

**T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ**

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

**CONTROL OF MERGERS AND ACQUISITIONS IN
EUROPEAN UNION AND TURKISH LAW**

YÜKSEK LİSANS TEZİ

Yalçın YURTTAŞ

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Türkçe / İngilizce Yüksek Lisans Programı öğrencisi Yalçın Yurttaş' ın "*CONTROL OF MERGERS AND ACQUISITIONS IN EUROPEAN UNION AND TURKISH LAW*" konulu tez çalışması 29/06/2015 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından OYBİRLİĞİ / ~~OYÇOKLUĞU~~ ile BAŞARILI bulunmuştur.

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ABSTRACT

The objective of this study is to scrutinize the development of control of concentrations in European Union and Turkey from a legal and historical point of view and to analyze the interaction between the two concentration control regimes, together with their economic, sociological and theoretical background.

The subject of this study is not only the procedural aspects of concentration control, but also its historical roots and impacts upon the society, economy and the relationship between European Union and Turkey, together with the various valuable theoretical contributions made by different 'schools' upon it.

This thesis aims at depicting the differences and similarities within the production and formation of the Union and Turkish concentration control regimes.

Key words: acquisitions, concentrations, control, EU, mergers, Turkey.

ÖZET

Bu çalışmanın amacı; Avrupa Birliđi ve Türkiye'de şirket birleşme ve devralmalarının denetlenmesinin gelişimini hukuki ve tarihi bir perspektiften incelemek ve bu iki denetleme rejimi arasındaki etkileşimi, ekonomik, sosyolojik ve teorik arka planı ile ortaya koymaktır.

Bu çalışmanın konusu, yalnızca şirket birleşme ve devralmalarının denetlenmesinin usul kuralları değil aynı zamanda tarihi kökenleri ve toplum, ekonomi ve Avrupa Birliđi ve Türkiye ilişkileri üzerindeki etkisi ile farklı 'ekollerin' bu mevzuda yapmış olduđu teorik katkılardır.

Bu tez, Avrupa Birliđi ve Türkiye'deki şirket birleşme ve devralmalarının denetlenmesi rejimlerinin oluşum ve işleyiş süreçlerindeki benzerlik ve farklılıkları ortaya koymayı amaçlamaktadır.

Anahtar Kelimeler : Avrupa Birliđi, Birleşme, Denetleme, Devralma, Türkiye.

PREFACE

Competition is the engine of development in a free market economy. The governments need to protect it to secure smooth operation of market forces that will be to the benefit of both the economy in general and the consumers. The strong desire to prevail over the commercial rival might direct one to perform activities in breach of law. Unlawful practices of undertakings may create a threat to competition. Several types of concentrations should be construed as one of these practices. This situation creates the need to control concentrations.

Concentrations had been considered as useful tools to secure integration and improve the competitiveness of European economic entities at the early stages of the formation of EU. However, the lack of specific concentration control provisions has become a problem in EU in late 80s and the first Regulation on concentration control, Regulation numbered 4064/89 was enacted in 1989. Turkey followed suit and enacted its own "Act on the Protection of Competition" numbered 4054 in 1994.

The relationship between the control regimes of the Union and Turkey and their historical and economic roots needs further elaboration. These issues need to be addressed. This study aims addressing these problems to enlighten the distorting effects of concentrations and the relationship between the control regimes of the Union and Turkey.

I would like to express my sincere appreciation and thanks to my consultant Asst. Prof. Dr. Gerçek Şahin Yücel and Assoc. Prof. Mustafa Tayyar Karayigit for their invaluable guidance in choosing and studying this important and interesting subject and addressing a current problem in both EU and Turkey.

Yalçın Yurttaş -Istanbul 2015

ABBREVIATIONS

AC	Acquis Communautaire
EC	European Community
EEC	European Economic Community
EU	European Union
EUMR	European Union Merger Regulation
Ibid.	Above mentioned reference
LBO	Leveraged Buyout
M.E.T.U.	Middle East Technical University
OJ	Official Journal Of The European Union
Op.cit.	Previously mentioned reference
par.	Paragraph
pp.	Pages
UK	United Kingdom

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INTRODUCTION

Competition Law has always been more than just a set of rules that regulates fair commercial encounter among economic rivals. Its capability of being used as a means to create the foreseen economy and society has been known for more than a century. The enormously concentrated power within the hands of Standard Oil Company had been split via competition law rules by the American Supreme Court. The Scholars of Freiburg School, as early as the Weimar Republic period, had warned the German nation of the upcoming disasters by observing the anti-competitive and concentrative character of the economy. The 'Founding Fathers' of the European Union, had turned their faces to the principles of competition law to create a common market and a plural and peaceful European nation.

Concentrations have a similar multicultural and multidimensional effect. Their impact is not only upon the economy but also upon the sociology and structure of the society. But it should be noted at the same time that, concentrations are the output of a complicated process. The conditions of the society, technology, economy and even politics for instance may give birth to concentration waves. But the same conditions might serve as a wall against them as well.

As the globalization trend forces undertakings to concentrate and make use of each other's expertise, capital, network and ability, the need to protect overall competition increases as well. The accumulation of great capital and aggressive seizure of the market by a concentrated undertaking might not only distort competition between undertakings but undermine the public order as well. Such dangers necessitate the control of concentrations and a careful regulation and execution of the control procedure.

Control of concentrations in European Union has been the product of politically and economically wavy and risky decades. Even the issue of whether there had been a need for a specific, Union wide concentration control regime was of great debate. The competence battles between the European Commission and the Member States, the

valuable contributions made by the European Court of Justice and the influences of different theoretical ‘schools’ have generally shaped its properties. The end result now is an exclusively competent European Commission holding the power to approve or dismiss the greatest and most valuable concentration operations in the world.

Turkey on the other hand has followed much of a different path than the Union. Neither the capital collection nor the political and financial climate allowed the existence of huge concentrations among undertakings which might have had negative impacts upon the market and the economy, let alone the society. Therefore a specific competition law and concentration control regime had not been a necessity of the public or the business environment for a long time. Building up such a regime could only be possible when Turkey finally fulfilled her obligations stemming from the Ankara Agreement (1963) and the Additional Protocol (1970) after the entry into force of the 1/95 numbered Association Council decision. Therefore, unlike the Union, concentration control regime in Turkey had not been an initiative to satisfy the demand and pressure from the ‘below’.

The aim of this thesis is to examine the concentration control regimes in the European Union and Turkey. A comparative method is used to depict the framework of both regimes and put forward the differences and the similarities.

In the first chapter of the thesis, conceptual framework of concentrations will be scrutinized. Different appearances of concentrations together with their mandatory elements and their exceptions will be analyzed with precedents from the Commission’s case law.

In the second chapter of the thesis, three main types of concentrations will be scrutinized. Vertical, horizontal and conglomerate concentrations shall be compared with each other, according to their potential and actual impact upon the market. The distinction and differences among them shall be analyzed in compliance with the relevant Union guidelines.

In the third chapter of the thesis, the motivation of undertakings behind concentrations shall be scrutinized. Views of different scholars from different perspectives shall be put forward.

In the fourth chapter of the thesis, the history of concentrations shall be scrutinized. What are the economic, technological and political factors which give birth to concentration waves? Why and when does a concentration wave occur? What is the affiliation of world economics and the Union and Turkey within this equation? Answers for these questions are sought within this chapter. It should be noted that these first four chapters are kind of a study upon the legal, economic and conceptual framework of concentrations.

Fifth chapter of the thesis is kind of an introduction to the upcoming chapters. The method used within the upcoming chapters and the types of questions for which answers are sought shall be evaluated. In addition; the theoretical framework will be drawn. This fifth chapter might be construed as an introduction to the second main subject of “control” of concentrations.

In the sixth chapter of the thesis, the goals of European Union Competition Policy in general shall be evaluated. It is assessed that in order to reach a proper understanding of the historical development of concentration control in the Union, a proper understanding of the evolution of the Union-wide competition policy is also essential. The similarities between the competition policies and the concentration control regimes within the Union and Turkey will be scrutinized. The theoretical contributions made by Freiburg School and Chicago School shall also be examined.

In the seventh chapter of the thesis, the development of concentration control regimes in the Union and Turkey, together with its historical background and relevant case law shall be scrutinized. The relationship among Article 101 and 102 and the European Union Merger Regulation is examined within this chapter.

In the eighth and last chapter, the procedural aspects of concentration control in the Union and Turkey shall be put forward in a comparative approach. The principles that govern the control procedure, the details and phases of the control procedure within the Union and Turkey shall be put forward.

CHAPTER 1. CONCEPTS

Conceptual framework provides a basis on which academic examination and evaluation of a subject matter are made. In this chapter basic concepts such as mergers, acquisition and joint merges as they relate to concentration will be examined.

1.1. The Concept of Concentration

The concept of concentration is not an exception to the rule that a conceptual framework should be put forward first before making a comprehensive examination of a subject. The concept refers to the union - coming together - of different parts to either form a brand new whole - their separate entities being generally inextricable once the process is finished - or the dissolution of one of the parts within the other.

1.1.1. Etymological Background

The term of "concentration" has first been used in 1630s; being the noun form of the verb "concentrate" which means "the action of bringing to a common center".¹ The verb seems to have been produced from Italian *concentrare* -with the same meaning of bringing to a common center- that has the Latin roots of **com** (together) + **centrum** (center).

Aside its usage in military (*the act of bringing together military forces*), chemistry (*the process of increasing the concentration of a solution*), economics (*the degree to which the output or employment in an industry is accounted by only a few terms*), daily life (*intense mental focus*), the term is used widely in European Union Competition Law.

The conceptual framework of concentration and its mandatory elements within the framework of European Union Competition Law will be examined in the following sections.

¹ Online Etymology Dictionary, <http://www.etymonline.com/index.php?term=concentrate> (last access on 06.01.2015)

1.2. Concept of Concentration in European Union Competition Law

The Glossary of terms used in EU Competition Policy defines concentration as:

A concentration arises either where two or more previously independent undertakings merge (merger), where an undertaking acquires control of another undertaking (acquisition of control), or where a joint venture is created, performing on a lasting basis all the functions of an autonomous economic entity (full function joint venture).²

This glossary definition however needs further emphasis and further elaboration. It is vitally important to clarify the mandatory elements of a concentration so that similar transactions which do not fulfill the requirements might easily be precluded. It should be noted that this effort is essential in determining whether a transaction requires notification to and approval from the European Commission prior to its implementation and therefore is at the heart of the European Union Concentration Control Regime.

Recital 20 to the European Union Merger Regulation³ (EUMR) explains that the concept of concentration should be defined as only covering operations which bring about a lasting change in the structure of the undertakings concerned and therefore in the structure of the market. The joint ventures which perform all the functions of an economic entity on a lasting basis have been included within the boundaries of the definition as well. Similarly, transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time are treated as concentrations.

² Glossary of terms used in EU Competition Policy, <http://bookshop.europa.eu/en/glossary-of-terms-used-in-eu-competition-policy-pbKD4402795/>, (last access on 05.01.2015)

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] O.J. L 24/1.

The principle of Recital 20 is further explained and developed in Article 3 of the EUMR. The first paragraph of the article brings out two categories of concentrations and makes a distinction between them basically according to where *the change of control on a lasting basis* element stems from. It might stem from either:

- a) *the merger* of two or more previously independent undertakings or part 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 more other undertakings.
- c) *joint venture* performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the category of acquisitions specified in article 1 (b).

It might be concluded that within the context of EUMR; concentrations comprise mergers, acquisitions and joint ventures. Some writers rather the term "takeover" instead of "acquisition".

It should be noted that; in compliance with the general consensus within the literature, the concept of "merger", throughout this thesis as well, might well be construed to cover the whole concept of concentration unless otherwise stated. As the *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*⁴ points out:

The term 'concentration' used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this Document, unless

⁴ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] O.J. C 265/6.

otherwise specified, the term ‘merger’ will be used as a synonym for concentration and therefore cover all the above types of transactions.

Several different transactions and agreements could result in a lasting change in the decision-making process and the control of undertakings. Therefore, it is essential for an effective concentration control regime to adopt clear definitions of the used concepts. It would not be wrong to conclude that the scope of the concept of concentration is the basis of the Commission's concentration review jurisdiction.

The differences between these transactions and agreements and the meanings and boundaries of their essential elements, several definitions and exemptions within the literature and the case law of the European Court of Justice, together with the conceptual framework used in Turkish Competition Law will be analyzed throughout this chapter.

1.2.1. Mergers

A merger occurs where two or more formerly independent entities unite.⁵ This union should occur in the form of independent undertakings -any natural or legal person engaged in commercial or economic activity- joining together to trade as one undertaking.⁶

The Commission Consolidated Jurisdictional Notice⁷ states that a merger within the meaning of Article 3 (1) (a) occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities, or when an undertaking is absorbed by another, the latter retaining its legal entity while the former ceases to exist as a legal entity.⁸

⁵ Alison Jones, and Brenda Sufrin, **EU Competition Law: Text, Cases, Materials**, Oxford University Press, Fourth Edition, 2011, p.855.

⁶ The New Researcher, “How and Why does the European Union Regulate Concentrations?”, Vol.3, Summer 2010, pp. 36-39

⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2008] O.J. C 95/1.

