process. It is nevertheless found out within the relevant case that it does not provide any beneficial outcomes, but instead, the patients who need the relevant medicines are aggrieved because of the inadequate access to such medicines and such exclusivity of TEB is at the expense of the customers.[292] As a result of this determination, the Board has concluded that TEB is abusing its dominant position by aggravating the activities of its competitors.[293]

3. MERGERS & ACQUISITIONS IN THE TFEU AND CPC

3.1. Mergers and Acquisitions in the TFEU

EU merger law aims to regulate the conditions for mergers and acquisitions within the EU in order to prevent the firms to have such market power that may harm the competitive market structure, as well as the consumers. In order to avoid such outcomes, the EU *Merger Regulation*[294] came into force in 2004.

The firms that seeks to accomplish a concentration and which have an "EU dimension"[295] with regard to the *Merger Regulation*, are obliged to grant the permission

[291] Ibid, p. 55, para. 283-284.
[292] Ibid. p. 55, para 285.
[293] Ibid, p. 56, para. 286.
[294] *Merger Regulation*, op. cit. 180
[295] Ibid, Article 1.

of the Commission before implementing the pursued action.[296] In this respect, the purpose of the Commission is to make a prior investigation before the questioned concentration and publish a notification[297] about its prediction on the consequences and the future of the related market after the concerned action of the firms, in order to identify whether the action will "*significantly impede effective competition ... as a result of the creation or strengthening of a dominant position*".[298] If the action causes such a result, then the concentration will be considered as incompatible with the common market.[299]

If a concentration has the EU dimension and therefore is within the scope of the *Merger Regulation*, the only authority to handle the investigation process is the Commission, unless there are exceptional features within the considered action. On the other hand the cases which do not fulfill the criterion of the EU dimension according to the *Merger Regulation* are handled by NCAs.

3.1.1. Concentrations

The first rule to be able to apply the *Merger Regulation*

is the existence of a concentration. Concentration itself is described within Article 3.1 and 3.2. Article 3.1 states that;

A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or

[296] Ibid, Article 4(1).
[297] Ibid, Article 4(3).
[298] Ibid, Article 2(3).
[299] Ibid.

more undertakings.

In relation to this statement, Article 3.2 explains that;

Control shall be constituted by rights, contracts or any other means which, either seperately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

With regard to Article 3.1 and 3.2, it is clear that the *Merger Regulation* covers the merger of two or more firms which were once independent, and also covers the acquisition of either direct or indirect control of one or more undertakings which aims to gain the entire or partial control of the related undertakings.

Additionally, the *Merger Regulation* also covers joint ventures and this fact is stated in different articles. Article 3.4 states that;

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph (1)(b).

Joint ventures are also mentioned within the Article 2.4 by stating;

To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

Article 2.5 also adds that;

In making this appraisal, the Commission shall take into account in particular:

— whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

— whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

According to these articles, it is understood that a joint venture may as well fall into the scope of the *Merger Regulation*, only if it is an economic body that acts autonomously on a lasting basis and such entities are called as "full-function joint ventures".[300] In contrast, if a joint venture does not fulfill the conditions to be count as full-function joint venture, then it does not fall into the scope of the *Merger Regulation* and in such cases, the possible cases may be handled by the NCAs.[301]

3.1.2. The EU Dimension

The *Merger Regulation* covers the concentrations only when they have an "EU dimension". In this respect, the *Merger Regulation* also identifies the specific situations where a concentration will be considered as fulfilling this criterion. Because of the definite jurisdictional nature of these criterions, the *Merger Regulation* covers EU linked transactions as well as the transactions with only a little or even no EU link.[302]

Article 1.2 of the *Merger Regulation* gives the basic treshold to describe the scope of the EU dimension by stating that

A concentration has a Community dimension where:

(a) the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 5000 million, and

[300] Craig and Búrca, op.cit. 19, p. 1051.
[301] Slaughter and May, "The EU *Merger Regulation*: An Overview of the European Merger Control Rules", June 2016, p. 4.
[302] Ibid p. 5

(b) the aggregate Community-wide turnover of each of at least two the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Article 1.3 gives an alternative threshold to extend the scope and cover more concentrations that do not fall into the extent of the Article 1.2 and states that;

A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate world-wide turnover of all the undertakings is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purposes of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

In order to calculate such amounts, Article 5 gives the route. In this respect, all bodies that are owned by the concerned undertakings are taken into account.[303]

On the other hand, the concentrations that do not fulfill either of the threshold criteria which are stated above are considered as without an EU dimension and therefore such cases are solved by NCAs.

[303] Ibid p.6

3.1.3. Exceptional Relations of Jurisdictions between the EU and the NCAs

In principle, if a concentration has an EU dimension, the Commission has an exclusive jurisdiction and the NCAs are competent to review such cases only if the concentration does not have an EU dimension. However there are also exceptions for this principle which may allow the NCAs to handle the investigation instead of the Commission. These exceptions regulate either pre-notification or post-notification systems which reallocate the jurisdictions.

3.1.3.1. Article 4.4 and Article 4.5

With regard to Article 4.4, in the cases where the pursued concentration has an EU dimension and will significantly affect the competition in the market of a Member State and it would be reasonably more advantageous to investigate the action by the NCA of the relevant Member State, the Commission may be proposed by the parties to transfer the jurisdiction to the related NCA.[304] If the proposed NCA accepts to handle the investigation itself, the Commission can authorize the related NCA to review the case instead of the Commission.

On the other hand, Article 4.5 regulates exactly the opposite situation, where the concerned concentration does not have an EU dimension but, it is more advantageous for the parties to ask the Commission to investigate their case instead of the NCAs since otherwise it would be harder to investigate the case, because at least three different NCAs would have to check the same case.[305] In such cases if the authorized NCAs oppose to this request, the jurisdiction stays at the national levels and if no objection occurs from the competent NCAs, then the concentration would be considered to have an EU dimension and therefore the investigation would be handled by the Commission instead.

[304] Craig and Búrca, op.cit. 19, p. 1053.
[305] Slaughter and May, op.cit. 301, p. 9

3.1.3.2. Article 9 and Article 21.4

According to these articles, the Member states may also intervene the investigations by their own request to the Commission. In this sense, Article 9 states that a Member State may inform the Commission if

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not consitute a substantial part of the common market.

After receiving such notification, the Commission searches whether the claim is correct. Depending on the result, it can either decide to handle the case itself or authorize the relevant NCAs.[306]

Member States may also be allowed to take appropriate measures to protect legitimate interests with regard to Article 21.4, which takes the Member States' considerations into account which are not related to competition law. Examples to such legitimized cases are the concerns of public security, plurality of the media and prudential rules for financial services.

Another similar exception that is in favor of the Member States is to prevent parties from revealing military scopes of mergers to the Commission with regard to Article 346 of the TFEU.[307]

3.1.3.3. Article 22

With regard to this article, one or more Member States may request from the Commission to review the concerned concentration investigation, even though it does not actually have an EU dimension but would affect the trade between Member States

[306] Craig and Búrca, op.cit. 19, p. 1053.
[307] Slaughter and May, op.cit. 301, p. 17.

and threaten to affect significantly competition within the territory of the Member State or States making the request.

3.1.4. Investigation

When the Commission receives a notification about a concentration, it examines whether the concentration will be compatible with the common market. In this sense, the Commission may state that the concerned concentration is out of the scope of the *Merger Regulation* or it can decide as well that the concentration has an EU dimension and compatible with the common market or it has an EU dimension but there are serious doubts about its compatibility with the common market and therefore requires further proceedings.[308] If the proceedings show that there are no more serious doubts about the concentration, then the Commission declares it compatible with the market[309] or otherwise the concentration will be declared as incompatible with the common market and the pursuant undertakings might be required to dissolve the concerned concentration[310] or implement interim measures to assure that the concentration will not harm the effective competition.[311]

In order to investigate the matter, the Commission may request all necessary information[312], ask for the inspections of competent NCAs[313] or conduct all inspections itself[314] or impose fines afterwards, which may vary up to 10 percent of the concerned undertakings' aggregate turnover.[315]

[308] *Merger Regulation* Article 6(1).
[309] *Merger Regulation* Article 6(2).
[310] *Merger Regulation* Article 8(4).
[311] *Merger Regulation* Article 8(5).
[312] *Merger Regulation* Article 11.
[313] *Merger Regulation* Article 12.
[314] *Merger Regulation* Article 13.
[315] *Merger Regulation* Article 14.

3.1.5. Substantive Analysis

3.1.5.1. Market Definition

During the process of investigation, the Commission questions the compatibility of the concerned concentration within the common market, with regard to a possible strengthened dominance which may create harmful outcomes on effective competition. In this respect, the determination of the relevant market is made with the criterion that are also used for defining relevant market for the cases that fall within the scope of Article 102 of the TFEU.[316]

3.1.5.2. The Test to Determine the Compatibility

The requirements to determine the compatibility of the questioned concentration with the relevant market are set out within Article 2 of the *Merger Regulation*. It is stated in Article 2.1 that the Commission will consider the structure of the concerned markets, potential competition by other undertakings within the same market, the market position of the concerned undertakings with regard to their economic and financial market power, substitutable suppliers and buyers, entry barriers of the relevant market, interests of the consumers and the development of technological and economic progress.

After getting a result from this process, the Commission will either claim that the concerned concentration will not significantly impede the effective competition and so it is compatible with the common market[317], or on the contrary, it will state that the concentration will significantly impede the effective competition and therefore it is incompatible with the common market.[318]

[316] Craig and Búrca, op.cit. 19, p. 1057.
[317] *Merger Regulation* Article 2(2).
[318] *Merger Regulation* Article 2(3).

3.1.5.3. Horizontal Mergers

The Commission has published the Horizontal Merger Guidelines[319] to show the factors in such mergers that affect the likelihood of anti-competitive effects within the relevant market. In this respect, the Horizontal Merger Guidelines divide its perception in two main ways, which are non-coordinated and coordinated effects and explains it through Article 22 as

There are two main ways in which horizontal mergers may significantly impede effective competition, in particular by creating or strengthening a dominant position:

(a) by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behavior (non-coordinated effects);

(b) by changing the nature of competition in such a way that firms that previously were not coordinating their behavior, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).

a. Non-Coordinated Effects

With regard to Article 24 and 25, which are explaining the conditions to declare that there is such a dominance that arise from a concentration and would significantly impede the effective competition, the importance is on the extent of the market power which is granted by the questioned concentration and as a consequence, the ability to change prices without regard to the response of other competitors, customers or consumers[320].

[319] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Undertakings, OJ [2004] C31/5, 5.2.2004, hereinafter "Horizontal Merger Guidelines".
[320] Slaughter and May, op.cit. 301, p. 19.