⁸ Ibid., par.9.

In addition to that; the Notice states that a merger within the meaning of Article 3(1) may also occur where in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit.

The Notice emphasizes the fact that while determining the previous independence of undertakings, the issue of control should be carefully taken into account since the mentioned transactions could only be an internal restructuring within the group. In such case, assessment of control would include *de jure* as well as *de facto* control.⁹ The Notice further states that; such case may occur where two or more undertakings, while retaining their individual legal personalities establish a common economic management or the structure of a dual listed company via contracts. But it should be noted once again that the end result of such transaction would constitute a merger only if it leads to a *de facto* amalgamation of the undertakings into a single economic unit. It would not be wrong to conclude therefore that the prerequisite for the determination of such a *de facto* merger is the existence of a permanent and single economic management.

The Commission held in its *Avesta II* decision¹⁰ that in a case where the shareholders of an undertaking were having joint control, the reduction of the shareholders; others still possessing joint control would still lead to the creation of a concentration. The Commission held that one shareholder; acquiring full veto rights would mean a lasting change in the quality of control.

When the states owned undertakings are involved, the conditions of a concentration are not much different. When a concentration comprises undertakings owned by the either the State or another public body, the operation would constitute to be a concentration only if the undertakings had been different economic units having an independent power of decision.

⁹ Ibid. par.16.

¹⁰ Commission Decision of 9 June 1994, Case No IV/M.452

In NESTE/IVO¹¹, the holding company of IVO-Neste, established and totally owned by the Finnish State intended to merge within itself the two different state-owned companies by the name of Neste and Ivo. The operation had two steps; first of which included the transfer of shares of Neste to the holding company, and the second step including the transfer of shares of IVO to IVO-Neste. The Commission held that the first step of the operation would not constitute a concentration since there existed no change in control but the operation was an internal restructuring within the State. The second step on the other hand meant a lasting change in the control since the independent decision making body of the newly formed undertaking IVO-Neste had already been formed. Therefore, the second step of the operation would constitute a concentration within the meaning of the EUMR.

In Ford/Hertz¹² issue, Ford Motor Company, had been offered to buy 5% shares of Hertz corporation, 49% shares of which it had already possessed. The end result of the purchase agreement would thus be a 54% share control of the Hertz by the Ford. Despite the fact that Ford already had the power to appoint four directors out of nine within the Board of Directors and that the purchase agreement would grant the power to appoint extra directors, leading to an absolute majority within the Board of Directors, the Commission held that such an agreement would not lead to a lasting change of control within the meaning of EUMR. The purchase agreement would therefore not constitute a concentration.

As noted before; a classical example of a merger would occur when an undertaking is absorbed by another, the absorber with its legal entity intact while the absorbed ceases to exist as a separate legal entity. There are several such cases within the Commission precedents.¹³ If a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking

¹¹ Commission Decision of 2 June 1998, Case No IV/M.931.

¹² Commission Decision of 7 March 1994, Case No IV/M.397.

¹³ Case COMP/M. 1673 - Veba / VIAG of 13 June 2000; Case COMP M.1806 - AstraZeneca / Novartis of 26 July 2000; Case COMP / M. 2208 - Chevron / Texaco of 26 January 2001; Case IV/M.1383 - Exxon / Mobil of 29 September 1999.

under Article 3 (1) (b) however, a merger in the meaning of Article 3(1) (a) is not deemed to occur.¹⁴ That would rather be evaluated as an acquisition of control regulated under Article 3(1) (b).

Where the combination of the activities of previously independent undertakings results in the creation of a single economic unit, there is a merger within the meaning of Article 3 (1) (a) even though there isn't any legal merger agreement. While analyzing the concept of previous independence, the concept of control, which shall be scrutinized within the "Acquisition" section of this thesis, might be relevant to make a distinction with a probable internal restructuring of the undertaking.

The concept of control within this conceptual framework includes *de jure* and *de facto* control. When the two previously independent undertakings establish a contractual relationship that results with an amalgamation of them into a single economic unit, there is a merger. A necessary element for the establishment of such a *de facto* merger is the existence of a permanent and single economic management.

The concept of control shall be analyzed within the following section of acquisitions.

1.2.2. Acquisitions

When the term "acquisition" is used, what is meant actually is the acquisition of control of an undertaking. Article 3(1)(b) of the EUMR, states that 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 and indirect control of the whole or parts of one or more undertakings would constitute a concentration.

It should be noted that the term 'person' within this framework should not only cover individuals and private entities only but also public bodies including the State itself.

¹⁴ Case COMP / M.2510 - Cendant / Galileo

The Commission in its Air France/Sabena decision¹⁵, held that despite the fact that the operation was described by the parties as a partnership agreement (the operation consisted essentially of an agreement which provided for Air France to take a stake of 37.58 % in the capital of Sabena), the Belgian State was considered as a ‘person’ that is a party to the concentration within the context of the Acquisition article.

Control might also be acquired by one undertaking acting alone or by several undertakings acting jointly. These circumstances are to be analyzed separately throughout this section. With regard to natural persons however, such acquisition by them is considered to bring about a lasting change in the structure of the undertaking only if the natural persons concerned carry out further economic activities on their own account or if they control at least one other undertaking.¹⁶ In Asko/Jakobs/Adia¹⁷, the Commission held that the private individual was to be evaluated within the framework of the undertaking concerned as stated within the EUMR.

As defined before within the Merger section, a concentration within the meaning of the Merger Regulation is limited to changes in control and therefore internal restructuring within a group of undertakings can not constitute a concentration.

An additional case with regard to acquisitions occurs when both the acquiring and acquired undertakings are public undertakings owned by the same State or by the same public body. This detection brings for the question of whether the undertakings were formerly part of different economic units having an independent power of decision.

The Commission in its Pechinoy/Usinor decision¹⁸ held that the operation between the undertakings had constituted a concentration since both parties possessed the independent power of decision. On the other hand, it is accepted that such an independent

¹⁵ Commission Decision of 5 October 1992, Case IV/M.157.

¹⁶ Commission Notice par.12

¹⁷ Commission Decision of 16 May 1991.

¹⁸ Commission Decision of 24 June 1991, Case IV/M.097.

power of decision does not normally exist where the undertakings are within the same holding company.¹⁹

The old Commission Notice on the concept undertakings concerned addressed the question in a detailed manner. With attribution to the Recital 12 of the old Merger Regulation, the Notice states that the principle of non-discrimination between public and private sectors set out within the mentioned Recital requires that calculation of the turnover of an undertaking which is a party to a concentration should take account of the concerned undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them. Therefore, an acquisition of control arising between two undertakings owned by the same State may constitute a concentration since the fact that they are owned by the same State does not necessarily mean that they belong to the same ‘group’. This was the approach used by the Commission in its SGS/Thomson decision²⁰. The Commission held that the decisive issue in such case would be whether or not the concerned undertakings had been part of the same industrial holding being subject to a coordinated strategy.

As noted before; since what is meant with the general concept of acquisitions is actually “acquisition of control”, the concept of control shall be analyzed within the following sub-sections.

1.2.2.1. The Concept of Control

The second paragraph of Article 3 clarifies how the concept of control may occur. Therefore, paragraph one should be read in conjunction with paragraph two. The paragraph indicates that control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law

¹⁹ Commission Notice On The Concept Of Undertakings Concerned Par.55,

²⁰ Commission Decision of 22 February 1993, Case IV/M.216.

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

The test in Article 3 mainly focuses on the concept of control and whether the control occurs on a lasting basis or not. "Control" should occur in a permanent manner if the operation between the undertakings is to be evaluated within the scope of concentration according to the Merger Regulation. Paragraph 28 of the Commission Consolidated Jurisdictional Notice confirms this detection;

"...The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control..."

In order to successfully determine the existence of a concentration; the concept of "control" and its scope and qualifications should also be scrutinized.

Article 3 (2) of the EUMR defines control as the possibility of exercising decisive influence on an undertaking. This definition brings the conclusion that no actual and final exercise of decisive influence is necessary but that the potential power to exercise that very influence is sufficient.

The Court of First Instance, in its *Cementbouw v. Commission* Judgement²¹ held that;

"While decisive influence, within the meaning of Article 3(3) of Regulation No 4064/89,

²¹ European Court Of First Instance, 23 February 2006, T-282/02, <http://curia.europa.eu/juris/showPdf.jsf?docid=65712&doclang=EN>, (last access: 06.01.2015)

need not necessarily be exercised in order to exist, the existence of control within the meaning of Article 3 of that regulation requires that the possibility of exercising that influence be effective."²²

It should be noted that an effective possibility of exercising the decisive influence might emerge within different forms. A concentration might occur on a de jure as well as de facto basis and take the forms of sole or joint control under Article 3 (1) (b).

The most common means for the acquisition of control is the acquisition of shares of an undertaking. This might occur either in the form of a shareholders' agreement in case there is a joint control or in the form of acquisition of assets.

Control can also be acquired on a contractual basis. But the contract concerned should bear some qualifications in this case. It should lead to the control of the management and the resources of the other undertaking and be valid through a very long duration to fulfill the "change on a lasting basis" criteria.

There are several other means for the establishment of control. Article 3 (1) (b) therefore uses the term "by any other means" in order not to limit the scope of such cases. Economic and commercial relationships that do not look like a concentration at all at first glance might result with long lasting structural links for instance. They might cause decisive influence upon undertakings as they might lead to a control upon de facto basis. Even inheritance or the exit of a shareholder might lead to change of control on a lasting basis.

The types of control on the other hand shall be analyzed under two titles: Sole control and joint control.

²² Ibid., Par.1.

1.2.2.2. Sole Control

Commission Consolidated Jurisdictional Notice states that sole control is acquired if one undertaking alone can exercise decisive influence on another undertaking.²³ There are generally two different cases where sole control can be distinguished. In the first case, the undertaking which enjoys sole control has the power to determine the strategic commercial decisions of the other undertaking. In order to determine the strategic commercial decisions, it is essential that the undertaking has the majority of the voting rights. The second case is where only one shareholder is able to veto strategic decisions in an undertaking even though he does not have the power on his own to impose them. Such a power of blocking the adoption of a strategic decision means possession of a great level of influence upon an undertaking.

In contrast to jointly controlled undertakings, there is no other shareholder enjoying such right and influence when there is a sole control. Since the power and influence of the solely controlling party might produce a deadlock situation with regard to taking decisions within the undertaking, the shareholder is accepted to have a decisive influence within the meaning of Article 3 (2).

Sole control might be acquired on either a *de jure* or a *de facto* basis.

De jure sole control normally occurs on a legal basis where an undertaking acquires a majority of the voting rights of an undertaking. Stemming from the necessary elements that are derived from the definition of the concept of concentration, there is no control even in the case that the majority of the capital belongs to a shareholder but the majority of voting rights do not. However, in case of minority shareholding with specific rights attached to it, there might be a sole control on a legal basis. These specific rights may include the right to appoint more than half of the members of the supervisory board or the administrative board or an extra voting right while taking a strategic decision concerning the undertaking.

²³ Commission Notice par. 54.

De facto sole control is another case where the shareholder is highly likely to achieve a majority at the shareholders' meetings considering the level of its shareholding compared to the other shareholders. The past voting patterns and data will provide the Commission the necessary information to analyze the shareholders' status and possible changes in the future. The Commission will also analyze the roles and positions of other shareholders in the decision making process of the undertaking concerned. Criterion for such an analysis focuses upon whether or not the remaining shares are widely dispersed, whether other important shareholders have structural, economic and family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company.²⁴

1.2.2.3. Joint Control

Where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking there exists joint control.²⁵ It had been noted within the previous sections that the concept of decisive influence might appear with different forms. With regard to joint control, decisive influence should emerge in the form of the ability to create a deadlock situation in the negotiation and rejection of a proposed strategic decision concerning the undertaking.²⁶ The conclusion to be derived from this detection is that the undertakings should reach a consensus in determining the commercial policy of the undertaking.

There are several appearances of joint control. The clearest form is where there are only two parent undertakings which equally share the voting rights in a joint venture. It is not essential that there is a formal agreement between them regulating their status. Equality might also occur where both parent undertakings have the right to appoint an equal number of members to the decision making bodies of the joint venture. This is not a mandatory condition for joint control though. Joint control may also occur where there is no equality

²⁴ Commission Notice par 59.

²⁵ Ibid., par.62.

²⁶ Directorate For Financial And Enterprise Affairs, Competition Committee, Definition Of Transaction For The Purpose Of Merger Control Review, 18 June 2013, par.10.

between the two parent undertakings but where minority shareholders have additional rights which allow them to veto decisions that are necessary for the strategic commercial behavior of the undertaking.²⁷ It should be noted that these veto rights must be related to strategic decisions on the business policy of the undertaking concerned. The Commission Notice states that veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. It might be concluded therefore that the acquisition of joint control does not necessitate dominance upon day-to-day issues of an undertaking. The crucial element that is to be taken into consideration with regard to veto rights is the influence regarding the strategic business behavior of the undertaking. It should be noted that the acquirers' making use of its decisive influence is not essential in determining the existence of joint control. Rather, the possibility of exercising this influence and the mere existence of veto rights is sufficient.²⁸ It is not essential for a minority shareholder to have all veto rights within an undertaking though. Some or even one such right may be sufficient according to the specific case at hand. These cases might emerge in different forms. The Commission Notice counts and analyzes several of the veto rights concerning the appointment of senior management and determination of budget, the business plan, investments, market-specific rights.²⁹ The Commission also puts forward the method while analyzing whether or not veto rights cause joint control or not. It states that the determination of whether or not joint control exists or not should be based upon an assessment of these rights as a whole and that the rights should not be evaluated in isolation.

There is one other case where even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control.³⁰ This occurs when the undertakings concerned possess the necessary means to control the target undertaking other than the veto rights. That would generally mean that minority shareholders will have the majority of the voting rights and act together while

²⁷ Commission Notice, par. 63.

²⁸ Ibid., par. 67

²⁹ Ibid., par.69-72

³⁰ Ibid., par.74

exercising these rights. This cooperation might emerge either in the form of a legally binding agreement or in the form of a *de facto* status.

1.2.3 Joint Ventures

Other than the mergers and acquisitions, Article 3 (4) of the EUMR provides 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 the EUMR. The Regulation brings forth the full functionality criterion for a joint venture to constitute a concentration. The details of this criterion should therefore be deeply analyzed in order to separate the different appearances of joint ventures that do not form a concentration within the meaning of the EUMR.

For instance; the full functionality criterion excludes the application of the EUMR for the creation of joint ventures by the parties that intend to organize a brand new structuring of the undertaking concerned. Joint ventures created by the individually owned assets contribution shall also be excluded as long as they do not fulfill the full functionality criterion.

The full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market.³¹ In addition to this criterion, it should be noted that in order to achieve the goal of performing on a lasting basis, a joint venture must have a properly organized management units and access to sufficient necessary resources. However, the fact that the undertaking's being economically autonomous from an operational viewpoint does not always mean that it shall also enjoy autonomy with regard to the adoption of strategic decisions.

A joint venture cannot be considered to be have a full function character in case it only fulfills one specific function within the parent companies' business activities without

³¹ Directorate For Financial And Enterprise Affairs, op.cit., par.27.

its own presence in the market. Joint ventures only involved in Research & Development activities or production can be specific examples. Joint ventures only fulfilling the duty of distribution, acting as a sales agency of the parent companies should also be evaluated within the same framework. Another examples occurs when the purpose of a joint venture is only limited to the acquisition of a certain real estate for the parent company. It will not be considered to have a full function character in such case.

It should be noted at this point that these detections alone do not render a separate joint venture - with its main field of activity being the distribution business in the market for instance- from having a full function character. Similar to that, a separate joint venture's relying on the parent company only in the initial start-up period does not affect its full-function character. It should be stressed once again that the main criterion to evaluate the joint ventures in such cases should be its having or lacking the resources to operate independently.

When the parent companies are strong actors within the upstream or downstream markets, actors that control an important amount of sales or purchases between the parent companies, the full function character of the joint venture should carefully be taken into consideration since such coordination between the joint venture and the parent company may result in the elimination of competition in a substantial part of the market. In such cases, not only the EUMR, but Article 101 of the EU Treaty should also be taken into consideration since such activity might be construed within the framework of anti-competitive coordinated behavior.

Such was the case between Apollinaris / Schweppes³² when the parties intended to set up a joint venture. The operation included the transfer of the business of the parent companies to the newly established joint venture. The parent companies would continue their business activities within the same product market independently though. The Commission held that established joint venture would have the effect of coordinating the

³² Commission Decision of 24 June 1991, Case No IV/M.0093

competitive behavior of the parent companies and that therefore, since it did not have a full function character, it would not constitute a concentration.

The relationship between the parent company and the established joint venture needs further attention. There might be cases where the sales from the joint venture to the parent companies occur on a lasting basis. In such case, the important criteria to evaluate the joint venture should be whether or not the joint venture is actually economically autonomous from an operational viewpoint.³³ The joint venture should act in such a way that the relationship between it and the parent company should be explainable with commercial terms, that is, the joint venture should in its commercial activities, have the power to make a distinction between the unrelated purchasers and the parent company and choose the unrelated purchaser if it is to make a more profitable offer.

The case where the joint venture is the purchasing party is a little bit different though. This is the case where the joint venture is the closest to being only a joint sales agency of the parent company. The choice of preferring the parent company in such cases would be understandable since little value is added to the products and sales at that level of the transaction. Again it is an important criterion whether or not the joint venture is active in the market, performing the functions of a normal and separate company. Only in such a case will the joint venture be considered to have a full function character.

Another case where the formation of a joint venture might constitute a concentration is when the parent company decides to enlarge the field of activities of the joint venture in the course of its lifetime. The importance of this lifetime period was pointed out by the Commission in the TKS/ITW Signode/Titan³⁴ decision. In this case, options could have been used after a five year period starting from the opportunity of sole

³³ Directorate For Financial And Enterprise Affairs, op.cit., par.32.

³⁴ Commission Decision of 6 May 1998, Case No IV/M.970

control but the Commission held that such a five year period is long enough to result with a lasting change. As noted before, a joint venture agreement shall be of indefinite duration.³⁵

This enlargement might emerge within the form of acquisition of the whole or part of an undertaking that belongs to the parent company or within the form of transfer of additional assets, contracts, intellectual property and portfolio to the joint venture from the parent company. In case this enlargement results in the extension of the activities of the joint venture into other product or geographic markets on a full function basis, the issue might require prior notification to the Commission since it is highly possible that the transaction would constitute a concentration.

1.2.4. Exceptions

Article 3 (5) of the EUMR sets out three situations; where the operations and activities of certain types of undertakings and persons do not constitute a concentration within the scope of the EUMR.

The first one is the credit and financial institutions and insurance companies who are dealing, for their own account or for others in securities.

It should be noted that the acquisition of securities within these transactions do not aim for a change in the control of an undertaking at all but they are to be acquired on a temporary basis with an intention to resale them within one year.³⁶ The acquiring undertaking in such cases is not allowed to exercise the voting rights with a view to determining the strategic commercial behavior of the other undertaking. The undertaking should also exercise the voting rights in such a way that she is to get ready for the disposal of the controlling interest.

³⁵ Ing-Marie Sjögren, “The Concept of Control Under The Merger Regulation”, p.7, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=1561947&fileOid=1565802> (last access: 06.01.2015)

³⁶ Ibid. p.9.

The second exception is when there is no actual change of control and therefore no actual concentration within the meaning of the EUMR. This exception comprises cases that the change of control stems from the acquisition by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings. These transactions would not constitute concentrations. Parallel to this detection, transactions resulting only in a temporary change of control do not constitute concentrations.

The third and final exception is that a concentration does not arise where a financial holding company within the meaning of the Fourth Council Directive 78/660/EEC³⁷ acquires control, provided that the undertaking enjoys the voting rights only to maintain the full value of its investment and does not directly effect -directly or indirectly- the commercial activities of the controlled undertaking. Therefore, it would not be wrong to conclude that this exception and the notion of 'financial holding company' is only limited to undertakings whose sole purpose is to acquire holdings in other undertakings without directly or indirectly involving themselves in the management affairs. The EUMR also provides that such undertakings should be structured in a way that compliance with the limitations can be supervised by an administrative or a judicial authority.³⁸

Finally it should be concluded that these exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings.³⁹

³⁷ Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, O.J. L 222/11 (1978).

³⁸ EUMR, par. 113.

³⁹ Directorate For Financial And Enterprise Affairs, op. cit., par 41.

CHAPTER 2. THE TYPES OF CONCENTRATIONS

After an analysis of the concept of concentration within Chapter 1, the different types of concentrations in European Union and Turkish Law and their potential effects and consequences shall be scrutinized within this Chapter.

Concentrations are generally categorized as *horizontal concentrations*, *vertical concentrations* and *conglomerate concentrations*.⁴⁰ (There is another approach that classifies concentrations as to how they are financed: *Purchase Mergers* occurs when one undertaking purchases the other. The purchase might take place either by cash or through the issue of a debt instrument. *Consolidation Mergers* occurs on the other hand when a brand new undertaking is formed to comprise the merged undertakings -their legal entities ceasing once the process is over- under its entity.) It should be noted that the Commission's assessment of these different types are outlined in two guidelines: Horizontal Merger Guideline⁴¹ and Non-horizontal Merger Guideline.⁴² Vertical and Conglomerate Concentrations are evaluated within the same category of Non-horizontal Mergers in the relevant Guideline.⁴³

There is however one other rare case that the concentration may entail both horizontal and non-horizontal effects. This proves that the classification stated above does not bring *one size fits all* solutions. The Non-horizontal Guideline exemplifies the case where the merging undertakings are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the concerned

⁴⁰ Simon Bishop and Mike Walker, **The Economics of EC Competition Law. Concepts, Application and Measurement**, Third Edition, London, Sweet & Maxwell, 2010. p.349.

⁴¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31/5, (2004)

⁴² Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 265/6, (2008)

⁴³ *Ibid.*, par. 3.

relevant markets. The Guideline draws the Commission's framework of assessment of such cases and concentrations in such a way that she should take into consideration the relevant Notices while appraising their horizontal, vertical and/or conglomerate effects.⁴⁴

For example, Paragraphs 58 to 60 of the Horizontal Mergers Guideline bear the title of *Merger with a potential competitor* -which might indeed result with both horizontally and vertically distorted competition- and sets the conditions for such a transaction to have significant anti-competitive effects. The Commission is to evaluate the concentration transaction at hand according to the conditions set forth therein.

One other rare case is "diagonal" concentrations -so considered by the Commission- where the undertakings to the concentration transaction do not operate in markets that are directly horizontally or vertically related. In other words, a diagonal concentration is one where two merging undertakings are not horizontal competitors and are also not in a direct vertical relationship.⁴⁵ Bishop exemplifies this type of concentration where one of the undertakings is only the provider of an input into a supply chain which ends with a product that competes with the product of the other merging undertaking. Such competition concerns arose in the Google / Doubleclick concentration which had been cleared by the Commission unconditionally early in the Phase II investigation on the ground that no condition for a distorted competition and a competitive harm would be fulfilled. This concentration had occurred between Google -a supplier of online text advertising- and Doubleclick - supplier of the ad service technology-.

The approach, methodology and the credibility of the Commission's appraisal of concentrations is clarified in paragraphs 8 and 9. The Guideline actually points out the Commission's evolving experience and expertise and states that the Commission's appraisal of concentrations is without prejudice to the probable interpretation given by either the Court of Justice or the Court of First Instance.

⁴⁴ Ibid., par. 7.

⁴⁵ Simon Bishop and Mike Walker, Op. Cit., p.449.

Despite the fact that the text of the Paragraph seems to favor also the appraisal and interpretation of *Court of Justice or the Court of First Instance of the European Communities*, it might be construed that the Guideline -so the Commission herself- favors her own interpretation of concentrations and acts with the self confidence that she bears the role and duty to lead the Courts in defining the types of Concentrations. Commission's exclusive competence in the Control Procedure should not be forgotten while interpreting such issues.

It should be noted once again though that the cases stated and discussed above and rare types do not necessarily invalidate the classical three types of concentrations foreseen within the EUMR. Therefore, these three types concentrations, together with the ones in Turkish Law shall be scrutinized in the following paragraphs.

2.1. Vertical Concentrations

The Non-horizontal Merger Guideline states that vertical mergers involve undertakings operating at different levels of the supply chain.⁴⁶ The Guideline exemplifies this definition with the merging of a manufacturer of a certain product with the distributor of that product. The different levels of supply chain are further explained with the concepts of *upstream firm* and *downstream firm*. The Guideline employs these definitions to clarify the commercial relationship between the concentrating undertakings. The commercial relationship between the concentrating parties with regard to vertical concentrations is that the 'downstream' firm purchases the output from the 'upstream' firm and uses it as an input in its own production, which it then sells on to its customers. The market where the first transaction occurs is called therefore the intermediate market (upstream market) while the latter is called the downstream market.⁴⁷

It should be emphasized at this point once again that vertical mergers -together with conglomerate mergers- are generally less likely to significantly impede effective

⁴⁶ Non-horizontal Merger Guidelines, Op. Cit. Par.4

⁴⁷ Ibid., supra note 4.

competition than horizontal mergers.⁴⁸ This stems from the fact that vertical mergers do not entail the loss of direct competition between the concentrating undertakings in the same relevant market.⁴⁹ This is a general finding with exceptions though. Such a loss of direct competition might somehow arise where one of the undertakings is a potential competitor in the relevant market of the other merging undertaking. As there is no loss of competition between the concentrating parties, the rare case which gives birth to competition concerns at a vertical concentration is if the merged entity has market power in at least one of the markets affected by the deal and if potential competitors' access to supplies and to the markets are hampered by the operation.⁵⁰

The second fact is that vertical concentrations may be pro competitive in the case that the activities and the products of the merging undertakings are complementary to each other. The integration of these complementary activities would be beneficial to consumers. This integration through a vertical concentration would result in a decrease in mark-ups downstream which would cause a higher demand upstream. That would create a decrease in the prices and a better and faster service to consumers in summary.