In this sense, the Commission stated in *Digital Equipment International*[321] case that,

"it is unlikely that the concentration will create or strengthen a dominant position because conditions of competition will not significantly change. ... High market shares on a new developing market are not extraordinary, and they do not necessarily indicate market power. ... Barriers to entry are relatively low ... Thus ... the concentration does not raise serious doubts as to its compatibility with the Common Market."[322]

On the other hand, the opposite claim was made in *Aérospatiale SNI*[323] and the Commission stated that the concerned concentration would significantly strengthen the position of the relevant undertaking, ART, within the commuter markets by stating that,

"*ATR would increase its share of the overall worldwide commuter market around 30 per cent to around 50 per cent. ... The combined market share may further increase after the concentration… ATR would significantly broaden its customer base after the concentration. ... The competitors in these markets are relatively weak. The bargaining ability of the customers is limited. The combination of these factors leads to the conclusion that the new entity ... would ... have a dominant position on the commuter markets as defined*."[324]

b. Coordinated Effects and Collective Dominance

The coordinated effects of horizontal mergers are explained within Article 39 and 40 of the Horizontal Merger Guidelines. According to Article 39,

"*a merger which occurs in concentrated market may significantly impede effective competition, through the creation or strengthening of a collective dominant*

[321] European Commission, Decision of 22 February 1991, Case IV/M057- *Digital/Kienzle*, Official Journal L-2985.
[322] Ibid para. 20-22.
[323] European Commission, Decision of 2 October 1991, Case IV/M053-*Aerospatiale-Alenia/de Havilland*.
[324] Ibid para. 27-51.

position, because it increases the likelihood that firms are able to coordinate their behavior in this way and raise prices, even without entering into an agreement or restoring to a concerted practice within the meaning of Article 81 of Treaty [Article 101 of TFEU]".

Article 40 also gives examples of such coordination, which might be keeping prices above the competitive level, limiting the number of production or dividing markets.

It is discussed in case law, whether collective dominance is covered by the *Merger Regulation* or not and was questioned because of the fact that unlikely to Article 102 of TFEU, the *Merger Regulation* itself, did not refer to 'one or more undertakings' terming, which arose the dilemma of whether this fact means that the latter does not have any effect on collective dominance.[325] The CJEU concluded the issue as the *Merger Regulation* does cover the collective dominance, even though it was not namely mentioned.[326] It is stated by the CJEU that it cannot be understood from the wording that Article 2 of the *Merger Regulation* "*excludes the possibility of applying the Regulation to cases where the concentrations lead to the creation or strengthening of a collective dominant position, that is ... held by the parties to the concentration together with an entity not a party thereto."*[327] It is also added that "*if it were accepted that only concentrations creating or strengthening dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose ... would be partially frustrated.*"[328]

In this sense, the parties that seek to create a concentration that may cause oligopoly concerns, has to prove that this new entity will not significantly impede the effective competition, aggravate the market entry or harm the customers[329]. In order to

[325] Craig and Búrca, op.cit. 19, p. 1063.
[326] *France and Others*, op. cit. 236.
[327] Ibid para. 166.
[328] Ibid para. 171.
[329] Slaughter and May, op.cit. 301, p. 21.

fulfill these necessities, the Commission requires three conditions for such markets which were stated as,

"*First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardize the results expected from the coordination*."[330]

It is added that a "*special consideration is given to the possible impact of the effects (of entry and countervailing buyer power of customers) on the stability of coordination.*"[331] In this respect, sustainability of the concerned coordination is also necessary in order to prove that the market, which the concerned concentration may take place, is convenient for such actions.

3.1.6. Vertical and Conglomerate Mergers

Similar with the Horizontal Merger Guidelines, the Commission also has published another guideline which is about the non-horizontal (vertical) mergers.[332] Vertical mergers occur between firms which are not acting in the same market but are acting in supplementary markets, such as production and distribution markets, and therefore it may be optimal for the parties to cooperate, whereas conglomerate mergers occur between firms that act in distinct markets and therefore generally they are seen as harmless, and yet if the concerned different products are supplementary in order to create another product, such mergers may create the concerns about anticompetitive consequences.[333]

[330] Horizontal Merger Guidelines, op. cit. 319, para. 41
[331] Ibid para. 57.
[332] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2008] OJ C265/7, hereinafter "Vertical Merger Guidelines".
[333] Slaughter and May, op.cit. 301, p. 23.

It is stated within the Vertical Merger Guidelines that vertical or conglomerate mergers do not directly cause the loss of competition between merging firms in the same relevant market.[334] In fact, they may even provide decreased prices and increased outputs, as well as decreased transaction costs and better coordination conditions.[335] However it does not mean that such mergers cannot significantly impede the effective competition.

In the case where the parties of such concentrations have substantial market power within the relevant markets of the supply chain, which may hamper the benefits of consumers[336], may also have non-coordinated effects on the effective competition, as having the ability of foreclosing the market access, which is found to be "anticompetitive foreclosures" and are concerned to significantly impede effective competition.[337] It is also possible for such concentrations to have coordinated effects that may change the nature of the competition which may provide a chance for the firms to cooperate together even though they would not if the concerned concentration did not exist, or it may enhance the conditions of such cooperative actions of the firms.[338] If such matters are possible to occur, vertical or conglomerate mergers may also be found by the Commission as incompatible with the common market.

3.1.7. Concentrations and Exceptional Defenses

Within some certain and exceptional situations, the Commission considers the investigated concentrations as compatible with the common market anyway and in this sense, these excuses are the efficiency defense and failing firm defense.[339]

To be able to benefit from the efficiency defense, the referred efficiencies, that will arise from the pursued concentration, must be beneficial for the consumers, also less anti-competitive alternatives must not grant the same or better qualified efficiencies

[334] Vertical Merger Guidelines, op. cit. 332, 12.
[335] Ibid para. 13-14.
[336] Slaughter and May, op.cit. 301, p. 23.
[337] Vertical Merger Guidelines, op. cit. 332 18.
[338] Vertical Merger Guidelines, op. cit. 332, 19.
[339] Slaughter and May, op.cit. 301, p. 22.

and the benefit of the efficiencies should be convincing enough to outweigh the possible harm of the concentration which will occur on consumers.[340]

On the other hand in order to fulfill the latter excuse, it is necessary prove that

"*the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. ... there is no less anti-competitive alternative than the notified merger, ... in the absence of a merger, the assets of the failing firm would inevitably exit the market*."[341]

In this sense if the concerned firm is a failing firm, the notified merger might be found as compatible with the market, only if the allegedly failing firm would be out of the market because of great financial struggles, there is no other substitutable solution to avoid from this undesirable result and the departure of the failing firm from the concerned market will cause the loss of its assets, which may create even bigger trouble on the sustainability of the effective competition by giving the other competitors a chance to strengthen their dominant position, as well as their market power.

When the conditions of either of these exceptional cases are met by the concerned parties, the Commission may declare the pursued concentration as compatible with the common market.

3.1.8. Judicial Review

The decisions of the Commission with regard to the disputes arising from the *Merger Regulation* are handled by the EU Courts, with regard to Article 263 TFEU[342], which enables to annul such Commission acts that produce binding effects.[343] According to this article, it is possible for the parties, without regard to being natural or legal person, to apply for proceedings against a decision of the Commission which is addressed to them or is not addressed but is somehow within the direct and individual

[340] Horizontal Merger Guidelines, op. cit. 319, para. 76-88.
[341] Horizontal Merger Guidelines, op. cit. 319, para. 90.
[342] Craig and Búrca, op.cit. 19, p. 1069.
[343] Whish and Bailey, op.cit. 13, p.892.

concern of the parties, which may also allow the third parties to appeal for the proceedings as long as they are able to provide the proof of their direct and individual concern.[344]

Fines and penalty payments are on the other hand under review by General Court, with regard to Article 261 TFEU.[345] Regulation 1/2003 also highlights that the CJEU has unlimited jurisdiction to review and cancel, increase or decrease the decisions of the Commission which constitutes a fine or periodic penalty payment.[346]

3.2. Article 7 of CPC

Article 7 of CPC is determined similarly with the *Merger Regulation* of the EU and states that,

Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.

The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.

Within the sense of this article, dominant position itself is not forbidden but creating a merger or an acquisition action with the purpose of becoming dominant or strengthening the current dominant position is forbidden. Therefore for example the

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[344] Ibid p. 893.
[345] Ibid p. 891.
[346] 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, hereinafter "*Regulation 1/2003*", Article 31.

undertakings, which already have dominant positions, may commit to concentration actions, although it is not allowed for them to strengthen their dominant position by lessening the competition within the relevant market with the help of pursued concentration actions.[347]

According to this main framework, the mergers and acquisitions which do not create or strengthen dominant positions and therefore do not significantly lessen the competition within relevant market of the whole or a part of the country would be permissible for the Board, which would grant the pursued authorization.[348]

Within the *Toyota*[349] case, Toyota Industries Europe AB (Toyota Europe), which was controlled by Toyota Industries Corporation (TICO), was pursuing to take over the shares and control of Vive B.V. (Vive). It is found out within the acquisition application that neither Vive nor TICO have the dominant position within the relevant markets that they were active. Moreover the market power of TICO within TR market after the acquisition of Vive was not expected to gain a dominant position. Therefore the Board has concluded that the acquisition of Vive by Toyota Europe, indirectly by TICO as well, is permissible.

The Board has also declared a communiqué[350] in order to determine the details of Article 7 of CPC. According to the Communiqué on the Concentrations, the market definitions are made by the distinction of geographic market and product market.[351]

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[347] Ecem Süsoy, "Rekabet Hukukunda Yogunlasmalarin Denetlenmesi*"*, Erdem&Erdem Publications, 18.05.2017, http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/rekabet-hukukunda-yogunlasmalarin-denetlenmesi/en/ , (last access: 05.12.2017)..

[348] Erdem Bafra, "Rekabet Hukuku Açısından Banka Birleşmeleri*"*, Ankara University PhD Thesis, Ankara 2008, p.42.

[349] Competition Board decision, Decision Number 17-12/143-63, 06.04.2017, hereinafter "*Toyota decision*".

[350] WIPO, Communiqué Concerning the Mergers and Acquisitions, amended by the Competition Board, Communiqué No. 2010/4, hereinafter "*Communiqué on the Concentrations*", http://www.wipo.int/wipolex/en/text.jsp?file_id=245292 , (last access: 05.12.2017).

[351] Ibid, Attachment File, Article 5.

3.2.1. Market Definitions

3.2.1.1. Geographic Market

According to the definition of the Communiqué on the Concentrations, relevant geographic market is the

"*regions where undertakings operate for the supply and demand of their goods and services and that are readily distinguishable from the neighboring regions because the competitive conditions are sufficiently homogenous, and especially, the competitive conditions are noticeably different from those in the neighboring regions*."

Therefore within the geographic market assessment, the considerations would focus on

"the properties of the relevant goods and services, consumer preferences, entry barriers, and the existence of a noticeable difference between the relevant region and the neighboring regions in terms of the market shares of the undertakings or prices of goods and services."

It is detected within the *Toyota* decision, that TICO not only aimed to take over the control of Vive, but also was pursuing to take over Bastian, which is an active company within the same product market with Vive. However Bastian was active only within the American and Australian markets and has no sales within the relevant product market of the TR. In such situation, even though Bastian is also producing similar goods, its geographic market is irrelevant to the geographic market of Vive and therefore the acquisition of Bastian does not strengthen the position of TICO within the relevant product market of Vive.[352]

It is also stated within the *ASL*[353] case, that even though the relevant parties of the pursued transaction have generally similar activities within the world market; since

[352] *Toyota* decision, op. cit. 349, p. 5, para. 27.
[353] Competition Board decision, Decision Number 17-11/129-58, 23.03.2017.

their activities within the relevant product market of the TR are distinctive[354], the concerned transaction does not contain any risk for the competition and is therefore permissible.[355]

3.2.1.2. Product Market

Communiqué on the Concentrations also gives the definition of the relevant product market by stating that "*the market made up of all of the goods or services that are accepted as exchangeable or substitutable in the eyes of the consumer, in terms of price, purposes of use and qualities, are taken into account; other factors that might affect the determined market are also considered*."

In *Kering*[356] case, it is stated that since the competitors within the relevant glasses market are numerous and the pursued transaction cannot lead to the creation or strengthening of a dominant position, the transaction is found to be permissible.[357] Similarly it is seen in *Eurodrip*[358] case that the product selection of the consumers is not shaped by the brands of the products but instead the quality and the performance of the products are affecting the selection. Moreover there is no market entry barrier within the relevant market and there are several competitors within the market. Therefore there is no risk due to the pursued transaction.[359]

It is also concluded within the *Toyota* decision that because of the weak substitution between the products of different companies, possible pursued concentrations are seen harmless. Due to the fact that such concentrations would involve different markets as well, creating a dominant position, strengthening an existing dominant position or reducing the competition within the market out of such

[354] Ibid, p.2, para. 8.
[355] Similar decisions: Decision Number 17-07/76-32, 16.02.2017; Decision Number 17-07/68-28, 16.02.2017; Decision Number 17-06/50-17, 09.02.2017; Decision Number 17-07/67-27, 16.02.2017; Decision Number 17-07/70-29, 16.02.2017; Decision Number 17-07/71-30, 16.02.2017; Decision Number 17-08/85-35, 23.02.2017.
[356] Competition Board decision, Decision Number 17-06/55-21, 09.02.2017.
[357] Ibid, p.5, para. 20-22.
[358] Competition Board decision, Decision Number 17-08/87-37, 23.02.2017.
[359] Ibid, p.4, para. 22.

concentrations is assumed as almost impossible.[360] Moreover, even though the secondary relevant product market of TICO is supplementary to the product market of Vive, since the market share of TICO is low within the concerned market, the pursued concentration is not expected to create a risk against the competition.[361]

3.2.2. Conditions

Communiqué on the Concentrations highlights the situations in which the actions are considered as a merger or an acquisition action. According to this distinction of conditions, it is possible to identify the features of an action to understand the possible existence of a merger or an acquisition.

3.2.2.1. Negative Conditions

Communiqué on the Concentrations highlights specific actions, which would not be considered as a merger or an acquisition action and therefore may be regarded as negative conditions.[362] Such transactions would not be considered within the framework of Article 7 of CPC and would not require the authorization of the Board.

According to the Communiqué, the actions within the scope of an intra-group transactions and other transactions which do not lead to a change in control; or temporarily holding on to securities purchased for resale purposes, provided that the voting rights from those securities are not used to affect the competitive policies of the undertaking which issued the securities in question; or an acquisition of control by a public institution or organization by operation of law and due to divestment, dissolution, insolvency, suspension of payment, bankruptcy, privatization or a similar reason; or an action as a result of inheritance would not be considered as a merger or an acquisition action within the frames of the Article 7 of CPC.[363]

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[360] *Toyota* decision, op. cit. 349, p. 4, para. 23.
[361] Ibid, p. 5, para. 26.
[362] Erdem Bafra, op.cit. 348, p. 27.
[363] Communiqué on the Concentrations, op. cit. 350, Article 6.

3.2.2.2. Positive Conditions

Article 7 of CPC declares the restrictions due to the merger or acquisition transactions; Communiqué on the Concentrations also identifies the conditions that have to be fulfilled in order to consider a transaction as a merger or an acquisition action as stating that

"*the merger of two or more undertakings; or the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means shall be considered a merger or acquisition transaction, provided there is a permanent change in control.*"[364]

It is also stated that in order to consider a merger or an acquisition action within the framework of CPC, the action must happen in between independent undertakings with the purpose of the purchase or control of shares or assets which gives the right of authorization to handle administrative procedures of the concerned undertakings.[365] The term of "independence" refers to economical independence[366] and therefore if the concerned action occurs between the undertakings which are not independent or if the undertakings are within a group of undertakings, the action will not be considered as a merger or an acquisition action with regard to competition law.

Moreover Article 7 of the Communiqué on the Concentrations gives specific financial limits to the transactions in order to determine whether an action requires an authorization from the Board. According to Article 7 of the Communiqué on the Concentrations,

(1) In a merger or acquisition transaction (...) authorization of the Board shall be required for the relevant transaction to carry legal validity in case,

[364] Ibid Article 5.
[365] Competition Board, "17th Annual Report", 2015, p.20.
[366] Erdem Bafra, op.cit. 350, p.49.

(a) Total turnovers of the transaction parties in Turkey exceed one hundred million TL, and turnovers of at least two of the transaction parties in Turkey each exceed thirty million TL, or

(b) Global turnover of one of the transaction parties exceeds five hundred million TL, and at least one of the remaining transaction parties has a turnover in Turkey exceeding five million TL.

(2) Except in cases of joint ventures, authorization of the Board shall not be required for transactions without any affected market, even if the thresholds listed in the paragraph 1 of this Article are exceeded.

(3) The thresholds listed in paragraph 1 of this Article shall be re-established every two years after this Communiqué comes into force.

3.2.3. Obligation of Notification

The concentrations within the limits referred above has to be notified to the Board to get autorization. The Board declares its approval or objection within the first fifteen days beginning from the date of notification.

The Board may also require some necessary conditions or commitments in order to grant the permission and with the fulfilment of such conditions or commitments, the pursued permission may still be granted. The difference between the conditions and commitments is the fact that in the case when the conditions are not met, the concerned action may be considered by the Board as if it was never approved at all, whereas if the commitments are not fulfilled, the outcome would appear either as the necessity of fine payment or the proceeding of the relevant investigation.[367]

For example, within the *Mobil Acquisition Decision*[368], the Board concluded that the pursued action of Mobil Oil Türk A.S. requires the permission of the Board with regard to the Communiqué on Concentrations and the approval of such action is

[367] Filiz Toprak Esin-Nehir Aydeniz, "Anadolu Endüstri Holding-Migros Kararı Işığında Türk Rekabet Hukukunda Taahhüt Sistemi Uygulaması Üzerine Değerlendirmeler", FMR Journals 2016/1, p. 67.

[368] Competition Board Decision, Decision Number 14-24/482-213, 16.07.2014, p.13.

possible with the application of the commitments which are submitted by the applicant and if the applicant does not fulfill the commitments of the action within the granted time, the approval would be declared null and void. Similarly in the *Astrazaneca Holding Decision*[369] it was stated by the Board that even though the concerning acquisition may create a dominant position within the sunflower seed market, it is not expected to affect the competition within the relevant market because the parties have agreed to undertake the commitment of transfering the sunflower seed business to a third party undertaking and therefore the pursued acquisition is permissible.

As a different example, within the *Vatan Newspaper Decision*[370], it was stated that the acquisition of the Vatan Newspaper may grant Doğan Group a dominant position within the daily political newspapers market, however Vatan Newspaper is in a huge debt, which is mostly owed to the Doğan Group and Vatan Newspaper is on the treshold of bankruptcy because of its inability to pay this debt and the only way for Vatan Newspaper to survive is to be taken over. Moreover it was highlighted that there is no other willing purchaser for Vatan Newspaper other than Doğan Group and if the acquisition is not permitted, then an alternative newspaper brand would be vanished from the daily political newspapers market, meanwhile causing many people to lose their jobs. Accordingly it was decided that allowing this acquisition would create less harm than forbidding it and therefore under further specific conditions, the acquisition would be permissible.

On the other hand, in the situations, when the Board makes a conclusive investigation to determine the necessities of the case, the pursued action of undertakings are not valid or applicable during the process but instead it is in abeyance status until the response of the Board is declared.[371] However if the Board does not give any response within the first thirty days after the notification, the concentration is

[369] Competition Board Decision, Decision Number 04-49/673-171, 29.07.2004.
[370] Competition Board Decision, Decision Number 08-23/237-75, 10.03.2008.
[371] Competition Board, "16th Annual Report", 2014, p.38.

automatically considered as legally valid and in force.[372]

If an action was supposed to be notified to the Board and somehow was not notified, the Board checks the features of the concerned action and first of all decides whether the action is within the limitations of the merger and acquisition control. If it does not fall within the restricted scope of Article 7 of CPC, then the Board allows the merger or acquisition action but imposes fines on those concerned due to their failure to notify. If the action falls within the forbidden actions which are counted in the Article 7 of CPC, then the Board decides the termination of the relevant merger or acquisition transaction, together with fines, elimination of all de facto situations committed contrary to the law, as well as returning any shares or assets to their former owners.[373]

3.2.4 Concentration Provisions of the Draft

One of the most important innovations of the *Draft* is about re-regulating the merger and acquisition actions.[374] First of all, the term of "mergers and acquisitions" is no longer used and exchanged with the term of "concentrations", which is a parallel and similar update with regard to the recent application of the EU competition policy.

Secondly the test of dominant position is exchanged with the test of "significant elimination of the active competition", which was introduced by the EU *Merger Regulation*. According to this new test, the existence of a concentration is not necessarily contrary to the competitive market. In such sense, the dominance test will not be applied in order to determine the existence of a dominant position of a concentration, but instead the effects of the concentration on the effective competition will be examined[375] in order to see whether the concerned concentration is harmful for the competitive market or not.

In fact, within the current wording of the CPC, if a concentration does not

[372] CPC, Article 10.
[373] CPC, Article 11.
[374] Ibid, Article 3.
[375] Ünal Tekinalp, op.cit. 130, p.36.

create or strengthen a dominant position; possible outcomes of such concentrations have the potential to be ignored by the Board. For example in *Tekno Ray* decision[376], it is stated by the Board that solar energy technology market of the TR is a rather new market and accordingly neither Tekno Ray and Tekno Inşaat, which are recently founded and therefore yet to be inactive companies, nor Enerray, which is active only in the Italian market, cannot create or strengthen a dominant position. Therefore the investigation was no longer pursued by the Board and it was declared that the pursued concentration is permitted. However the effects of the concerned concentration with regards to significantly eliminating the active competition criteria were not discussed[377].

In fact, even if a concentration may not create or strengthen a dominant position, it could still reserve a potential to have harmful effects on the competition, especially within the case of vertical mergers, which may not create dominance in different stages of the relevant markets but they can still restrict the entry to these markets[378]. Similarly, a newly created or strengthened dominance may not be able to significantly eliminate the competition with regards to other features of the relevant market either, for example due to low entry barriers or a structure that allows rapid changes on dominance. In such case forbidding a pursued concentration only with regard to the creation or strengthening of a dominant position may not always be quite fair either.

Therefore using dominance as a key to find out the outcomes of a concentration with regards to significantly elimination on competition is not guaranteed to be the best tool to count on. Accordingly investigating the consequences, instead of the triggers, and changing the determination procedure by focusing on the effects of such concentrations, which is also the pursued method of EU competition law with the guidance of EU Merger Regulation, would not only harmonize TR and EU competition

[376] Competition Board Decision, Decision Number 12-08/224-55, 23.02.2012.

[377] Similar Decisions: Decision Number 18-13/231-106, 03.05.2018; 18-13/234-109, 03.05.2018; 18-13/232-107, 03.05.2018; 18-08/143-72, 15.03.2018; 18-09/158-78, 29.03.2018; 11-64/1656-586, 29.12.2011.

[378] Metin Topçuoğlu and Nilgün Dolmacı, "Yoğunlaşmaların (Birleşme Veya Devralmaların) Kontrolünde Şartlı İzin Ve 2010/4 Sayılı Tebliğ'in Getirdiği Yenilikler", in **S.D.Ü. Hukuk Fakültesi Dergisi C.I, S.1**, 2011, p. 98.

policies even closer, but it would also have the result of improving the domestic concentration principles of the Turkish competition law towards a reasonably fairer path.