The TomTom/TeleAtlas⁵¹ and Nokia/Navtec⁵² concentrations are examples of vertical concentrations considered by the Commission. These cases have been chosen since they are both related to the same product market. Tele Atlas and Navtec were producers of navigable digital map databases while TomTom and Nokia were producers of portable navigation devices and applications. The product of one of the concentrating undertakings served as an input to the other.

⁴⁸ Ibid., par. 11.

⁴⁹ Ibid., par.12

⁵⁰ Paul McGeown and Aude Barthelemy, "Recent Developments in EU Merger Control", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.6, p.450.

⁵¹ Commission Decision, TomTom/Tele Atlas (2008), COMP/M.4854

⁵² Commission Decision, Nokia/Navtec (2008), COMP/M.4942

2.2. Horizontal Concentrations

Horizontal Concentrations involve undertakings that operate at the same level of the supply chain, producing substitute goods.⁵³ Bishop explains the concept of substitute goods in the case that an increase in the price of one good induces an increase in demand for the other.⁵⁴

Parallel to this definition; the Horizontal Concentration Guideline⁵⁵ states that its subject matter is concentrations in which undertakings to the transaction are actual or potential competitors on the same relevant market.⁵⁶ Some examples might be the concentration of Friesland/Campina (active undertakings in the production of dairy products) and MAV Cargo / Rail Cargo Austria (active undertakings in the provision of rail freight transport and freight forwarding services).

Hovenkamp emphasizes two important effects of such concentrations upon the market in which the undertakings to the concentration transaction operate:

Because the horizontal merger involves two firms in the same market, it produces two consequences that do not flow from vertical or conglomerate mergers: 1) after the merger the relevant market has one firm less than before; 2) the post-merger firm ordinarily has a larger market share than either of the partners had before the merger.⁵⁷

Competitive concerns may arise since the horizontal concentrations result with a decrease in the number of the undertakings active in the market and a possible serious increase in the market share of the concentrating parties. The creation of such a dominant position of an undertaking within the market is a primary form of competitive harm.

⁵³ Simon Bishop, op. cit., p. 349.

⁵⁴ Ibid., p. 349.

⁵⁵ Horizontal Merger Guideline, op. cit., par.2.

⁵⁶ Ibid., par. 5.

⁵⁷ Herbert Hovenkamp, **Federal Antitrust Policy, The Law of Competition and Its Practice**, 3rd Edition, Thomson West, 2005, par. 12.1.b.

Therefore, this increase might occur at such levels that the concept of dominance comes into question.

The concept of dominance might be defined as;

“... a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers.”⁵⁸

It should be noted that it is difficult for competition authorities to control the behavior of undertakings enjoying a dominant position within the market and detect a probable abuse of market power. Therefore, it would not be wrong to conclude that horizontal concentrations create the biggest concern with regard to competitive harm. The Commission Guideline, states that it is expected that most cases of incompatibility of a concentration with the common market will continue to be based on a finding of dominance.⁵⁹ It might be said that a strong and successful concentration policy requires a close attention on them and the prevention of dominant positions established after the transactions.

2.3. Conglomerate Concentrations

Conglomerate Concentrations have been defined within the The European Court of First Instance’s Tetra Laval/Sidel decision as;

“... a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers or customers. Mergers of this type do not give rise to true horizontal overlaps between the activities of the parties to the merger

⁵⁸ European Court Of First Instance, 25 March 1999, T-102/96, <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-102/96>, (last access: 06.01.2015), par.200.

⁵⁹ Guideline on horizontal mergers, op. cit., par.4.

or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed as a general rule that such mergers produce anti-competitive effects. However, they may have anti-competitive effects in certain cases...Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, ... the proof of anti competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects”⁶⁰

The Non-horizontal Merger Guideline states that conglomerate mergers are between undertakings that are in relationship which is neither horizontal, like the competitors in the same relevant market nor vertical, like suppliers and customers. A general assessment involves concentrations between undertakings that are actively in closely related markets. Concentrations involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use are classical examples.

The Guideline notes that the distinction between conglomerate and horizontal mergers may be subtle when a conglomerate merger involves products that are weak substitutes for each other and that the same is true for the distinction between vertical mergers as well. The Guideline exemplifies the situation when the products may be supplied by some companies with the inputs already integrated through a vertical relationship, whereas other producers leave it to the customers to select and assemble the inputs themselves through a conglomerate relationship.

An example of conglomerate concentrations is Proctor & Gamble / Gillette, which involve undertakings that produce different types of oral products sold to the same retailers and GE / Amersham which involve an undertaking producing medical scanning hardware

⁶⁰ European Court Of First Instance, 25 October 2002, T-5/02, <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-5/02>, (last access: 06.01.2015), par.142, 155.

equipment and an undertaking producing diagnostic pharmaceuticals that enable images to be produced by such scanning hardware to make the diagnosis of a disease easier.

CHAPTER 3. MOTIVATION BEHIND CONCENTRATIONS

Why do undertakings concentrate? What are their motives behind such complicated and somehow risky and expensive operations?

A focus on the motives is essential to understand the nature and the functions of concentrations. In addition, it should not be forgotten that the need for the *control of concentration* emerges in a way from the misuse or exploitation of these motives.

Generally speaking, the main motivation behind concentrations can be summarized in one sentence: Maximizing the market value of the undertaking through enhancing its power of competition. All motives which shall be scrutinized within this chapter are in fact the subtitles of this main feature.

It has become a vitally important goal for the undertakings to increase their market value through enhancing their power of competition especially in the tough international competition conditions of our times.⁶¹ In addition, the undertakings increase their bargaining position within the market during their commercial transactions as they increase their market share and strength.⁶² Another technical point is that undertakings desire to decrease transaction costs that stem from bilateral contracts and that they seek to make use of increased economies of scale. Economies of scale which arises from the concentration, enables the concentrated undertaking to become more cost-efficient and profitable.⁶³

The EUMR evaluates the motives of concentration from different points of view as well. Recital 3 and 4 to the Merger Regulation emphasizes a motive from the European Union's perspective by stating that the completion of the common market and of economic

⁶¹ Helin Berfin Akyüz, **Türk Rekabet Hukuku Kapsamında Şirketlerde Birleşme ve Devralmalar**, 1.Baskı, Ankara, Adalet Yayınevi, 2007, p.33.

⁶² Uğur Özgöker, **Avrupa Birliği Rekabet Hukuku Ve Politikası**, 1. Baskı, İstanbul, Beta Yayınları, 2008, p.44.

⁶³ In other words, an undertaking makes use of economies of scale when its average cost decreases as total output increases.

and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment creates a need of corporate reorganization particularly in the form of concentrations.

It is stated as well that such reorganizations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community. Jones evaluates these provisions to be a reflection of the desire to increase the scale of national and European undertakings and states that this might be the goal of a national or European industrial policy.⁶⁴ He further explains that the ability to restructure or to create national or European champions may mean that the parties can survive and compete more effectively on international markets, contribute to technical and economic progress and facilitate cross-border trade. Roberts explains this motive as national and international consolidation.⁶⁵ He states that this type of driver occurs where there are compatible companies available for concentration within the same geographical region.

In any case, it would not be wrong to conclude that concentrations, as long as they do not impede competition within the Union as stated within the EUMR, are desirable tools within the context of the competition policy of the Union especially with regard to the Integration goal. Bishop states that European Competition Law is unique in having market integration as one of its objectives.⁶⁶

In summary, a brief examination of the motivation behind concentrations within the context of the ECMR reveals that The Merger Regulation evaluates mergers within the EU to be inevitable and desirable. Thus the third recital to the Regulation acknowledges that the dismantling of internal frontiers will result in major corporate reorganization; while

⁶⁴ Alison Jones and Brenda Sufrin, *op. cit.* p. 856.

⁶⁵ *Ibid.*, p.858.

⁶⁶ Simon Bishop and Mike Walker, *op.cit.*, p.5.

the fourth recital states that this is to be welcomed as one means of increasing the competitiveness of EU industry on world markets.⁶⁷

A different set of motives meet us when countries with developing economies are scrutinized. In compliance with the official economic development policies, concentrations are encouraged with the aim of creating high capital undertakings. The need to be stronger against the devastating effects of financial crisis, inflation and low demand within the markets, directs the undertakings to concentrate and become immune to these problems.⁶⁸ This might be evaluated to be one of the main factors behind the serious increase in the number of concentrations within Turkey. The need for a thorough and satisfactory regulation of concentration provisions is such that the new 6102 numbered Turkish Commercial Code, unlike the previous 6762 numbered one, contains much more detailed concentration provisions which are in compliance with the European Union *acquis communautaire*.

Analysis of developed economics provides no different result either. The modern economics require the undertakings –whether it be public or private- to be of a certain economic size and strength. The undertakings indeed have a tendency to expand and grow as much as they can. This tendency has increased the importance of the amount of capital and corporate restructuring. In some cases, no matter how big an undertaking is, concentration activity might still be the one and only option to achieve these goals.⁶⁹ Yavuz adds to that the motivation of acquisition of specific assets which may be either a source of raw materials, a good management team of good research and development facilities. She

⁶⁷ Paul Craig and Grainne de Burca, **EU Law: Texts, Cases and Materials**, Fourth Edition, Oxford, Oxford University Press, 2007, p.1048.

⁶⁸ Adnan Sevim, “Şirket Birleşmelerinde Kurumsal Kaynak Planlaması (Enterprise Resources Planning –ERP)’nin Önemi”, Haluk Sümer ve Helmut Pernsteiner (Ed.) **Şirket Birleşmeleri** içinde (327-360), İstanbul: Alfa Yayınları, 2004, p.328.

⁶⁹ Billur Yaltı, “Kurumlar Vergisi Kanunu Açısından Sermaye Şirketlerinde Tasfiye, Birleşme, Nevi Değişirme”, (**Yüksek Lisans Tezi**, İstanbul), 1987.

emphasizes the fact that this is a much cheaper and quicker way for the undertakings to grow and achieve the abovementioned status.⁷⁰

The concept of globalization needs further attention at this point.⁷¹ The development of communication possibilities and Information Technologies made the geographical distances less of an obstacle for undertakings to cooperate and concentrate. As the political borders disappeared with regard to the commercial transactions, different undertakings found the chance to act as single entities regardless of distances. A software company in the Silicon Valley for instance can acquire the control of a bright start-up in Turkey within days.

Yaltı summarizes the motives and the benefits of concentration under a number of titles. The general outlook after the concentration is over is a strengthened undertaking position at the market. The client portfolio seems to widen. The competition between the parties to the concentration disappears. The undertakings start to work more rationally and efficiently. Usage of double employee for the same task is prevented. There occurs a decrease in costs. The potential of marketing increases. The new budget, which is the product of the union of the two powers, enables the financing of research and development activities. This prepares further technological developments.⁷²

3.1. Economies of Scale

De Burca summarizes the effects of concentrations under three topics.⁷³ The first topic is that concentrations make it easier for the merging undertakings to make use of economies of scale. Gaughan defines economies of scale as the decreases in per-unit costs

⁷⁰ Rukiye Işıl Yavuz, "An Integrative Perspective On Mergers And Acquisitions: Social Identity, Acculturation, Organizational Support, Rewards And Organizational Commitment", (**Master Thesis**, The Graduate School Of Social Sciences Of Middle East Technical University, June 2005.), p.18.

⁷¹ For details of the impact of globalisation upon concentrations, See; Mehmet Devrim Aşkın, "The Control Of Mergers And Acquisitions In EU And Turkish Competition Law", (**Master Thesis**, The Graduate School Of Social Sciences Of Middle East Technical University, December 2006.), p.7.

⁷² Billur Yaltı, op. cit.,

⁷³ Paul Craig and Grainne de Burca, op.cit., p.1048.

that result from an increase in the size or scale of an undertaking's operations.⁷⁴ He states that the manufacturing firms typically operate at high per-unit costs for low levels of output and that this is because the fixed costs of operating their manufacturing facilities are spread out over relatively low levels of output. Most important of all is that as the output levels rise, the per-unit costs decline. Add to these other gains the increased specialization of labor and management and the more efficient use of capital equipment which might not be possible at low output levels.⁷⁵

De Burca points out that, undertakings which are at the optimum size for the industry can reap the benefits of these transactions. In addition, the fact that certain products might be produced by machinery which require a specific turnover before it is economically viable makes concentrations a useful way to reap scale economies.

3.2. Distributional Efficiency

While examining the motive of distributional efficiency, De Burca gives the example of a manufacturing undertaking merging with a distributor and gathering the chance to extend its operations down market in a fast and efficient way. This, she states is a more practical way compared to the undertaking's learning the distribution business from scratch. Roberts on the other hand evaluates this topic as a drive to acquire a new market or customer base. He states that a concentration can often provide a "fast track route" to new and established markets.⁷⁶ He gives the example of a high street bank merging with another bank and each bank acquiring the customer base of the other. In some cases, Roberts and others say that the acquired customer base may represent a market which had been previously unavailable. Although this type sounds more of a motive for horizontal concentration, Roberts states that the issue is the same for vertical integration as well since vertical integration results with a decrease in the risk profile associated with the supplier

⁷⁴ Patrick A. Gaughan, **Mergers, Acquisitions And Corporate Restructuring**, Fourth Edition; John Wiley & Sons, Inc., 2007, p.126.