On the other hand, another different aspect of this updated version of the provision will be the new ability of the Board to grant permission to concentrations with the obligation to fulfilling some specific conditions, which will also be determined by the Board, in order to prevent the complications arising from the founding format of such concentrations.

4. STATE AID IN THE TFEU AND CPC

4.1. State Aid in the TFEU

The basic definition of "state aid" is a subsidy which is provided by a government to an undertaking and which is restricted with regard to Article 107 of TFEU. The Article states that,

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

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

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the

Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

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

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

According to the first paragraph of Article 107, any kind of government support that is granted to an undertaking is principally prohibited. Second paragraph gives justifications to the general rule within exceptional cases, such as consumer protection, promoting charity in the areas that are damaged by natural disasters, as well as the exceptional decisions of the Council under specific circumstances. Third paragraph on the other hand explains the situations where the concerned aid would be count as compatible with the internal market, with the reasoning of economic development, execution of an important project, facilitation of economic activities in certain areas, protection of cultural heritage or further categories that will be decided by the Council.

The purpose of such justifications is to prevent the state aid from becoming a handicap against the needs of the internal market in exceptional circumstances[379] and ensure the well-functioning and fair economic standards.[380] Article 108 determines the application process of Article 107, whereas Article 109 highlights the jurisdiction of the Council to adopt new regulations on state aid[381] and the application of Articles 107 and 108.

4.1.1. Article 107(1) of the TFEU - Conditions of State Aid

According to Article 107, four conditions, which are cumulative and have to be fulfilled, must be met in order to categorize aid as state aid.

4.1.1.1. Receiving an Advantage

First of all, there has to be an advantage that is to be granted and which will provide the recipient private undertaking a supremacy over its competitors. Such aid is a wider advantage than a simple fiscal subsidy, because it covers not only subsidies but also various forms of interventions, such as mitigating the expenses of the undertakings which would be paid by themselves otherwise.[382] The aid may for example be in the form of a direct loan, tax exemption, adjustment of interest rates or social contribution.[383] In this sense the aid might either be a benefit or liberation from a burden.

On the other hand, public service compensations for performing services of general economic interest are not seen as state aid. It is stated in *Altmark*[384] that, if the state measure is done as compensation for the services that are provided by the recipient undertaking,

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[379] William Fry, "The EU State Aid Regime: An Overview", 2015, p.1

[380] European Commission, *State Aid Control*, 12.09.2016, http://ec.europa.eu/competition/state_aid/overview/index_en.html, (last access: 05.12.2017).

[381] Whish and Bailey, op.cit. 13, p.247.

[382] Case 30-59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, EU:C:1961:2, hereinafter "*Limburg*", p.19.

[383] Craig and Búrca, op.cit. 19, p. 1088.

[384] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415.

"Those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favorable competitive position than the undertakings competing with them"[385]

Therefore such measure is not within the content of Article 107. Likewise, in the case where the contribution is not made as an aid but is made as an investment, the payment may not be considered as aid.[386]

However if the public investor claims not to grant aid to a private undertaking but instead to make an investment to it; there has to be a pursued profit that will be acquired in time[387]. If there is no profit that will be granted through the investment or if the concerned investment is such an investment that a private entity would not get involved, then the questioned investment would also fall in the scope of Article 107[388] and be counted as state aid.

4.1.1.2 "Member State or through State Resources"

In order to classify an aid within Article 107, the aid must be conferred by a member state or through state sources. Should the consignor of the granted aid be a private entity which was established by a state, the concerned private entity will also be counted as a public body and therefore the granted aid will additionally be considered as state aid.[389]

In *Kwerkerij Gebroeders*, the private company Gasunie, whose 50 per cent of shares are held by the Dutch government, was found non-autonomous and unable to fix the tariffs without access to the requirements of the public authorities and therefore the aid that it received was found to be an aid which is granted by a member state.[390]

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[385] Ibid para. 87.
[386] William Fry, op.cit. 379, p.1
[387] Craig and Búrca, op.cit. 19, p. 1090.
[388] Cases T-228/99 and 233/99, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities*, EU:T:2003:57, para. 244-246.
[389] Craig and Búrca, op.cit. 19, p.1091.
[390] Case 67, 68 and 70/85, *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, EU:C:1988:38, para. 35-38.

4.1.1.3. Distortion of Competition or the Risk of Competition Distortion

In order to count state aid as incompatible with the internal market, the concerned aid must either distort the competition or threaten to distort the competition. Determination of the level of distortion or the risk of distortion is made with regard to concerned company's position before and after receiving the aid.[391]

4.1.1.4. Effect on the Internal Market

In the case where concerned aid gives the recipient undertaking an advantageous position against its competitors within the EU, the aid is considered as affecting the internal market without regard to whether the distortion is or will be affected, the possibility of this consequence is enough to count the aid as inconsistent with the internal market.[392] In this scenario, the amount of the aid or the size of the recipient undertaking is also ignored.[393]

4.1.2. Article 107(2) of the TFEU

With regard to Article 107(2), not every aid is considered as incompatible with the internal market but there are three exceptional cases where they may be seen as compatible instead.

Article 107(2)(a) highlights the aids that have a social character which are granted to individual consumers and provided that they are granted without discrimination which is related to the origin of the products concerned may be compatible within the internal market.

Article 107(2)(b) justifies the situation which the aid is provided in order to compensate damages that are occurred by natural disasters or exceptional occurrences.

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[391] Case 173/73, *Italian Republic v Commission of the European Communities*, EU:C:1974:71.
[392] Craig and Búrca, op.cit. 19, p. 1093.
[393] Case C-142/87, *Kingdom of Belgium v Commission of the European Communities*, EU:C:1990:125.

Article 107(2)(c) on the other hand, legitimates the aids which are supplied for the special position of Germany, which arose from the division of the country, and aimed to reimburse the economic disadvantage that is caused by the division.

4.1.3. Article 107(3) of the TFEU

Likewise Article 107(2), Article 107(3) also constitutes exceptions for the general prohibition which is stated in Article 107(1). However the main difference of the exceptions that are stated within the third paragraph is the fact that they are not obliged to be seen as compatible with the internal market, but instead they are discretionary and therefore the exceptional cases may be seen as incompatible with the internal market as well.[394]

Such exceptional aids, as they are stated above, are given in order to promote the economic development of areas which have abnormal living standards [Article 107(3)(a)], to execute an important project of common European interests or a remedy to an important disturbance in the economy of a member state [Article 107(3)(b)], to facilitate certain economic activities or areas where the aid would not harm the trading conditions [Article 107(3)(c)], to promote culture and heritage conservation [Article 107(3)(d)] or to provide such other exceptional categories that will be decided by the Council with a proposal of the Commission [Article 107(3)(e)].

4.1.4. Block Exemptions

In 2008, the Commission has published some categories of aid which will be considered as compatible with the internal market[395]. According to this regulation these categories, which are up to twenty six so far, of aids will not be notified to the Commission[396]. The target categories for block exemptions are aiding small and medium sized enterprises, aid for female entrepreneurship, research and development,

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[376] Craig and Búrca, op.cit. 19, p. 1094.

[395] Commission Regulation (EC) No 800/2008 of 6 August 2008 *declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty* (General Block Exemption Regulation) [2008] OJ L214/3.

[396] Craig and Búrca, op.cit. 19, p. 1099.

innovation, regional aid, environmental aid, training aid and aid for disabled and disadvantaged workers.[397]

4.1.5. Notifying the Aid

Principally state aid control requires a prior notification to the Commission[398] and therefore the Member States are obliged to wait the decision of the Commission before enforcing the concerned measures.[399] During the investigation, the Commission decides about the existence of an aid. If the concerned contribution is found as not affiliated with the scope of state aid, then it is consistent with the internal market and may be enforced by the related member state. If there is an aid within the meaning of state aid, then the Commission decides upon its compatibility with the internal market and in that case, the measure would either be found as conditionally compatible and may be implemented or entirely incompatible and therefore may not be implemented.[400]

However there are also exceptional aids that are not subject to this procedural mandatory rule. These exceptions are for the aids that are subject to block exemptions, the aids that are granted with and aid that is already authorized by the Commission and the aids that are seen as within the limits of *de minimis* rule[401] and not exceeding €200.000 per undertaking over any period of 3 fiscal years which would be €100.000 for the road transportation sector.[402]

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[397] William Fry, op.cit. 379, p.3

[398] Article 108(3) TFEU: *The commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

[399] European Commission, *State Aid Procedures*, 29.05.2015, http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html, hereinafter "*State Aid Procedures*", (last access: 05.12.2017).

[400] William Fry, op.cit. 379, p.4.

[401] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the *Application of Articles 87 and 88 of the Treaty to De Minimis Aid* [2006] OJ L379/5.

[402] *State Aid Procedures*, op.cit. 399.

4.1.6. Unlawful Aid

State aid, as explained above, has to be notified to the Commission for preliminary investigation. As a consequence, if an aid is enforced and granted without notifying the Commission, it is called as "unlawful aid" and in such circumstances, the Commission holds an immediate examination about the concerned aid.[403] During the investigation, the Commission may decide to have a 'suspension injunction'[404] upon the state to suspend the aid until the final decision is given or it may also decide to have a 'recovery injunction'[405] in order to oblige the concerned member state to recover the aid.

The result of the examination may, similarly to the notified investigation, be revealing that there is no aid and therefore there is no measure that is incompatible with the market, or there is an aid which is consistent with the internal market but requires conditions, or it might as well be found completely inconsistent with the internal market. If the final decision is made as the third possibility and the aid is already paid out, then the Commission may require the concerned member state to recover the aids with interests from the beneficiary undertaking. If the member state does not apply the decision, the Commission may bring the case to the CJEU.[406]

4.1.7. Judicial Review

The decisions and management procedure of the Commission are subject to be reviewed by the General Court and CJEU is also responsible to handle the appeal cases.[407]

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[403] Ibid.

[404] Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the Application of Article 93 of the Treaty [1999] OJ L83/1 Article 11(1).

[405] Ibid Article 11(2).

[406] *State Aid Procedures*, op.cit. 399

[407] William Fry, op.cit. 379, p.4-5.

4.2. State Aid in CPC

4.2.1. General Information

Article 34 of the 1/95 Decision determines the state aid matters between the EC and the TR. According to the first paragraph of the article,

"any aid granted by Member States of the Community or by Turkey through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Community and Turkey, be incompatible with the proper functioning of the Customs Union."[408]

The second paragraph of the Article nonetheless gives exceptions for the basic rule. The first three paragraphs of the exceptions are the same with Article 107(2) of TFEU, which also regulates the exceptions of state aid restrictions. On the other hand Article 34(4)(d) is specifically determines exceptional situations in the TR, by stating that

"for a period of five years from the entry into force of this Decision, aid to promote economic development of Turkey's less developed regions, provided that such aid does not adversely affect trading conditions between the Community and Turkey to an extent contrary to the common interest"[409] is compatible with the functioning of the CU.

Moreover the third paragraph of the article regulates the exceptional situations which might be considered as compatible with the functioning of the CU and this paragraph is also very similar with the Article 107(3) of TFEU, with a few additional exceptions which are specified only for the TR.[410] Also Additional Protocol declares that the TC may be estimated as in the exceptional economic situation which is

[408] 1/95 Decision, Article 34(1).
[409] 1/95 Decision, Article 34(2)(d).
[410] 1/95 Decision, Articles 34(3)(c) and 34(3)(d).

described within Article 107(3)(a) of TFEU and therefore promoting the economy of the TC may be considered as compatible with the proper functioning of the Association, as well as stating that at the end of the transitional stage, the Council of Association would be autorized to decide upon the extension of the time period that such exception would be applied.[411]

4.2.2. The Evolution Process of State Aid Practices

Organizational structure of state aid within the EU and the TR are varied and therefore there are different type of applications within these two law systems. Indeed state aid is handled in the EU by both central and local authorities within the surveillance of the Commission. However because of the structural differences, it is handled within the TR only through the central governing authority, which caused the need to have a new legal body to observe the state aid process and be able to inform the EU with regard to the responsibilites due to the 1/95 Decision.

4.2.2.1. Before 2010

The TR had problems with entirely fulfilling its obligations arising from the 1/95 Decision, since it couldn't be possible to finalize the adaptation process of the TR legislation within the context of state aid. In such sense it was essential to create a unique system rather than simply translating the EU legislation and pursuing to apply it exactly within the TR legislation, since it was more important to define and stress the exceptional situations with regard to the economic and social status of the TR in which state aid, as an aid which normally disorts the free market economy and the competitive market structure, may be excused. Moreover, the necessity appeared to review the tax legislation of the TR, since state aid is granted to the undertakings mostly through the tax exemptions.

Another problem through the state aid matters within the TR was, and even today continuing to be relevant is, the fact that such matters do not fall into the scope of

[411] Additional Protocol, Article 43(2).

the CPC in order to control and supervise the granting process.[412] It is problematic because it means that the Board cannot involve into the granting process of the state aids, other than declaring its opinions, which are non-binding.[413]

Moreover, state aid is regulated by several different regulations and also granted by various different legal bodies. There was no mutual and active state aid surveillance mechanism within the TR, no collection of data which shows the already given state aids and therefore it is very hard to calculate the real effect of state aid within the market of the TR and notify the EU about the past and onging process[414]. In fact, the situation was repeatedly stressed by the regular progress reports of the Commission, with regard to the adaptation process of the TR legislation within the state aid provisions. However the process was very slow and without any remarkable achievements until 2010.

4.2.2.2. After 2010

With regard to the responsibilities of the TR in order to comply with the 1/95 Decision, a new legal code was created and came into force.[415] State aid code is aimed to monitor and supervise the state aids and it also constituted a new legal body, Board of Monitoring and Supervision of State Aids (State Aid Board), which is ever since the authorized body to examine and supervise the process of state aids.

The State Aid Code explains the state aid as,

"any aid providing a financial benefit to its beneficiary granted by the State or through State resources in any form whatsoever which disorts or threatens to disort competition by favoring certain undertakings or the production of certain goods, in so

[412] Buket İlhan, "Avrupa Birliği Rekabet Politikasinda Devlet Yardımları ve Türkiye'nin Uyumu", Sayıştay Publications, Publication no. 76, 2010, p.126.

[413] Mustafa Ateş, op.cit. 116, p. 77-78.

[414] Deniz Yıldızoğlu, op.cit. 28, p. 35-38.

[415] "Devlet Desteklerinin Izlenmesi ve Denetlenmesi Hakkinda Kanun" Law No: 6015, 13.10.2010, hereinafter "State Aid Code", http://www.resmigazete.gov.tr/eskiler/2010/10/20101023-1..htm , (last access: 05.12.2017).

far as it affects trade between European Union and Turkey."[416]

In this sense five compulsory conditions must be fulfilled to estimate an aid as state aid: The aid needs to be granted by the State or through State resources, such aid must grant an advantageous position to the beneficiaries, such aid is within a selective form, the aid must be disorting or threatening to disort the competition and lastly such aid should have the potential to affect the trade between the EU and the TC.[417]

The concept of aid is interpreted widely within the EU law and therefore it does not have to be in the form of an amount of money, tax redemptions or any form of supports that relieves the relevant undertaking from burden.[418]

Establishment of the State Aid Code and State Aid Board was promising, with regard to the ongoing slow and solutionless process of the adaptation stage on state aid matters. However the problem could not be effectively solved, since the necessary communiqués to effectively apply and operate the State Aid Code were constantly postponed. The World Bank criticized the situation within its report of 2013 and stated that the framework of the State Aid Code and its implementation process are remaining incomplete due to the lack of secondary legislations, while also giving agriculture, fishery and service sectors quite wider exemptions in comparison to the EU legislations, with regard to the fact that such sectors consitute 70 percent of the gross domestic product (GDP) of the TR economy.[419] Giving these sectors exclusion has also been criticized, since such sectoral exclusion does not exist within the EU state aid policy and since the main purpose of the State Aid Code was to harmonize Turkish and EU state

[416] Ibid Article 2(b).

[417] Nilsun Gürsoy, "State Aid in Turkish Competition Law*"*, Erdem&Erdem Publications, Newsletter January 2016, http://www.erdem-erdem.av.tr/publications/law-post/state-aid-in-turkish-competition-law/ , (last access: 05.12.2017).

[418] *Limburg*, op. cit. 382.

[419] World Bank, "Republic of Turkey Reform for Competitiveness Technical Assistance – Fostering Open and Efficient Markets Through Effective Competition Policies*"*, Report No: ACS2430, 23.10.2013, p. 11, http://documents.worldbank.org/curated/en/702721468120294246/pdf/ACS24300WP0P120official0use0only090.pdf , (last access: 05.12.2017).

aid policies, the provision itself is contrary to this aim[420].

In fact, the latest progress report of the Commission has also highlighted the concerning issues about the recent status of the state aid matters.[421] It is stated within this document that even though the State Aid Code came into force in 2010,

"*the secondary legislation, which is required to implement the law in question, is not in place yet. It is currently due to enter into force on 31 December 2016, according to a deadline already postponed four times. ... It is therefore not yet possible to assess the enforcement capacity of the Board and the General Directorate for State Aid.*"[422]

Moreover the lack of the comprehensive state aid inventory and action plan alignment is stressed and the freedom of the State Aid Board is also criticized within the same document by saying that the general directorate of the State Aid Board is affiliated with the Prime Ministry's Undersecretariat of Treasury and therefore the independence of the State Aid Board is arguable.[423] In fact, according to the Article 4(11) of the State Aid Code, the State Aid Board takes its decisions independently, which means no other governmental bodies or private persons may order or influence such decisions. However in practice, because the members of the State Aid Board are assigned by the governmental bodies[424], it is highly doubtful to estimate the State Aid Board as a fully independent and autonomous body.

The absence of legal personality and questionable independence of the State Aid Board, with regard to its administrative and financial construct, are argued also by the Turkish Industrialists' and Businessmen's Association within the drafting stage of the State Aid act, since the Board could have been a more independent legal body to monitor and supervise the state aid matters, as well as arguing the wide content of

[420] Gönenç Gürkaynak, Merve Öner and Hazar Başar, "The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey", 2018, p.280.

[421] European Commission Staff Working Document, "Turkey 2016 Report", 09.11.2016, http://www.ab.gov.tr/files/5%20Ekim/20161109_report_turkey.pdf , (last access: 05.12.2017).

[422] Ibid page 47.

[423] Ibid.

[424] State Aid Code, op. Cit. 415, Article 4(2).

exempted sectors[425], and yet such suggestions are not used within the relevant provisions of the official State Aid Code.

5. PENALTIES in the TFEU and CPC

5.1. Penalizing in the TFEU

Whereas Articles 101 and 102 of the TFEU regulates competition law and its boundaries, Article 103 (ex Article 83) regulates the result of breaching these provisions. In this respect, Article 103 states that;

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

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[425] Turkish Industrialists' and Businessmen's Association, "Devlet Yardımlarının İzlenmesi ve Denetlenmesi Hakkında Kanun Tasarısı"na İlişkin TÜSİAD Görüşü", TÜSIAD Publications 02.04.2010, p. 1-3. http://tusiad.org/tr/component/k2/item/2332-devlet-yardimlarinin-izlenmesi-ve-denetlenmesi-hakkinda-kanun-tasarisina-iliskin-tusiad-gorusu , (last access: 05.12.2017).

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

With regard to this article, the Council has published Regulation 1/2003[426] which sets out the basic principles of enforcing Articles 101 and 102, division of jurisdiction, investigation procedures and the cooperation between the Commission and the NCAs. Regulation 1/2003 also determines the penalizing procedure with regard to possible breaches to the boundaries of competition law laid down within the Article 101 and 102 and empowers the Commission to impose penalties on such undertakings. The Commission also published a guideline[427] to set out the principles of exercising the envisaged fines which are arising from Article 23(2)(a) of Regulation 1/2003.

5.1.1. The Purpose of Penalizing

The penalties, which are arising as a consequence of the infringing actions of undertakings against Articles 101 and 102, are imposed by the Commission and aimed to prevent or reduce the number of such actions in order to ensure the effectiveness of the competitive market[428]. As a result of the punishment, deterrence is also pursued and therefore the gravity and duration of the infringement are important to determine the amount of the fine to be imposed.[429] In this sense, the Commission also takes into account the factors such as the percentage of the annual sales of the concerned undertakings, duration of the examined infringing action, leniency and settlement reductions, as well as other incidents that may require increase or decreases on the fines.[430]

According to the cartel statistic of the Commission that was published in 2016, the amounts of the adjusted fines that have been imposed in between 1990-2016 have

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[426] *Regulation 1/2003*, op. cit. 346.

[427] Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C210, 1.9.2006, hereinafter "Guidelines on Fines".

[428] European Commission, "Fines for Breaking EU Competition Law", November 2011, hereinafter "Fines for Breaking EU Competition Law", p.1.

[429] European Commission, "*Competition: Antitrust Procedures in abuse of Dominance, Article 102 TFEU Cases*", July 2013, p.2.

[430] Fines for Breaking EU Competition Law, op. cit. 428, p.1-2.

gradually been reduced.[431] With regard to this finding, the highest amount of the fines were imposed within the period of 2005-2009 with the sum of 7,920 million euros, while later this amount decreased slowly in the following years and radically fell back to 3,440 million euros in between 2015-2016.[432] As a result of this study, it might be argued that the penalty strategy of the Commission is working efficiently and it is gradually increasing the deterrent effect on the undertakings.

5.1.2. Determining the Amount of Fines

In order to determine the amount of the fine to be imposed, the Commission has a two-step methodology which consists of setting a basic amount for each undertaking or association of undertakings and then adjusting the envisaged amount upwards or downwards.[433]

The basic amount is calculated according to the value of relevant sales, depending on the type of action,[434] degree of gravity and duration of the concerned infringement.[435] Such fines may be up to 30 % of the relevant value of sales.[436] The value of such sales is multiplied by the number of years or months of duration in which the infringing action took place.