⁷⁵ Patrick A. Gaughan, *op. cit.*, p.127.

⁷⁶ Alexander Roberts, William Wallace and Peter Moles, **Mergers And Acquisitions**, Edinburgh, Edinburgh Business School Heriot-Watt University, 2003.

and that continuity of the supply chain is guaranteed through the elimination of intermediaries.

3.3. Managerial Efficiency

De Burca emphasizes the fact that the threat of a takeover is a good motivator for the management of an undertaking to perform well. Indeed, a manager's motive for a concentration is generally to strengthen the acquirer's dominant position in the market or to preserve the existing market position.⁷⁷ This extra effort will move the undertaking further and satisfy the shareholders. Shareholders who are happy with the current status and hopeful about the future of the undertaking will not be in the need to sell the undertaking to another. Undertakings, in order to achieve these objectives are increasingly involved in concentrations. This is actually such a strong motivation that, it was the locomotive of the third concentration wave as stated within the History of Concentrations chapter.

Roberts states several specific factors concerning the managerial efficiency motivation.⁷⁸ In addition to what has already been indicated above, he points to the different fact that the deficit of an undertaking with regard to management expertise in one or more "key areas" might be a drive for increased management effectiveness and efficiency. What makes these areas "key" is that they are central to a new growth area the undertaking is seeking to develop or because they are connected to the achievement of the new strategic objectives.

Other than the motives summarized under three general topics by De Burca, Gaughan identifies several other motives. them. These additional motives will be analyzed in accordance with Gaughan's evaluations at this point of the thesis.

3.4. Growth

Gaughan compares the two broad ways an undertaking can grow. One is through internal growth. A type of growth by one undertaking's own means. Mostly slow and an

⁷⁷ Rukiye Işıl Yavuz, op.cit., p.19.

⁷⁸ Alexander Roberts, William Wallace and Peter Moles, op.cit., p.7.

uncertain process. He states that growth through concentrations is a faster and more effective alternative since it enables the undertakings to acquire the necessary resources to achieve competitive goals. When an undertaking wants to expand to another geographic region, it is much better for it to choose the concentration way than internal growth because the concentrated undertaking will most probably be familiar with the cultural and social values of the region. The unique characteristics of the region requires great many years and a lot of experience for the undertaking to be successful. Concentrations in such circumstances are the fastest and lowest-risk alternatives.⁷⁹

3.5. Synergy

Simply to say, synergy refers to the phenomenon of $2 + 2 = 5$. Gaughan states that with regard to concentrations, this translates into the ability of a corporate combination to be more profitable than the individual parts of the combined undertakings.⁸⁰ A simple example would be like an undertaking thinking that it can sell its products and services to the customer base of the other undertaking. An undertaking's manufacturing ability combining with the distribution ability of the other undertaking or an undertaking's manufacturing ability combining with the marketing ability of the other undertaking would be similar examples. The total effect of the concentration would be much more than the value of the separate undertakings combined.

There are several types of synergy. Beside the classical revenue enhancing synergy, another type is the cost reducing synergy which aims to decrease the lower per-unit costs. Another type is the financial synergy which refers to the impact of a concentration on the costs of capital to the acquiring undertaking or the concentrating partners. In financial markets, a financially stronger undertaking has certain advantages that might lower the cost of capital –which would be used in further investments- since they have better access to financial markets and they are less risky than smaller undertakings.

⁷⁹ Patrick A. Gaughan, *op. cit.*, p.119.

⁸⁰ *Ibid.*, p.124.

As stated before, within the context of Concentrations, synergy means the ability of a corporate combination being more successful than the sum of the individual successes of the two separate undertakings. Simply to say, the combined undertaking value is worth more than its parts. The explanation of this phenomenon is that the merging undertakings generally were filling some important and missing part that prevented them before from performing up to their potential prior to the concentration transaction. This logic motivates the undertakings to involve in concentrations and create synergies. It can also be said that this motivation is an answer to the undertakings' need to grow, by taking advantage of the synergy effect within the supply, production, finance, marketing and management functions.⁸¹

3.6. Diversification

Gaughan defines diversification as growing outside an undertaking's current industry. He expresses that this motive especially played an important role within the third concentration wave when during the late 1960s, undertakings often chose to expand by buying other undertakings rather than through internal expansion. One of the reasons why an undertaking may choose diversified expansion is its desire to enter an industry more profitable than its current industry. This is in compliance with the economic theory that in the long run, only industries that are difficult to enter will have above-average returns.

Undertakings may seek to lower their risk and exposure to certain volatile industry segments by adding other sectors to their corporate umbrella. Undertakings' following of expansion strategy might render the diversification of the products easier and therefore reduce the management risks. Although the success of diversifying the sectors is of doubt, there are several successful examples. One such undertaking is General Electric (GE) which despite its name is no longer only an electronics oriented undertaking. Through several concentration transactions, it became a major player in several other sectors such as insurance, television stations, plastics and medical equipment. It should be noted however

⁸¹ Orhan Çelik, *Şirket Birleşmeleri ve Birleşmelerde Şirket Değerlemesi*, 1. Baskı, Ankara: Turhan Kitabevi, 1999, s.7.

that this is the exception rather than the norm. What is meant by relevance is diversifying into a field that is somehow close to the concentrating party's business. As Gaughan puts it, the track record of related concentration transactions is significantly better than that of unrelated ones.⁸²

Roberts evaluates the diversification motive as a means of balancing the risk profile of an undertaking's portfolio. On the other hand he points out to the fact that more recently there has been a move away from diversification as a risk management strategy.⁸³ It should be noted however that undertakings still use concentrations as a way to enter a new sector, as long as there exists an expectation that, that sector is to expand in the future. Yavuz counts this motive under the title of *risk reduction*. She gives the example of two undertakings one of which is producing swimming suits while the other skiing equipments. She states that even if it is not snowing, the concentrated undertaking can compensate the lack of cash flow through the commercial activity of the other. This indeed is a measure against the probability of bankruptcy

3.7. Leveraged Transactions

While examining the history of concentrations and witnessing that concentrations come in waves, what is seen in the fourth concentration wave is that it featured the introduction of the concept of leveraged buyout (LBO). This is the kind of a transaction financed using a significant amount of debt and often involving the takeover of a public undertaking by a private one.⁸⁴ Leveraged transactions will enable the undertakings to finance their expensive operations easily through junk bonds.⁸⁵ Leveraged transactions continued to take place in the fifth concentration wave as well.

⁸² Patrick Gaughan, op. cit., p.144.

⁸³ Alexander Roberts, William Wallace and Peter Moles, op.cit., par. 1.2.3.

⁸⁴ Patrick Gaughan, op.cit., p.17.

⁸⁵ Patrick Gaughan defines Junk bonds as “either bonds with a Standard and Poors rating of BB or lower or bonds that were lower rated right from the date of issuance.”, Ibid., p.355.

3.8. Intellectual Property

The most significant part of the fifth concentration wave took place in the technology sector. It should be noted that a lot of these transactions occurred in order to take advantage of the valuable intellectual property of the target undertaking. Instead of spending the precious resources on research and development to create similar products or using the very same ones by paying the patent rights, several undertakings chose the option to concentrate to make use of the target undertaking's invention and expertise.

Roberts explains this motive with the requirement for specialist skills and / or resources. He states that an undertaking might want to concentrate with another one for its specific skills or resources. He detects that concentrations that are fueled by this motive are often carried out in the form of an undertaking acquiring a smaller undertaking which has developed high-value specific skills over a number of years and where it would take a very long time and a great deal of investment for the acquiring undertaking to develop the same skills.⁸⁶

⁸⁶ Alexander Roberts, *op. cit.*

CHAPTER 4. CONCENTRATIONS AS AN ECONOMIC INDICATOR

A brief examination of the economic history reveals that concentrations come in waves.⁸⁷ An examination of these waves is worth noting to show that concentrations can not be evaluated separately from the sociological, political and economic atmosphere of the period concerned.⁸⁸ There are underlying factors and specific characteristics of each wave. But what is it exactly that causes a concentration wave? What is the affiliation between the concentration economics of one country –if there is any- with another? Is it possible to talk about a strong interaction within the context of concentrations between Turkey and the United States and European Union?

With regard to the triggering effects of the concentration waves, there are different theories and comments. Some writers especially point out to the correlation with high stock market valuations⁸⁹ while others have developed models in which concentration waves result from managerial timing of market overvaluations of their firms.⁹⁰ A more neoclassical explanation, at first asserted by Gort⁹¹ later dealt by Mitchell⁹² state that the waves result from shocks that hit an industry's economic, technological or regulatory

⁸⁷ Marina Martynova and Luc Renneboog, "Mergers And Acquisitions In Europe", European Corporate Governance Institute Working Papers In Finance, No:114/2006, http://www.ssrn.com/abstract_id=880379 (last access: 06.01.2015), p.1.

⁸⁸ Devra L. Golbe and Lawrence J. White, "Catch A Wave: The Time Series Behavior Of Mergers" [Electronic Version] *Review of Economics And Statistics*, August 1993, Volume 75, Number 3, <http://www.jstor.org/discover/10.2307/2109463?sid=21105034792561&uid=4&uid=3739192&uid=2>, (last access: 06.01.2015), p.493.

⁸⁹ Andrei Schleifer and Robert W. Vishny, "Stock Market Driven Acquisitions", [Electronic Version] *Journal Of Financial Economics*, June 2001, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=278563, (last access: 06.01.2015), p.1 and p.19.

⁹⁰ Matthew Rhodes-Kropf, S. Vishwanathan, David T. Robinson, "Valuation Waves And Merger Activity: The Empirical Evidence", 13 May 2004, 14th Conference on Financial Economics & Accounting (FEA), AFA 2004 San Diego Meetings, EFA 2003 Meetings Paper No.94, 5th Annual Texas Finance Festival, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=412680, (last access: 06.01.2015), p.1, 7-10.

⁹¹ Michael Gort, "An Economic Disturbance Theory Of Mergers", [Electronic Version] *Quarterly Journal Of Economics*, 1969, Volume 83, Number 4, <http://www.jstor.org/discover/10.2307/1885453?sid=21105034792561&uid=2&uid=4&uid=70&uid=2134&uid=3739192>, (last access:06.01.2015), pp.624-642.

⁹² Mark L. Mitchell and J. Harold Mulherin, "The Impact Of Industry Shocks On Takeover And Restructuring Activity", [Electronic Version] *Journal of Financial Economics*, 1996, Volume 41, <http://www.sciencedirect.com/science/article/pii/0304405X9500860H>, (last access: 06.01.2015), pp.193-229.

environment. Harford's latest works support this view and assert that industrial shocks, its nature being either economic, regulatory or technological, cause the concentration waves.⁹³

The literature has so far detected five merger waves: Those of the early 1900s, the 1920s, the 1960s, the 1980s and the 1990s.⁹⁴ Within this chapter, each wave and their effects on the countries and their interactive relationship between each other shall be separately scrutinized. In addition, the answer to the question of “did these waves have an effect on the history of concentrations in Turkey?” will be analyzed.

4.1. Concentration Waves In USA and EU

It is interesting to see that each concentration wave period points out to a serious change in the ongoing status quo either in politics, technology, production methods or cultural patterns. For instance; the first wave which occurred between 1897 and 1904 is the product of technological developments and the expansion of heavy manufacturing industry in the United States.

At the very beginning of this chapter, it should be emphasized that United States have been a pioneer in Competition Law as well as Concentration transactions all around the world. This is not only because of the economic and technological developments in the New Continent and the political stability after the American Civil War, but also because of the fact that Europe was too much into conflict, clashes and political instability in the beginning of the 20th century. Therefore, a thorough analysis of the history of concentrations in Europe requires a thorough analysis of American Concentration history as well.

What was the triggering cause behind this first wave? Especially the completion of railway and telegraphic networks within the continent had been assessed to play an important role since they built a national market and resulted in an increase in the growth

⁹³ Jarrad Harford, “What Drives Merger Waves?” [Electronic Version] *Journal of Financial Economics*, 2005, Vol.77, <http://www.sml.hw.ac.uk/ms75/GP%20Papers/G132.pdf>, (last access:06.01.2015), p.531.

⁹⁴ Marina Martynova and Luc Renneboog, op. cit., p.1.

opportunities for firms which used to operate at a local or regional scale.⁹⁵ The effect of the emergence of such a vast national market was the development of mass production techniques. This is a period where companies in United States tried to build monopolies in their respective industries by forming trusts. Many undertakings formed alliances so as to avoid a tough price competition. Giant companies like Standard Oil Company, United States Steel Corporation and International Harvester Corporation are several examples of this period. This is a period where the first mega undertakings with giant capitals started to appear on the world stage.