After calculating the basic amount, the Commission also considers additional factors that may create the necessity for adjustments. In this respect, a relapse with the same or similar infringing action by the same undertaking requires up to 100 % increase of the basic amount, while refusal of cooperation and the instigation of actions leading to the infringement would also require the increasing of the fine.[437]

On the other hand it is possible to reduce the basic amount of the fine in certain incidents, when there is willing cooperation and evidence supply of the concerned

[431] European Commission, "Cartel Statistics", 19 July 2016.
[432] Ibid p.2 graphic 2.
[433] Guidelines on Fines, op. cit. 427, para 9-11.
[434] Ibid para.23.
[435] Ibid para.19.
[436] Ibid para.21.
[437] Ibid para.28.

undertakings during the investigation.[438] In exceptional cases it may be possible for the Commission, upon request, to consider the related undertaking's inability to pay with regard to social and economic context, only if objective evidences are brought which are about the fact that such fine has the serious potential of irretrievably jeopardizing the economic viability of the undertaking concerned, which would eventually lead the entity to lose all value of its assets.[439]

It is also highlighted within the Guidelines on Fines that, in any circumstances, the fine to be imposed may not exceed 10 % of the total turnover of the penalized undertaking.[440]

5.2. Administrative Fines in CPC

5.2.1. Generally Types of Fines

CPC aims to provide the competitive market environment with different articles, which are stated above, and in order to preserve such market structure, there are also penalty mechanisms to prevent the breaches of the rules. In such sense, there are mainly two types of penalizing systems in the Turkish law. The first one is the liability based on private law to void the anti-competitive actions and to compensate possible damages.[441] On the other hand second one aims to prevent and penalize such anti-competitive actions within the level of public law.[442]

5.2.2. Features of the Administrative Fines

The Competition Authority of the TR carries out its administrative actions via the Board with regard to the Article 27(f) of CPC.[443] These administrative actions may

[438] Ibid para.29.
[439] Ibid para.35
[440] Ibid para. 32.
[441] CPC, Articles 56-59.
[442] CPC, Articles 16 and 17.
[443] CPC Article 27(f), "*Duties and Powers of the Board ... f)To issue communiqués and make the necessary regulations as to the implementation of this Act*".

for example be information requests, on-the-spot inspections, examinations and inquiries, termination of infringements, negative clearance decisions, exemption decisions, as well as the administrative fines.[444] Administrative fines are the most efficient tool of the Board in order to conduct its deterrence policy upon the anti-competitive actions of undertakings.[445] However in the recent years, the deterrence policy of CPC has been extended to a different level.

In fact, before the update[446] of CPC in 2008, public law was only covering the penalizing of the undertakings which breached Articles of 4, 6 and 7 of CPC. However with the newer version of the CPC, it is also possible to penalize the directors of the undertakings as well, if they personally involved and even leaded the anti-competitive actions of such undertakings.

5.2.2.1. Being Applicable to Both Natural and Legal Persons

Article 16 of CPC declares the rules of administrative fines. According to the third paragraph of the article, the undertakings which commit the prohibited behaviors which are stated within Articles 4,6 and 7 of CPC may be penalized with an administrative fine of

"*up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board"*.

Before the related provisions of the Act 5728, there was a certain minimum amount of the administrative fines arising from this article. After the update in 2008,

[444] CPC, Articles 5, 8, 9, 14, 15, 16, 17, 40.

[445] Emin Koç, "4054 Sayılı Rekabetin Korunması Hakkında Kanun'da Düzenlenen İdari Para Cezaları İçin Öngörülen İdari Usul*"*, Turkish Bar Association Publications, 2012(98), p.237.

[446] "Temel Ceza Kanunlarına Uyum Amacıyla Çeşitli Kanunlarda ve Diğer Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun" with the Act No. 5728, 08.02.2008, hereinafter "Act 5728", http://www.resmigazete.gov.tr/eskiler/2008/02/20080208-1.htm , (last access: 05.12.2017).

there is no more minimum amount of fine but instead the calculation is made exclusively for each case, in which the total base of the amount may be up to 10 % of the latest annual gross revenues of the related undertakings.

Also before the Act 5728 it was not possible to penalize natural persons with regard to their role within the action which breaches the Articles 4,6 and 7 of CPC. However this situation changed with the update of CPC in 2008 and according to the current version of the fourth paragraph of Article 16 of CPC, it is possible to charge natural persons as well who took an important role within the related undertakings' anti-competitive actions which are stated in the third paragraph of Article 16 of CPC. Such administrative fines may be up to

"*five percent of the penalty imposed on the undertaking or association of undertakings shall be imposed on managers or employees of the undertaking or association of undertakings who are determined to have a decisive influence in the infringement." It is claimed that such extension of the deterrence policy against the anti-competitive actions of undertakings may grant even more important effects on the application of the Article.*[447]

5.2.2.2. Considerations with regard to the Application

Before the Act 5728, the considerations of CPC within the calculation process of the administrative fines were exemplified as the existence of intention, importance level of the fault, amount of the damage, as well as the market power of the accused undertakings.

For example within the *Ytong Decision*[448], it was stated that the concerned undertakings have played a leading role through the infringement, which is a matter of aggravation. It was stated in *Benkar Decision*[449] that resisting to disobey the decision of

[447] Harun Gündüz, "Rekabet Hukukunda Uygulanan İdari Para Cezaları", Competition Board Publications, Publication No. 0308, Ankara 2013, p. 7.
[448] Competition Board decision, Decision Number 06-37/477-129, 30.05.2006.
[449] Competition Board decision, Decision Number 03-57/671-304, 15.08.2003.

the Board is a matter of aggravation; meanwhile having an investigation procedure before and accordingly having the intention[450], as well as having an important level of economic and financial power[451] were also stated as matters of aggravation.

As reverse examples, compliance of the investigated undertaking with the Board's decision within its further actions[452], cooperating the ongoing investigation of the Board[453] or having a minor impact on the relevant market via the pursued prohibited action[454] could be count as the mitigation matters of the Board to be considered.

On the other hand, the fifth paragraph of Article 16 of CPC highlights the new considerations of CPC with regard to the deciding process of the Board within the calculations of the fines. With regard to this provision, the considerations might be such as "*the repetition of infringement, its duration, market power of undertakings or associations of undertakings, their decisive influence in the realization of infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place*". Such considerations are also shaped within the context of Article 17(2) of the Faults Act.[455]

With regard to this updated version of such considerations, it might be said that the focus of the former version was more likely to be on the intention of the accused undertakings and the results of the related actions, whereas within the new version, features of the concerned actions and the tendency of undertakings to commit repetition of infringements take more importance with regard to the calculation method of the administrative fines.

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[450] Competition Board decision, Decision Number 04-77/1108-277, 02.12.2004.
[451] Competition Board decision, Decision Number 07-34/349-129, 24.04.2007.
[452] Competition Board decision, Decision Number 03-10/114-52, 18.02.2003.
[453] Competition Board decision, Decision Number 05-13/156-54, 10.03.2005.
[454] Competition Board decision, Decision Number 05-64/925-248, 04.10.2005.
[455] "Kabahatler Kanunu" with the Act No. 5326, 30.03.2015, hereinafter "Faults Act", http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5326.pdf , (last access: 05.12.2017).

5.2.3. Penalizing the Misleading Actions and Defiance to the Judgements

The first part of Article 16 states that,

Among the cases that

a)false or misleading information or document is provided in exemption and negative clearance applications and in authorization applications for mergers and acquisitions,

b)mergers and acquisitions that are subject to authorization are realized without the authorization of the Board,

c)in implementation of articles 14 and 15 of the Act, incomplete, false or misleading information or document is provided, or information or document is not provided within the determined duration or at all,

d)on-the-spot inspection is hindered or complicated,

the Board shall impose on natural and legal persons having the nature of an undertaking and on associations of undertakings or members of such associations an administrative fine by one in thousand of annual gross revenues of undertakings and associations of undertakings or members of such associations which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board for those mentioned in sub-paragraphs (a), (b) and (c), and by five in thousand of their gross revenues to be calculated in the same manner for those mentioned in sub-paragraph (d). However, the penalty to be determined pursuant to this principle cannot be less than ten thousand Turkish Liras.

In this sense, the Board not only penalizes the actions that are infringing the Articles of the CPC, but also it is possible to penalize the actions of undertakings which are pursued to hide or hinder informations in order to avoid from fines, as well as hindering the inspections of the Board or not informing the Board about the issues subject to authorization. Therefore it might be claimed that the Board does not only aim to penalize the anti-competitive actions of undertakings, but it also aims to prevent such actions in the first place by intimitating the pursuants who seek to commit the prohibited actions.

On the other hand, the first part of Article 17 states that

Provided that penalties mentioned in Article 16 paragraph one are reserved, the Board shall, for each day, impose on undertakings and associations of undertakings an administrative fine by five in ten thousand of annual gross revenues of the relevant undertakings and associations of undertakings and/or members of such associations which generate by the end of the financial year preceding the decision, which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board in the event that

a)*obligations introduced or commitments made by a final decision or interim measure decision are not complied with,*

b)*on-the-spot inspection is hindered or complicated,*

c)*in implementation of articles 14 and 15 of the Act, information or document requested is not provided within the duration determined.*

Within the sense of the article stated above, the Board also aims to provide the compliance of the accused undertakings to the consequences of the administrative fines, which means not only the actions of undertakings but also the compliance with the judgments of the Board is important in order to avoid facing the administrative fines of the Board.

5.2.4. Duration of the Administrative Fines

Duration of the administrative fines depend on the reason of the fines. Article 16 of CPC determines the fines which are imposed only to the action, without regard to the duration of infringement, whereas Article 17 of CPC determines the calculation of fines which are implied according to a period of time, in which the concerned infringement took place. In this sense for example defying to provide the requested information might be subject to both Article 16(c) and 17(c) with regard to the ongoing character of the action and therefore may require both action and duration dependent

fines.[456]

5.2.5. Effects of Leniency on the Administrative Fines

The Act 5728 also brought a new concept to CPC, by giving importance to leniency and cooperation between the accused undertakings and the Board. In this sense, sixth paragraph of Article 16 of CPC states that

To those undertakings or associations of undertakings or their managers and employees making an active cooperation with the Authority for purposes of revealing contrariness to the Act, penalties mentioned in paragraphs three and four may not be imposed or reductions may be made in penalties to be imposed pursuant to such paragraphs taking into consideration the quality, efficiency and timing of cooperation and by means of demonstrating its grounds explicitly.

According to the Article, there is no clear statement about the feature of contrariness to the Act, which means that this provision is applicable to all kinds of infringements in general.[457]

Moreover the Competition Authority has published a communiqué[458] to determine the rules with regard to the provision above. It is stated within the general preamble of the Leniency Communiqué that the cartels lead to the most serious competition infringements with regard to their consequences on the relevant markets and consumers and yet, it is also very difficult to discover them by their nature unless the other parties of the concerned cartel cooperate with the Board to reveal the cartel and therefore it is important to motivate such parties to a cooperation with the exchange of their immunity from the Board's pursued penalties.[459]

In such sense, it is possible to give immunity to undertakings, as well as

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[456] Harun Gündüz, op.cit. 447, p. 8-9.
[457] Ibid. p. 10.
[458] "Regulation on Active Cooperation Cartels" amended by the Competition Board, Communiqué No. 27142, 15.02.2009, hereinafter "Leniency Communiqué", english translation: http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr127en.pdf , (last access: 05.12.2017).
[459] Ibid, General Preamble, para. 2-3.

independently to their executive members. In fact, the first undertaking which submits the information and evidence independently from its competitors, before the Board decides to carry out a preliminary inquiry may be assumed as immune from the fine[460] or it is also possible to get discounts from the fine for the undertakings which the immunity cannot be granted[461], under certain conditions.[462]

Similarly, the first undertaking manager or employee who submits the information and evidence may get an immunity advantage[463], as well as the discount opportunity for the ones who may not grant the immunity[464] and the conditions[465] are also laid down seperately.

The Competition Authority has also published a guideline[466] to clarify the rules, which are laid down within the Leniency Communiqué. In accordance with these provisions, it is important for the undertakings and the employees of the undertakings to be the first to provide the information about the cartels that they are a member of, or else the opportunity of the pure immunity is no longer possible to grant.[467]

5.2.6. "Commitment Program" as an Indirect Interpretation Matter

Within the Turkish competition policy, there is no clear provision about a commitment program against the infringement of competition. The absence of such provision was also recognized by the Competition Authority and therefore they have mentioned the importance of having an amendment according to this problem has been mentioned within the five years strategic plan of the Competition Authority as well by stating;

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[460] Leniency Communiqué, op. cit. 458, Article 4.
[461] Leniency Communiqué, op. cit. 458, Article 5.
[462] Leniency Communiqué, op. cit. 458, Article 6.
[463] Leniency Communiqué, op. cit. 458, Article 7.
[464] Leniency Communiqué, op. cit. 458, Article 8.
[465] Leniency Communiqué, op. cit. 458, Article 9.
[466] "Kartellerin Ortaya Çıkarılması Amacıyla Aktif İşbirliği Yapılmasına Dair Yönetmeliğin Açıklanmasına İlişkin Kılavuz" amended by the Competition Board, 18.04.2013, http://www.rekabet.gov.tr/tr/Guncel/pismanlik-kilavuzu-yayimlandi-6d71c19943e84699a578dfd63e4c08a7 , (last access: 05.12.2017).
[467] Ibid.

"*It would be appropriate to include the commitment system to our domestic law; due to its efficiently accelerating effect on eliminating the undertaking actions which are limiting the free competition, as well as its positive effect on the development of the competitive market structure*."[468]

Even though such absence is highlighted by the Competition Authority and such provision is also included to the *Draft*, there is no equivalent provision within the current version of the CPC. However the Board has established an indirect interpretation of the Article 9(3) of the CPC in its jurisprudence to cover the lack of a commitment program.

Article 9 of CPC states that;

"*If the Board, upon informing, complaint or the request of the Ministry or on its own initiative, establishes that articles 4, 6 and 7 of this Act are infringed, it notifies the undertaking or associations of undertakings concerned of the decision encompassing those behavior to be fulfilled or avoided so as to establish competition and maintain the situation before infringement, in accordance with the provisions mentioned in section Four of this Act.*

Natural and legal persons who have a legitimate interest are entitled to file a complaint.

The Board, prior to taking a decision pursuant to the first paragraph, shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement.

Where the occurrence of serious and irreparable damages is likely until the final decision, the Board may take interim measures which have a nature of maintaining the situation before the infringement and which shall not exceed the scope of the final decision."

According to the first and last paragraphs of this article, when the Board realizes an infringing action against the articles 4, 6 and 7 of the CPC, a decision is

[468] 2014-2018 Rekabet Kurumu Stratejik Planı, p. 52, http://www.rekabet.gov.tr/Dosya/icerik/stratejik-plan-pdf, (last access: 01.07.2018).

given to reestablish the competition by stating actions for the relating undertakings to take or avoid and in the meantime, the Board can take interim measures to avoid extensive damages. Third paragraph on the other hand is mentioning giving an "opinion" to the concerned undertakings before the decision. In such sense, it is clear that such opinion is only a suggestion by the Board and therefore is not binding to be enforced, which also means that there is no penalty against the lack of the enforcement. However enforcement or ignorance towards the opinion might be taken into account within the calculation process of possible administrative fines[469].

With regard to the third paragraph of the article, the Board may deliver its opinion, about which commitments are expected from the undertakings to end the concerned infringement, before the final decision and close the case at that stage without further investigation, which would indeed be beneficial both for the Board and the undertakings to avoid wasting extensive time and money on the investigation. In such sense, it is interpreted that the Board has discretion to demand commitments from the undertakings before the investigation and avoiding the further proceedings, if it would not have the risk of causing serious and irreparable damages with regard to the Article 9(4)[470]. The same provision is also perceived as a way of giving the Board the discretion to apply *de minimis* doctrine, with regards to the concerns which are explained above within the relevant sections, within the Turkish competition law. However both interpretations have the problems of having neither a clear basis within the law itself, nor a concrete certainty about its application in every case.

Accordingly, it was argued within the *Mais*[471] case of the Board that the Board has the discretion to choose to apply or not to apply the Article 9(3) of the CPC with regard to the equivalent application within the EU competition law. It was stated that Article 9(3) of the CPC is mostly based on the guidance of the *1/2003 Regulation*;

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[469] CPC, Article 16, para. 5: "*When deciding on an administrative fine pursuant to paragraph three, the Board shall take into consideration issues such as ... whether they comply with the commitments given*"

[470] H. Odabaş Buba, "AB ve Türk Rekabet Hukukunda Rekabet İhlallerine İlişkin Taahhüt Yöntemi", Rekabet Kurumu Uzmanlık Tezleri Serisi No: 156, Ankara 2017, p. 40.

[471] Competition Board decision, Decision Number 00-42/453-247, 02.11.2000, hereinafter "*Mais decision*".

moreover according to the interpretation of the relevant provision within the *Camera Care*[472] decision of the CJEU, the Commission is entitled to give opinion to the concerned undertakings about infringing actions, however the Commission has the discretion to apply it or not and therefore the parallel application within the Turkish competition law would also require the discretion of the Board to decide either deliver its opinion to the concerned undertakings with regard to the 9(3) of the CPC or to directly continue the investigation and decision process[473].

In practice, the commitment mechanism as an interpretation method of the Article 9(3) of the CPC was used by the Board first time within the *Çaykur*[474] decision. It was concluded within the pre-investigation phase of the case that even though an infringement against the 4th and 6th Articles of the CPC has been found, there is no need to proceed to the investigation process, since the CPC and the application with regards to it has been new. However 60 days has been given to the concerned undertaking with reference to the 9(3) of the CPC, to give them and opportunity to fix their infringing actions. It was also highlighted that the lack of application with regard to this conclusion would require further investigation of the Board. Similarly in *Kablo Tv Operatörleri*[475] and *Türk Telekom*[476] decisions it was highlighted that even though it is possible to proceed to the investigation phase of the case, as long as the concerned undertakings declare their commitment to immediately stop their infringing actions, there is no need to proceed further within the case. Such interpretation of the Board is criticized by some scholars with regard to the fact that the commitments were demanded before the cases were properly examined within the investigation phase, which is in fact putting inequitable pressure on the undertakings, since they are deemed to admit extra

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[472] Case 792/79 R, *Camera Care Ltd v Commission of the European Communities*, EU:C:1980:18. It was stated within the 16th paragraph of the decision that the Commission may address its recommendations to the concerned undertakings to end the infringing actions of them. On the other hand it was also higlighted that providing such recommendations to the undertakings does not limit the power of the Commission to make a decision.

[473] *Mais decision*, op. cit. 471 p. 27-28.

[474] Competition Board Decision, Decision Number 99-31/277-167, 22.06.1999, hereinafter "*Çaykur decision*".

[475] Competition Board Decision, Decision Number 03-83/1003-405, 25.12.2003. hereinafter "*Kablo Tv Operatörleri decision*" .

[476] Competition Board Decision, Decision Number 04-01/27-9, 08.01.2004, hereinafter "*Türk Telekom decision*".

burden; even if their actions may not actually be found as incompatible within the sense of the CPC, if a proper investigation process could be exercised[477].

On the other hand within the *PÜİS/TABGİS*[478] case, the Board has given its opinion with regard to Article 9(3) of the CPC not during the pre-investigation phase but instead during the investigation phase of the case. It was concluded that the opinion has been delivered during the investigation but before the official announcement of the investigation to the parties. It was highlighted that the concerned undertakings have complied with the opinion of the Board and therefore such compliance would be considered as a matter of extenuation.

With regard to the case law, there are common justifications of the Board to avoid proceeding to the judgement process by the conclusion of giving an opinion. The common justifications with regards to the interpretation method of a commitment program could be listed as;

- Having enough time to abolish infringing actions before their effects take place[479],
- Preferability of submitting opinion, due to higher efficiency in comparison with a possible investigation process[480],
- Benefits due to the procedural economic advantage[481].

On the other hand the common justifications possibly with regards to the interpretation of a *de minimis* principle could be listed as;

- Lack of application of the infringing agreement/decision/concerted

[477] M. H. Arı, E. Aygün and H. G. Kekevi, "Rekabet Hukukunda Taahhüt ve Uzlaşma", in **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu - VII**, 2009, s. 229-294, p. 35.

[478] Competition Board Decision, Decision Number 00-35/392-219, 18.09.2000.

[479] For example: Competition Board Decision, Decision Number 09-23/494-120, 20.05.2009.

[480] For example: Competition Board Decision, Decision Number 09-29/605-145, 18.06.2009; Competition Board Decision, Decision Number 12-38/1107-362, 18.07.2012

[481] For example: *Türk Telekom decision*, op. cit. 476; *Kablo Tv Operatörleri decision*, op. cit. 475; Competition Board Decision, Decision Number 07-31/325-120, 11.04.2007; Competition Board Decision, Decision Number 11-25/485-149, 21.04.2011.

practice[482]

- Low scale of infringing effect on the relevant market[483]
- Short time of infringing effect on the relevant market[484]
- Despite the infringing action, remaining of the competition within the relevant market[485]

As a sum, it might be argued that applying Article 9(3) of the CPC with a wide interpretation method, instead of simply continuing to the usual investigation process of the case, which results de facto as a commitment program or a *de minimis* mechanism within the case law, has its own benefits for both the Board and the parties, due to its advantages of saving time and avoiding extensive expenses.

However it should also be kept in mind that ongoing application systematic of the Board occasionally contradicts with its own case law. For example within the *Çaykur* decision, the Board has brought the case to an end with giving the concerned undertaking specific period of time to report their actions, which could potentially be qualified as infringing actions; meanwhile a similar conclusion has required additional commitment declarations from the concerned undertakings within the *Türk Telekom* and *Kablo Tv Operatörleri* decisions and on the other hand in *Ankara Kitap Dağıtım* decision[486], the Board had contented itself with solely demanding the termination of the infringing actions and closing the case with this demand. According to these different statements of the Board within relatively similar decisions, it is hard to foresee the outcomes of similar actions, which is in fact undermining the legal certainty within the case law.

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[482] For example: Competition Board Decision, Decision Number 04-23/251-55, 01.04.2004; Competition Board Decision, Decision Number 06-45/570-154, 22.06.2006; Competition Board Decision, Decision Number 11-52/1317-468, 13.10.2011; Competition Board Decision, Decision Number 11-45/1034-354, 17.08.2011.

[483] For example: Competition Board Decision, Decision Number 05-22/259-75, 07.04.2005; Competition Board Decision, Decision Number 11-64/1664-594, 29.12.2011; Competition Board Decision, Decision Number 12-57/1538-551, 15.11.2012.

[484] For example: Competition Board Decision, Decision Number 10-34/550-196, 06.05.2010; Competition Board Decision, Decision Number 11-57/1463-521, 17.11.2011.

[485] For example: Competition Board Decision, Decision Number 09-27/576-136, 11.06.2009; Competition Board Decision, Decision Number 09-48/1192-300, 21.10.2009.

[486] Competition Board Decision, Decision Number 04-43/533-130, 24.06.2004.

Moreover within the observation from a rather procedural aspect of law, it is obvious that the application requirements of the Articles 4 and 6 of the CPC do not count the impact of an infringing action on the relevant market as a "sole prerequisite". In fact "purpose" and "effect" of the concerned actions are different elements, which are alternatives to each other, in order to detect possible infringing actions with regards to the application of the Article 4 of the CPC; meanwhile the "risk" of eliminating the competition is also enough to consider a concentration as illicit within the wording of the Article 6 of the CPC. Therefore even if the effect of the concerned actions do not necessarily take place, having the aim of distorting or limiting the competition within the relevant market is also enough to be able to refer the related action as an infringing action within the meaning of the 4th and 6th articles of the CPC and to proceed to the investigation process of the case, with its consequences for the related undertakings.