Lynch highlights three main features of this merger wave: 1) Concentration movements were generally conducted by companies of a significant size that were concerned with reaching a monopolistic position. 2) At the outcome of the concentrations, production capacity was maintained despite the expectations of exploitation of economies of scale. 3) Concentrations in various industries did not adopt the mass production techniques. The drop in the product price was the result of the decrease in transport costs.⁹⁶

The first serious and sharp applications of Competition Law -namely the Sherman Antitrust Act⁹⁷ in United States- and the debates about the purposes of competition law emerged after this period. In 1911, the Supreme Court of the United States found Standard Oil Company of New Jersey in violation of the Act and ruled that the trust originated in illegal monopoly practices and ordered it to be broken up into 34 new companies. The business tycoon John D. Rockefeller's response to the judgment might be referred to the still ongoing debate about the purposes and boundaries of Competition Law and whether the strongest, the most successful, the mightiest undertaking which reaches that very

⁹⁵ Laurence Capron, "Historical Analysis Of Three Waves Of Mergers And Acquisitions In The United States (1887-1904, 1916-1929, 1950-1970): Triggering Factors, Motivations And Performance", Academy of Management Conference Best Papers Proceedings, Management History division, Cincinnati, Ohio, August 1996, <http://faculty.insead.edu/laurence-capron/documents/historical-analysis-of-three-waves-of-mergers.pdf>, (last access:06.01.2015), p.1.

⁹⁶ Harry H. Lynch, **Financial Performance Of Conglomerates**, First Edition, Boston: Harvard University Press, 1971, p.18.

⁹⁷ Sherman Antitrust Act, 15 U.S.C 1-7., http://www.linfo.org/sherman_txt.html, (last access: 06.01.2015)

position after a tough and ruthless competition journey should be given the right to live or not: "This is against God's Law!"

The second wave which occurred between 1916 and 1929 is the product of Post World War I economic boom. The automotive transport developments enabled the geographic expansion of companies while the developments in communication networks made advertisements on a national scale possible. Moreover the development of mass distribution systems with low commercial margins permitted the firms to reduce the production costs by increasing the volume of production. Horizontal mergers constituted an easy means to increase the production capacity.⁹⁸ The most active concentration industries in this period were primary metals, petroleum products, chemicals and transportation products. The actual parties to this wave involved small United States enterprises that missed the previous one between 1897 and 1904. These relatively small companies chose to concentrate to gain economies of scale and to compete with the dominant players in their industry. In other words it would not be wrong to conclude that these small companies' major aim was to increase their market power in general. World's largest financial crisis in 1929 and the depression put an end to this period. The concentration activities remained low because of the devastating effects of World War II until the 1950s.

The third wave of mergers which occurred between the 1950s until 1970s was characterized by the unrelated acquisitions and the birth of conglomerate mergers.⁹⁹ This characterization was the result of intense economic development and strong stock market buoyancy. Add to these the significant decrease in financial risk. The stability of the economic environment directed the undertakings to diversify their revenue streams and reduce the riskiness of their activities by creating conglomerates and holding companies involved in various unrelated sectors.

One interesting thing to note should be the interlinking of the personal motivations of the managers of the undertakings with this merger wave. Personal motivations of

⁹⁸ Laurence Capron, *op.cit.*, p.2.

⁹⁹ *Ibid.*, p.3.

increasing the power and prestige of the undertakings, personal expectations of financial gains in managing different groups -thereby balancing the probable loss of other businesses- have been seen as a key element lying behind this third merger wave other than the classical economic motivations. This third wave of mergers peaked in 1968 and collapsed with the oil crisis in 1973.¹⁰⁰

It should be noted that this is a period in which it is still not possible to talk about a specific European concentration wave. This is a period where the legal and economic order of the European Union and the major goal of market integration was still on its way. This is a period where yet there was much concern about the future and the success of the Union. Large scale concentration waves in Europe therefore would wait until mid - 1990s.

The fourth wave was the product of the recovery of the stock market from the economic recession of 1970s and the economic prosperity of the mid to late 1980s. The high inflation rates and high borrowing costs have directed the undertakings to respond to a series of shocks that had a global impact. Reaching a critical size had been seen as a way to survive these shocks. In addition, to remain profitable, many companies sought ways to reduce both operating and financial costs. These factors all came together to form up the fourth merger wave.

This period has been characterized by an unprecedented number of divestitures, hostile takeovers and going-private transactions which consist of LBOs –leveraged buyouts- and MBOs –management buyouts-. The underlying reason behind these leveraged buyouts was the availability of credit to finance the transactions and operations. In addition, deregulation and new financial instruments such as "junk bond market" -market for bonds issued by companies with poor credit quality-¹⁰¹ marked this concentration wave. The technological developments and the globally expanding economy together with the international competition constituted the engine of this concentration wave.

¹⁰⁰ Barbara S. Petitt and Kenneth R. Ferris, **Valuation For Mergers And Acquisitions**, Second Edition, New Jersey: Pearson Education Inc, 2013, p.4.

¹⁰¹ Marina Martynova, "Takeover Waves: Triggers, Performance and Motives", Tilburg University Discussion Papers, No: 2005/107, <https://pure.uvt.nl/portal/files/776337/107.pdf> (last access: 06.01.2015), p.6.

The collapse of high leveraged undertakings and the market crash of 1987 ended this period. A comparison with the previous concentration wave discloses the characteristics of this wave in a better way. The third merger wave – as noted before- had been characterized by unrelated acquisitions, conglomerate mergers and the diversification of businesses. The fourth wave, on the contrary has recorded an opposite approach. The diversification trend of the third wave had seemed fragile against industry shocks caused by deregulations, social policy changes, political and economic factors. The disadvantages of diversification have forced the undertakings to reorganize. A loose antitrust environment, more competitive capital markets and stringent shareholder control mechanisms pushed the undertakings to de-diversify and focus on their core sectors.¹⁰² Some of these companies which had taken over unrelated businesses during the third merger wave made use of the booming M&A market to sell their unprofitable divisions. It could be concluded therefore that the failure of conglomerates was one underlying factor for this fourth concentration wave. It had been witnessed that industries such as gas, oil, pharmaceuticals, airlines and banking, were dominant in their separate ways instead of mergers of conglomerate industries of the third wave.

The fourth concentration wave was in general limited with United States although foreign takeovers had become very common. Although Europe started to become the scene for quite a number of middle size concentrations, large scale concentrations appeared in Europe during the fifth concentration wave. However, UK governments pioneered to deregulate numerous sectors and to relax anti – merger and merger control legislation in this period. This initiative actively encouraged large-scale horizontal mergers.¹⁰³

The fifth concentration wave could be shortly described as the wave of strategic restructuring. Rather than immediate financial gains, longer term strategy was more broadly taken into consideration during the transactions. The expanding economy, the rising stock prices, low interest rates and technological developments -as always- played an important

¹⁰² Ibid., p.7.

¹⁰³ Alexander Roberts, William Wallace and Peter Moles, **Mergers And Acquisitions**, Edinburgh: Edinburgh Business School Heriot-Watt University, 2010, p.18.

role but there is however one major factor which we should note. Some authors describe this period as the globalization wave.¹⁰⁴ The effects of globalization throughout the world had never been as intense as it had been in the 1990s. It had been emphasized before that the concentration waves could not be thought separately from the political and sociological atmosphere of the era. Significant facts such as the fall of the Berlin Wall and the collapse of the Soviet Union ended the Cold War era and marked this era. The economic and cultural superiority of the Western Hemisphere became apparent. This reality fueled the globalization process all around the world.

The fifth concentration wave began in around 1993 after the effects of 1990-1991 recessions shrank. The expansion of the economy directed the undertakings to get into concentration activities to meet the booming demand. In places where the market growth was slow, concentration activities allowed the companies to grow in these slow markets as well. Low interest rates enabled a wide number of undertakings to borrow huge loans and finance their complicated concentration operations.

It was interesting find out that, the productivity and the increased supply in the market after the completion of concentrations, put a pressure on the prices and created an urge to reduce the costs. It was realized that scale economies through mergers and acquisitions provided a viable way of reducing costs and increasing competitiveness. The expansion of information and communication technologies enabled inter-continental transactions within seconds and removed the geographical obstacles and trade barriers. It would not be wrong to conclude that undertakings were this time subject to a global competition. The need to create efficient and profitable companies caused the privatization of public utilities. Undertakings were forced to produce higher quality and more consumer oriented products.¹⁰⁵

Roberts identifies a similarity between the first concentration wave and the fifth concentration wave in that both were the products of new technologies which enabled a

¹⁰⁴ Ibid.,

¹⁰⁵ Ibid.,

nationwide or worldwide market for goods. It was the completion of railroad network in the first concentration wave that formed a nation-wide market while it was the Internet and computers that prepared a -this time- global market in the fifth wave.

One factor which concerns European Union with regard to this fifth wave is that the introduction of common currency Euro in the end of 90s. Together with the completion of a good functioning common market, common currency Euro contributed a lot to the increase in the number of concentration transactions within the Union. Gaughan defines the concentration activities in Europe at this period as a spate of cross border deals.¹⁰⁶ Martynova and Renneboog stress the fact the European wave in this period was about as large as its American counterpart.¹⁰⁷

It should be noted at this point once again that it was mainly United States that pioneered the concentration activities in the world since the beginning of the 20th century. That is the actual reason why even though the subject of this thesis mainly focuses on the concentration activities and control of concentrations in the European Union, its “history of concentrations chapter” should comprise a thorough analysis of the history of concentrations in the United States.

This does not mean however that Europe had not been familiar with the concept and instrument of concentrations. Although it followed a different and slower progress than that of the United States, concentrations were a well known tool in Europe ever since the 20th century. It is obvious however that it was Europe that imitated the developments in United States from the very beginning and that, economic developments in United States had a strong effect on the European economy and therefore European Concentration transactions.

¹⁰⁶ Patrick A. Gaughan, *op.cit.*, p.121.

¹⁰⁷ Marina Martynova and Luc Renneboog, *op.cit.*, p.1.

Although some authors evaluate European history of concentrations in line with the above stated waves, some authors make a distinction between the United States and European concentration experience. Ensico, states four concentration waves in Europe.¹⁰⁸ He points that the first wave starts during the 1920s. Undertakings' major motive during this period was to take advantage of producing at a lower cost per unit. This wave resulted in a great increase in production. Second concentration wave occurs in 1960s due to the internationalization of the economy. He says a third wave was produced principally in United Kingdom during the 1980s, the key point and the enabling factor being the market evolution for corporate control. A fourth wave occurs in early 1990s when undertakings evaluated the concentrations as a useful tool to adapt the single European Market. Ensico links the last concentration wave with the introduction of common currency Euro to the Common Market.

It should be noted that this separate evaluation of concentration history is an exceptional assessment. The author of this thesis also believes that due to the political instability, the devastating effects of two world wars in the old continent and the long cold war, concentrations within Europe did not have a chance to have a worldwide economic effect and develop in its own course separately rather than imitating the economical effects of United States. Especially until the 90s, it is even hard to talk about the concentrations in Europe constituting a strong wave. However it would not be wrong to conclude that the effects of the fall of the Berlin Wall and the boom of the globalization process made the region economies more integrated and closely connected to each other so that it is impossible to assess them all in a separate way.

In conclusion, it is a fact that there is a strong affiliation between the USA and EU concentrations but it should be noted that this affiliation is more likely to stem from the economic developments on behalf of the United States side. In addition it would not be

¹⁰⁸ Isabel Martinez Torre-Ensico and Javier Bilbao Garcia, "Mergers and Acquisition Trends In Europe", [Electronic Version] *International Advances in Economic Research*, August 1996, Volume 2, Issue, pp. 279-286.

correct to conclude that a totally independent and separate concentration wave ever occurred within the European Union at least until the 90s.¹⁰⁹

At this point of the chapter, history of concentrations in Turkey will be scrutinized. While it is observed that the history of concentrations in European Union is strongly affiliated with economic developments in United States, it will emerge that no such strong affiliation actually exists between the United States, European Union and Turkish Concentration history.

4.2. History of Concentrations In Turkey

The first concentration in Turkey occurred in 1874's Ottoman Empire, when Avusturya – Osmanlı Bankasi and Bank-i Osman-i Sahane merged. Until the end of 1980s, no important concentration activity had taken place in the country.¹¹⁰ What was the reason for this dryness of concentrations in Turkey?

It can be said that this was mostly due to the lack of capital and a serious private sector in the country from the beginning of the century to the middle of the second half.

The roots of this economic stagnation however had deep roots lying in the 350 years of Ottoman Regression. After the Renaissance and Reform Movements, European ships had launched campaigns all around the world which eventually led to the conquest of the Americas, the Cape Of Good Hope and all other seas. European ports were filled with huge amount of gold and money which paved the way to the accumulation of capital and the Industry Revolution.

¹⁰⁹ This might be assessed to be one of the reasons why no specific Control of Concentration Regulation appeared in the Union until 1989. These issues will be analyzed within the “History of Concentration Control in European Union” Chapter.

¹¹⁰ Rukiye Işıl Yavuz, *op.cit.*, p.14.

This accumulation led to the formation of giant corporations and a strong private sector while Turkey –then Ottoman Empire- was mostly involved in energy consuming internal conflicts and battles during this long period.

The young Turkish Republic had in hand a devastated Anatolia after long bloody battles with such little economy that concentration activities were clearly not possible at all. Because of the lack of capital, expertise and private sector, State itself was mostly involved in even the basic industries. State sponsored undertakings were manufacturing and marketing the goods and leading the real sector. State sponsored private sector had been slowly but steadily growing but it took more than fifty years to adopt a free market economy with relatively small State intervention.