Thus, even though applying Article 9(3) of CPC and bringing the case to an end at an earlier stage is occasionally more beneficial within the case law practice; it also comes with the risk of neither being able to protect the free competition at a level that was envisaged by the legislator within the Articles 4 and 6 of the CPC, nor sustaining the deterrence towards potential pursuants of the infringing actions. Additionally the Board itself is challenging with its own decisions, which are in fact covering the cases of similar conditions. As a consequence of all these down sides, it is clear that practical advantages of interpreting the Article 9(3) of the CPC widely comes with the price of legal uncertainty and potentially lack of deterrence[487], which could in fact be dealt with with the help of specific amendments within the CPC itself, which has already been clearly proposed within the *Draft* and is only waiting for getting in force.

5.2.7. Provisions of Draft within the Field of Penalties

5.2.71. Reconciliation Program

Within the perception of competition law, reconciliation, or as in the academic literature "plea bargaining", may be presumed as a form of contract between the

[487] M. H. Arı, E. Aygün and H. G. Kekevi, opt. Cit. 477, p. 31.

investigated undertakings and the competition authority, since at the end of the bargaining, both parties makes a sacrifice and settle on an appropriate half way, which is in practice only a limited penalty discount offer of the competition authority in the exchange of active cooperation, to solve the issue[488].

The purpose of this mutual settlement for the competition authorities is to increase the efficiency by decreasing the amount of resources and time to be wasted, which would be invested to the formal investigation proceedings; meanwhile benefiting a reasonable discount from the penalty is the main purpose for the other side of the bargain, namely investigated undertakings. As an indirect gain of the competition authorities, it is also pursued to carry out a proper deterrence policy and with the help of such mechanism, the expectation is to reduce the number of infringing actions in the future, which would also decrease the workload and time consumption of the competition authorities and such resources could be invested to other concerning matters.

In practice, application of the reconciliation method is assumed to be at its most useful state within the cartel cases[489] and is perceived as a "win-win" tool, since cartels are hard to detect for competition authorities and receiving full immunity and leniency is also difficult for the undertakings[490]. On the other hand it has to be also concerned that too much benevolence from the competition authorities to the undertakings within the reconciliation cases may reduce the effective deterrence policy, which is in fact challenging with one of the main purposes of reconciliation program itself[491].

On the other hand, reconciliation was not directly determined within the Turkish competition law until the newly introduced provision of the *Draft*. However

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[488] OECD, Plea Bargaining / Settlement of Cartel Cases, DAF/COMP(2007)38, hereinafter "OECD - Plea Bargaining", p.22.

[489] Metin Pektaş, "Rekabet Hukukunda Alternatif Bir Yol: Uzlaşma", Rekabet Kurumu, Ankara 2008, p. 14.

[490] International Competition Network Cartel Working Group, "Cartel Settlements", Report to ICN Annual Conference, April 2008, p.2.

[491] OECD - Plea Bargaining, op. cit. 488, p. 23.

there is another provision which could be assumed as having reconciliation-like effects, namely Article 9(3) of the CPC, which in general determines the termination of infringement. In fact Article 9(3) of CPC has been also used for different interpretative ways, which are discussed above with regards to the chapters explaining the reflection of *de minimis* and commitment programs within Turkish competition law. Accordingly it is clear that the provision has been tried to be extended broadly to be used in order to fill in the legal gaps and interpretative necessities of the Turkish competition and therefore interpreting the provision also as a tool of a reconciliation mechanism does not grant a strong legal basis, which leads the necessity of a new and separate provision remain.

In order to fulfill this necessity, the preamble of the reconciliation provision in the *Draft* explains the purpose of this additional provision by stating that in order to reduce the costs of investigation and litigation procedures, to accelerate the solution process of the anti-competitive actions, as well as to correspond the recent version of EU competition policy, it is pursued to introduce the reconciliation program within the *Draft.*[492]

With regard to this provision, the undertakings which are investigated by the Board and are accepting the existence of an infringing action, may bargain with the Board to avoid the administrative penalties. Accordingly, the investigated undertakings, which have accepted the existence of their infringing actions, may file a reconciliation application to the Board until the report of investigation has been issued to the concerned undertakings and if the application is accepted by the Board, in the end of the negotiation process, the settled issues and the reduced amount of fine shall not be taken to the further proceedings by the Board.

In fact, this provision was already introduced and applied with regard to the Leniency Communiqué but relevant application is still in the need of a legal basis and such necessity could be resolved by the new reconciliation provision of *Draft*, if it

[492] Preamble of the *Draft*, op. cit. 45, Article 6.

enters into force. However this new provision is also mildly criticized that the same terminology is not followed between the Leniency Communiqué and the *Draft*, since the first is using the terms of "active cooperation" and "leniency", whereas the latter introduces the term of "reconciliation" for the same establishment.[493]

5.2.7.2. Commitment Program

Article 23 of the *Draft* establishes another parallel application to the EU competition policy by introducing a commitment program. According to this provision, the undertakings which make commitments through solving the problems, arising from the ongoing investigations which are within the restrictions of Articles 4 and 6 of CPC, may be immune from the related possible investigations or the ongoing investigations may be terminated for such parties.

However such amendment has also been criticized[494] by stating that including the actions, which are infringing with the Article 6 of the CPC, to this provision may have the risk of undermining deterrence and consequences of such problematic actions should have been determined in another particular provision; meanwhile the lack of a statement about the consequences of not complying with this provision is also an issue that could have been handled within the provision itself.

5.2.7.3. Penal Sanctions

The *Draft* grants judicial discretion to the Board in order to determine the amount of administrative penalties.[495] Indeed within the recent provisions, the amount of the administrative penalties are stated concretely, however the *Draft* uses the term of "up to", which allows the Board to decide on any amount according to the features of the situation, as long as the amount is below the declared limit.

[493] Ercüment Erdem, op.cit. 161.
[494] M. H. Arı, E. Aygün and H. G. Kekevi, opt. Cit. 477, p.37-38; H. Odabaş Buba, opt. cit 451, p. 52-53.
[495] *Draft*, op. cit. 45, Article 9.

5.2.7.4. Legal Sanctions

The *Draft* also aims to review the penalties arising from the private law.[496] According to this new provision, all of the actions which are regarded as anti-competitive are assumed to be void. In this sense, not only the actions which are falling into the scope of Article 4 of the CPC but also Articles 6 and 7 of the CPC are stated to be void[497].

Additionally, the provision declares an exception to this rule by stating that, the actions within the scope of the Article 4 of CPC and cannot get exemptions via Article 5 of CPC are void. In such sense if an action is within the framework of the Article 4 of CPC but granting exemptions at the same time, due to Article 5, then the action would not be counted as void.

[496] *Draft*, op. cit. 45, Article 30.

[497] Kerem Cem Sanlı, "Rekabetin Korunması Hakkında Kanun'da Değişiklik Yapılmasına Dair Kanun Tasarısı Taslağı'nın Özel Hukuk Alanında Getirdiği Değişikliklerin Değerlendirilmesi", Competition Board Publications, Competition Board Journal, Journal Nr. 30, Ankara 2007, p.9.

CONCLUSION

As it was stated within the Introduction chapter of this study, the aim of this thesis is to explain the structure of competition policy within the European Union and the Republic of Turkey, with regard to their strengths and weaknesses, meanwhile analyzing the harmonization status of both legal orders.

In order to reach a broad perception, it was necessary first to examine the historical backgrounds of both legal orders from the perspective of competition law. In such sense, the establishment process of the European Union and the achievements of this time period within the matters of competition law are examined. Moreover the great endeavouring of the Republic of Turkey, as an official candidate state of the European Union, to harmonizate its legal order with the European Union law witin the competition field to be able to comply with the legal acquis of the European Union, were chronologically expressed.

Within the second chapter, the ongoing application principles of both legal systems within the frames of competition law are comparatively put forward. In such sense both legal orders are analysed with the light of primary and secondary legal acts, as well as case studies. Several cases of the Commission, as well as the Court of Justice of European Union, have been examined to understand the principles, key features and the limits of European competition law. Moreover Competition Board decisions of the Republic of Turkey were also exemplified to analyse the similarities and mutual concepts of both legal systems. In this sense it was also aimed to identify the differences of the main concepts in between these legal orders.

As it is seen above from the chapters (A) and (B), the competition policies of the European Union and the Republic of Turkey are not working exactly in the same way, so it is hard to make a conclusion that the harmonization process between the two legal acquis is over. However they are not functioning broadly different and independent from each other either, which leads to the conclusion that they are two

different legal systems, which are “functioning similarly”.

The biggest difference would of course be the absence of the guidance, surveillance and interrogation of a mutual competent authority, since the Republic of Turkey is not yet an official member of the European Union. Therefore both parties have their own competent authorities to regulate and apply their competition policies, meanwhile surveillancing the potential breaches of these policies.

However the lack of a mutual competent authority within the competition field does not necessarily mean the lack of harmonization in between these two systems, since the Turkish competition policy was also designed and structured within the guidance and framework of the European Union competition policy and Republic of Turkey has its own actively working system within its domestic enforcement. Moreover the Code of Protection of Competition is reviewed and updated with regard to the new aspects of the European Union law and therefore harmonization process is not over yet.

In fact, since the date that the Code of Protection of Competition came into force, the European Union competition law was updated by several regulations and court decisions. In the meantime, the Code of Protection of Competition has also been reviewed and elaborated with regard to the recent evolution of the European Union competition policy. However one may argue that the Republic of Turkey still could not fulfill its obligation to adapt its domestic law to the European Union acquis and as an inevitable result, cannot exactly comply itself with the principles of European Union law.

On the other hand, from the perception of the adaptation process of Turkish competition policy with the European competition policy, the current stage of the Turkish competition law is already highly harmonized with the European competition policy and moreover the *Draft* promises many new positive changes to foresee the possible further evolution of the Turkish competition policy. Therefore the important provisions of the *Draft* were also highlighted within the relevant sections of Chapter (B) of this thesis, since these new provisions may be a chapter for the Turkish competition policy, if they come into force.

As it is explained above, the *Draft* is presenting various different and useful innovations for the current version of the Code of Protection of Competition. In this sense, if the *Draft* passes into law and comes into force, it will not only solve many existing stumbles of the Code of Protection of Competition but will also help the European and Turkish competition policies to come even closer to each other. Moreover, the *Draft* is expected to create a bridge in between the recent version of the Code of Protection of Competition and the secondary domestic legislation, which needs a legal base for specific new perspectives of the recent case law, since the secondary legislation was created by many communiqués which came into force after the establishment of the Code of Protection of Competition.

All the information above states the necessity of such new law provisions to be a part of the current competition legislation. The only obstacle right now is the fact that the *Draft* is in a pending status for a long time period to enter into force and in the meantime more innovations are and going to be achieved within the European Union competition law, which will cause the Turkish competition policies to be even less up to date and harmonized with the European acquis.

With regard to the explanations above, it is certainly important and essential to finally pass the *Draft* into law, in order to enhance and enrich the Turkish competition policy even further with the innovations, provide primary law basis for the ongoing application principles of the competition law, as well as to accelerate and strengthen the harmony between the EU and the TR competition policies.

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