In the 1980s, the economic stabilization program which aimed the transition to a free market economy and the steadily abolishment of state intervention caught the Turkish private sector in surprise. Concentrations had been evaluated as an important way to survive this crisis during this transition period. This brought the result that nearly all of the concentration transactions were small sized, local and national transactions where both parties were generally Turkish.

These might be thought as the first common concentration transactions in Turkish economy. When the period back then is carefully analyzed, it will be seen that there had been two periods where it could be said that an expansive concentrations activity existed in Turkey.¹¹¹

One of these waves took place within 2000 – 2001, while the second wave occurred between 2005 – 2008. It is a verified stat that, % 71 of total transactions with

¹¹¹ Evrim Akdoğu, “Türkiye’de 1988 – 2008 Dönemindeki Firma Birleşmeleri, Birleşme Dalgaları Ve Genel Tablo”, *Muhasebe ve Finansman Dergisi*, Ekim 2011, <http://journal.mufad.org/attachments/article/632/8.pdf>, (last access: 06.01.2015), p.141.

regard to the number and % 87 of total transactions with regard to total transaction value occurred during these waves.¹¹²

The causes and triggering factors of concentration waves in general had been analyzed above. These two waves have a huge difference with regard to their triggering effects however. 2000-2001 wave might be seen as an effort of undertakings to survive the devastating economic crisis while the 2005 – 2008 wave is most likely the effort of undertakings to take advantage of the positive economic signs and the advantageous market conditions. It should be noted that Turkey was seen as a very valuable emerging market during this period and great amount of foreign investment was flowing to the market. The positive effects of European Union candidacy and the outlook of a stable democracy were all attractions for the enormous amount of global liquidity.

It would not be totally correct to conclude that these waves were strictly affiliated with the economic developments in the European Union and the Globe however. Especially the concentration wave of 2000-2001 is the clear result of internal economic and political instability and the crisis. This is a period where there are positive expectations within the Union as the common currency Euro creates a Union wide excitement. This is a period where cross border deals and transactions within Europe increase as a result of positive indicators and a successful Common Market while concentrations are considered as the last hope of survival for the undertakings in Turkey during a deadly crisis. It would not be wrong however to conclude that the second concentration wave between 2005 – 2008 is the direct result of the global liquidity and that Turkey took advantage of this status with its stability and positive indicators. This is a period where there Turkey attracted the attention of a lot of investors an emerging market. This trend seems to fade away after the March 2013 FED decisions as the American Federal Reserve Bank announced that it will put an end to the global liquidity.

¹¹² Ibid., p.142.

These situations all prove that Turkey is a dependant player in the global markets who, in the good scenario, can take advantage of the economic circumstances if her fragile internal conditions so permit. This is the rare case where concentrations in Turkey –with similar triggering causes- follow a similar trend with the European Countries. More often case is that Concentrations in European Union and Turkey do not usually catch each other and follow a similar direction and a similar trend and that they do not have a noteworthy interaction.

CHAPTER 5. HISTORICAL DEVELOPMENT AND CURRENT STATUS

In order to fully understand the historical development and current status of the concentration control regime in the European Union; the overall competition policy of the European Union, together with its goals, historical evolution and different theoretical perspectives should be analyzed.

5.1. Historical Evolution

This is a process that would reveal the dynamics - whether it be economic, social or theoretical- which created the need for a specific control of concentration mechanism within the European Union. Different “schools” have emerged and defended different goals and theories. They have managed to make their way out of the political debates and not only shaped a legal branch but an entire Union. These schools and theories can not be thought separately from the historical stages that the Union has gone through. In addition, it should be noted that they had been the product of the political and economic climate that had dominated their era.

But these detections alone are not sufficient to answer some questions: Is it true that the European Union competition system had been merely an import from the American Anti-trust tradition? Or is it only a myth? What is the German influence that is said to lie within the very core of the Union competition regime? Do we really have to admit that the European Union Competition Law has a unique character of her own?

5.2. Theoretical Framework

These questions deserve a close attention to understand the approach and understanding which dominate today. Answers to these questions would give insights not only to the overall competition policy but also the specific concentration control policy of the Union today. Such an effort however requires an analysis of the theoretical framework of EU competition law. As Gerber puts it;

“During the development of the current system, the Commission has sought to locate knowledge relating to EU law in Brussels, creating few incentives for member state decision-makers to acquire such knowledge. As a consequence, both the details of competition law and the basic values and objectives behind it have often been little known and understood not only by those who are supposed to obey them, but sometimes even by those administering them... The story of the system’s development provides valuable insights into the effects of both deficits in knowledge and conflicts over its distribution.”¹¹³

In order to reach those valuable insights, this thesis aims at first to analyze the goals of European Union Competition Policy first and then to analyze the historical periods -which have been shaped around these goals- and the theories of the ‘Schools’ -which have sought to provide answers to the complex relationship between competition law and the society and the Union.-

On the other hand, the reflections of this evolutionary process upon the Turkish control of concentration mechanisms, which were all formed after the 1/95 numbered Association Council decision¹¹⁴, shall also be scrutinized throughout the upcoming chapters. The reason for Turkey’s inclusion is that one other phenomenon that this thesis aims to address is the dynamics of the relationship between the European Union and Turkish concentration control regime.

¹¹³ David J. Gerber, **Law And Competition In Twentieth Century Europe: Protecting Prometheus**, Fourth Edition, Oxford, Oxford University Press, 2003. p.iv.

¹¹⁴ EC Turkey Association Council, Decision No 1/95 on implementing the final phase of the Customs Union, O.J. L 35/1, 13 February 1996.

CHAPTER 6. THE GOALS OF EU COMPETITION POLICY AND CONCENTRATION CONTROL

Throughout the history of European Union Competition Policy, debates about its role, aims and goals have generally been centered upon two concepts. One is the *integration goal* while the other is a more general *economic goal*.

It is generally admitted that the establishment of a common market was the most important goal of competition law enforcement with the Commission and the Court using Article 101 and 102 as means to provide a competitive and safe commercial relationship without private restraints across national borders of the Member States.

The second and more basic goal of competition law was to protect competition from obstacles and attacks and restraints considering economic necessities. The protection of effective and undistorted competition was a typically Ordoliberal goal of European Union competition policy.¹¹⁵ However, even the concept of “*protecting competition*” is somehow vague in itself so as Gerber puts it, there should be at least four basic conceptions of what it means to *protect competition*.¹¹⁶

Economic Efficiency is one goal that aims to reach optimum resource allocation and wealth-maximization. Although expressed in indirect terms at the beginning periods of a Community competition policy and Competition Law; this goal has always been part of the European Union competition system. It is out of doubt that while undistorted competition would lead to both allocative and productive efficiency; being in a monopoly position in a certain market for too long would lead to certain inefficiencies in these fields.¹¹⁷ This efficiency goal is being much more often pronounced after the early 1990s, as there had to be no serious concern any more with regard to the creation of a Common

¹¹⁵ Sigfrido M. Ramirez Perez and Sebastian van de Scheur, “The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge”, Kiran Klaus Patel and Heike Schweitzer (Ed.), in **The Historical Foundations Of EU Competition Law** (pp. 19-53), Oxford: Oxford University Press, 2013, p.19.

¹¹⁶ David J. Gerber, op. cit., p. x, xi.

¹¹⁷ Simon Bishop and Mike Walker, op. cit., p.28.

Market and its consequences. This might be explained with the increasing effects of Chicago School –which is to be discussed within the upcoming chapters- or the shift in the priorities of the Union as the social, economic and political progress had reached to an important and satisfactory extent.

Economic Freedom is a goal which is a part of the heritage of classical liberalism that had served an important role for European integration. The concept refers to the boundaries of the probable restraints on competition which might have a significant effect upon the opportunities and choices of the economic actors. In a free economic environment, not only the consumers but also the competitors within the market should have a free and undistorted conscience. They all should have the chance to make their own choices and decisions. This understanding still continues to have an important effect upon several decisions by the Commission and judgments by the Union Courts. With regard to the early years of the Union's competition policy however, it is generally admitted that the long-term policy goals of the Union had not been to protect economic freedom but rather economic efficiency.¹¹⁸

Economic Power is a concept that deals with the prevention of the undertakings' misuse of their economic strength to undermine the economic and social and competitive structure. Gerber states that this goal is often associated with German neo-liberalism in particular and economic constitutionalist thought in general but that its influence is much broader. So broad that the reflections of this goal might be easily seen with the concerns arising out of the horizontal concentrations and the tools which have been employed to fight against the undertakings' exploitation of their dominant position.

Promoting Economic Change and Development, according to Gerber is the fourth and last concept that is affiliated with effective competition. It should be construed to cover the means and tools necessary to reduce and eliminate the obstacles against economic change and development. In many countries this goal has played a prominent role within

¹¹⁸ Sigfrido M. Ramirez Perez and Sebastian van de Scheur, op. cit., p.20.

their competition policies. Its role in the European Union is likely to increase in the upcoming years since it is still a major goal that is stated within the Union Treaties to take the necessary measures and reducing the barriers for the establishment of a dynamic and developing economy.

This analysis only aims to have a deeper understanding of the concepts though. It does not change the fact that it would not be wrong to conclude EC Competition Law has two major goals: one is the promotion of economic integration between the Member States while the other is the promotion of effective and undistorted competition.

6.1. The Integration Goal

Stemming from the fact that; its scope and subject is closely connected with the free movement rules and the goal of creating a common market, EU competition law has always been at the core of the European integration project.¹¹⁹ As has been pointed out; competition law has always been an essential part of European law because effective competition is a key enabler of a successful Common Market.¹²⁰

This goal of creating a common and unified market has dominated the process of building a competition law system for the Union.¹²¹ This is an interactive relationship. Competition Law enforcement on the other hand helped to eliminate the national border barriers and to liberalize large sectors of the economy.¹²²

Hawks summarizes this fact as follows:

"Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first principle

¹¹⁹ Heike Schweitzer and Kiran Klaus Patel, "EU Competition Law in Historical Context: Continuity and Change", Heike Schweitzer and Kiran Klaus Patel (Ed.), in **The Historical Foundations Of EU Competition Law** (pp. 207-230), Oxford: Oxford University Press, 2013, p.229.

¹²⁰ The New Researcher, op. cit., p.39.

¹²¹ David J. Gerber, op. cit., p.347.

¹²² Heike Schweitzer and Kiran Klaus Patel, "Introduction", Heike Schweitzer and Kiran Klaus Patel (Ed.), in **The Historical Foundations Of EU Competition Policy** (pp. 1-18), Oxford: Oxford University Press, 2013, p.1.

*of EEC antitrust law, and is basic to the treaty objective of a
“common market.”*¹²³

This might be well understood as Article 2 of the EC Treaty emphasizes that market integration is seen as an important goal of EU Competition Law and an official Union policy:

“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout 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.”

This goal has been the central point in shaping the institutions and competences within the Union competition regime. In order to understand the roots of this competition policy goal of the Union, a look upon the historical periods and developments is mandatory. For as Gerber puts it; *competition law’s role in European integration has also made it the central reference point in the experience of competition law in Europe.*¹²⁴

It should be noted that the major competition policy concern in the beginning period of the European Economic Community was not so much alike with the concerns that Competition Laws and Competition Policies generally address. Despite the wording of the competition provisions of the Treaty, the main concern of the Commission while evaluating the cases and issues was not so much to prevent the agreements and concerted practices that

¹²³ Barry E. Hawk, “Antitrust in the EEC - The First Decade”, *Fordham Law Review*, 1972, Vol.41, Issue 2, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2102&context=flr> (last access: 06.01.2015), p.231.

¹²⁴ David J. Gerber, op. cit., p.385.

distort competition between undertakings but a concern with the integration of the Common Market.¹²⁵

It should be noted that the central objective of European competition policy was not similar to that of the goals pursued by American anti-trust law. The major goal, unlike United States was not to protect the individual rights and promote a competitive and productive market, but rather pursuing structurally different types of public policy goals, the most important one being market integration. Just as all other economic policies, competition policy of the Union was subject to this grand goal. But it should be noted that behind this integration goal laid also the effort to stand against the economic power and dominance of the United States after World War II. It should not be forgotten that the old continent was trying to recuperate from the fatal wounds of the devastating World War II.

This should not mean however that there had been no effort in achieving the basic goals of competition. The Commission in its *First Report on Competition Policy* stated that;

*"Although it is evident that the competition policy of the Community must be directed towards the creation and proper operation of the common market, its effectiveness would, nevertheless, be considerably improved if it were carried out in conjunction with more active competition policies at the national level and with the removal of certain obstacles to the free play of the market in various sectors, such as the fixing of the prices and the placing of orders by public authorities."*¹²⁶

This is definitely understandable from a historical perspective considering the difficult task and burden the Commission had to deal with. The Union had to build a

¹²⁵ Andreas Weitbrecht, "The First 50 Years Of European Competition Law", [Electronic Version] *European Competition Law Review*, 2008, Issue 2, 81-88, p. 82.

¹²⁶ Commission of the European Communities, *First Report on Competition Policy*, 1971, http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf (last access: 06.01.2015), p.12.

competition law regime that needed to have a supranational character and be enforced within the Member States sometimes at the expense of them. What would happen indeed when the Union competition policy and competition rules had been in conflict with the public interest as defined by national governments? The need to create effective and uniform competition law enforcement across all member states with different economic traditions required a serious transfer of power which all Member States seemed very doubtful and reluctant at the very beginning.¹²⁷ There had been no similar experience in the history and the results could only be guessed. There existed no serious example that could serve as a precedent other than United States antitrust law system and the newly forming German anti-trust law since the Member States did not have a specific competition law system. The Commission and the Union in general therefore had to be very careful. While paving the way to create a unique competition law system from scratch, they had to find new and specific solutions to the arising issues.

While searching for these solutions, they have never ignored the fact that the integration goal and the integration function had always been at the heart of the Union competition policy.

6.2. The Economic Goal

The text and spirit of the main competition rules of the Union reveal that economic goals and economic concerns in general which aim to protect *effective competition* throughout the Union is at the heart of the European Union Competition Regime. For instance; Article 101 prohibits agreements that may negatively affect the trade between Member States. Article 102 prohibits abuse of dominant position of undertakings with the aim of reaching an economically efficient status both for the consumers, the undertakings and even the Member States. When the EUMR is analyzed; it is clear that the major aim is to protect and promote effective competition by declaring the concentrations *which would significantly impede effective competition* incompatible with the common market.

¹²⁷ Heike Schweitzer and Kiran Klaus Patel, op.cit., p. 208.

Hans von Groeben, the first head of the Commission' Directorate for Competition, emphasizing the "economic goal dimension" of the Union's competition policy, stated that it was a fundamental objective *to establish an effective and workable competitive system*¹²⁸.

This brings forth the question of what *effective competition* is¹²⁹. There is no single effective competition definition in either the economic theory or the Court of Justice case law. The Court in its *BP v. ABG case*,¹³⁰ confirmed that the purpose of Article 86 (Article 102 TFEU) is to preserve an *effective competition structure* in the Common Market, especially where it is jeopardized by the elimination of independent economic operators by an undertaking in a dominant position.¹³¹

Boone describes the effects of the effective competition criterion upon the assessment of concentrations as follows:

*A merger should not be allowed (without further requirements or remedies), if the merger is expected to bring the industry outcome significantly further away from the effective competition outcome. If the merger is expected to bring the market outcome closer to the effective competition outcome (say, because of efficiency gains) then the merger should not be challenged.*¹³²

¹²⁸ European Commission, "Ninth General Report on the Activities of the Community", 1961, <http://bookshop.europa.eu/en/ninth-general-report-on-the-activities-of-the-community-pbXK0259006/>, (last access: 06.01.2015) p.50

¹²⁹ For details of the concept of Effective Competition, see; Tuna Baskoy, "Effective Competition and EU Competition Law", [Electronic Version] *Review of European and Russian Affairs*, 2005, Vol.1, No.1., <https://journals.carleton.ca/rera/index.php/rera/article/view/7/56>, (last access: 06.01.2015)

¹³⁰ European Court of Justice, 29 June, 1978, 77/77, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61977CJ0077>, (last access: 06.01.2015)

¹³¹ Christian M. Bender, Georg Götz, Benjamin Pakula, "Effective Competition: Its Importance and Relevance For Network Industries", *Intereconomics 2001 Forum*, p.2,

¹³² Jan Boone, "Effective Competition: A Benchmark For Competition Policy", Dept. of Economics, Tilburg University, <http://dev3.cepr.org/meets/wkcn/6/6638/papers/Boone.pdf>, (last access: 06.01.2015)

One other concept is *workable competition*. The European Court of Justice's definition of workable competition as early as 1978 is as follows;

*The degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.*¹³³

This makes the fact clear that although the central goal of EU Competition Policy had been the goal of integration, the Union had never ignored the economic goals and benefits of competition law. In *Hoffman-La Roche*, the European Court of Justice interpreted Article 3 (f) of the EEC Treaty in such a way that the establishment and maintenance of an effective competitive market structure had been envisaged within the Treaty with economic goals.¹³⁴

It is noted within the influences of the Ordoliberalists that competition law had been a tool in not only preserving consumer welfare but also in the construction of a plural and democratic social structure.¹³⁵ Although this detection may sound closely connected with the goal of integration, it is as much connected with economic goals as well. Because it was an Ordoliberal idea that the State –and the Union in this case- was under the obligation to prevent the market system from destroying itself through stabilization, anti-monopoly and social welfare policies while pursuing broader goals of social integration.

It should be noted therefore that the Ordoliberal idea of a strong state and a strong union is not only about the construction of a new society structure which should be

¹³³ European Court of Justice, 25 October 1977, 26/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0026>, (last access: 06.01.2015), par.20.

¹³⁴ European Court of Justice, 13 February 1979, 85/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085&from=EN>, (last access: 06.01.2015), par. 125.

¹³⁵ For details of Ordoliberal philosophy which is offered as a cure to modern economic crisis and disasters, See; Mathias Siems and Gerhard Schnyder. "Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation", *Governance: An International Journal of Policy, Administration and Institutions*, July 2014, Vol.27, No.3, p.379.

evaluated within the framework of the goal of integration, but at the same time about maintaining an economically strong structure which would render all other initiatives possible.

6.3. A New Goal: ‘The More Economic Approach’

It would definitely be wrong to summarize the goals of the competition policy of the Union as only two. As noted before several others might be counted but that this is only a major classification upon which the debates have generally focused upon.

Gerber states a third goal for instance which he calls 'regulatory'.¹³⁶ He states that this goal seeks *to shape the characteristics of economic activity or to acquire information for policy purposes*. He exemplifies this detection with procedural rules of the Union competition law and the aims that lie behind their enactment. He states that notification requirements are designed to provide information about economic developments and that many systems allow decision-makers to take economic policy goals other than the protection of competition while applying the rules. He states that the eastward expansion of the Union might seriously increase the importance of this goal within the upcoming years.

Parallel to these views, 'a more economic approach' might be evaluated as a mixture of recommendations on how to make more efficient use of economic insights while applying competition law.¹³⁷ In a general aspect, it is an initiative to redefine the goals of union competition law. According to this view, the current interpretations of the concepts of Union competition law should be tested and reevaluated according to the recent developments in economic theory.

The effects of this approach might be seen in the establishment of the office of 'Chief Economist' who had the mission of providing on cases stemming from economics and econometrics during the application of Union competition law. The effect of technical economic data and analysis in shaping the overall competition policy of the Union has

¹³⁶ David. J. Gerber, op.cit., p.xi.

¹³⁷ Heike Schweitzer and Kiran Klaus Patel, op.cit., p.220.

increased and the Commission started to take into consideration the complex econometric evidence while assessing the market definition and the probable damage occurred on it.

The more economic approach might be evaluated to be a direct result of the consumer welfare understanding that has gained space against the dominating integration goal after the 1980s.¹³⁸ The achievement of the goal of consumer welfare required detailed analysis carried out by economic expertise.

It is assessed according to this approach that especially, the concept of "harm" needs further elaboration. The classical economic objective of the Union competition law had been to prevent damage to competition, not to the competitors. The effort to prevent damage to competition in some cases may not therefore require the prevention of damage to competitors. The more economic approach states that the two should be distinguished from one another and a more detailed economic analysis should be carried out to determine their overall effects.

Influences of this approach might be best seen in Court's annulment of several Commission decisions with regard to concentration control in several cases¹³⁹ for insufficient and economically incomplete reasoning. This approach directed the Commission to change the center of its decision making process towards protecting competition according to the consumer welfare criteria which is to be detected according to economic data in each specific issue.

The reasons of this approach should be evaluated within the framework of the shift in the influence of the schools in the Union competition law. This subject shall be analyzed thoroughly within the upcoming chapters.

¹³⁸ For details on the shift in the goals of European Union competition policy, See; Tim Frazer, "Competition Policy after 1992: The Next Step", *Modern Law Review*, Vol. 53, No.5, New Perspectives on European Law (Sep.1990).

¹³⁹ For instance; European Court Of First Instance, 6 June 2002, T-342/99, <http://curia.europa.eu/juris/showPdf.jsf?docid=104291&doclang=en>, (last Access: 06.01.2015), par.109-120, par.172-191, par.270-277.

6.4. Influences on European Union Competition Policy

It had been noted within the previous chapter that the two major goals which have shaped the Union's competition policy were the integration goal and economic goal. These detections should be evaluated together with the theoretical framework which the 'Schools' had provided throughout the historical stages of the Union.

As Article 85 and 86 entered into force by the Treaty of Rome, the interpretation of these two articles has generally been the product of a point of view from a certain perspective. It is inevitable that these interpretations were to shift as time went by and the political and economic structure of the Union changed as well.

As Gerber puts it;

These respective conceptions of competition law and visions of its role would compete for decades. Gradually, a juridical conception of competition law took hold, and it also became increasingly clear that competition law would play a major role in European integration.¹⁴⁰

While examining these competing visions, since the period which is to be scrutinized is more than 55 years, it would be more beneficial to divide this time period into three¹⁴¹ and analyze the philosophical and theoretical influences according to the major goals explained in the previous chapter. It is assessed that this methodology will be helpful in understanding the shift in the priorities and the interpretation either in the doctrine or the assessment of the Commission and the European Court of Justice.

The first time period is from 1958 to 1969; a period when the Enforcement Regime of competition law had been established by Council Regulation 17/62 and the European Commission, together with the interpretations of Court of Justice started to build

¹⁴⁰ David J. Gerber, op.cit., p.347.

¹⁴¹ Periodization scheme is adopted from; Andreas Weitbrecht, op.cit.

the foundations. Facing the challenges of creating a supra-national competition regime, a regime of no similar historical example and precedent, the Union had to apply to the principles and theoretical framework of the Freiburg School, in other words the Ordoliberalists.

The second period is from 1970 to 1989; a period when the major competences and powers of the competition system under Articles 81 and 82 had been tested. As noted within the chapter 2.3.1 of the thesis, the competition policy had long been sustained without a specific concentration control regime. The scope of Article 82 had been interpreted and expanded during this period to an extent that covered the control of concentrations as well. The enactment of the first concentration control regulation in 1989 marked the end of this era.

The third time period is from 1990 to this day¹⁴²; a period when both the first concentration control regulation numbered 4064/89 and the revised 139/2004 numbered regulation came into force. Cold War was over and a major globalization wave surrounded the world parallel to the developments in communication technologies. The Union had expanded from 15 Member States to 25 and the competition policy had to address different issues. The goal of integration had been a huge success after serious endeavors and now different concerns had started to arise. While becoming one of the two leading competition control jurisdictions in the world, the Union had been influenced by the principles of Chicago School while preserving its unique identity during this period. These periods shall be analyzed within the upcoming chapters.

6.4.1 The Period between 1958 - 1969: Influences of Freiburg School

In order to analyze the details of the period between 1958 and 1969, the first address to look first should be the Treaty of Paris which has been concluded in 1950. The main concern of the drafters of the treaty was not so much to put forward a detailed

¹⁴² Weitbrecht marks this era between 1990 to 2004. However, as the trend and theoretical influence as of 2004 is still effective in 2015, the end of the era has been expanded until this day of 2015.

competition law system but rather a structure that would be acceptable for all of the Member States.¹⁴³

The main idea of the 'Founding Fathers' -Jean Monnet for instance- was to create a 'High Authority' that would control the European Coal and Steel Industry for which deadly world wars had broken out. The idea not to repeat the past mistakes after world war one was at the center of this view. It was assessed that heavy market concentration and the cartelization of German industry were behind the reasons of aggression and Hitler's rise to power.¹⁴⁴

What was aimed therefore was the prevention of concentration of too much power in the hands of cartels within strategically important sectors. They had been considered to be a major obstacle against the integration process and the supranational character of the *Community* as well.

In order to achieve these goals, Articles 65 and 66 had been drafted. As Vernon puts it;

*"The reasons ... [for Articles 65 and 66] are to be found only partly in the drafters' adherence to competition as an economic way of life. More important, perhaps was the concern of the drafters that cartels [and concentrations], if permitted to develop, might become the real political power of the Community and might constitute a challenge to the Community's sovereignty."*¹⁴⁵

Maybe the key detection in Vernon's statement is the *economic way of life* sentence. This might be the simplest summary of the doctrine of the *ordoliberal*s and the

¹⁴³ David J. Gerber, op.cit., p.337.

¹⁴⁴ Adrian Kuenzler and Laurent Warlouzet, "National Traditions of Competition Law", Kiran Klaus Patel and Heike Schweitzer (Ed.), in **The Historical Foundations Of EU Competition Law** (89-124), Oxford: Oxford University Press, 2013, p.97.

¹⁴⁵ Raymond Vernon, "The Schuman Plan" [Electronic Version], *The American Journal Of International Law*, April 1953, Volume 47, No 2, (183-202), foot note 43.

'Freiburg School'.¹⁴⁶ These ideas had been the product of the political and social crisis of the Weimar Republic and of Nazi Germany. The Ordoliberals thought that the main reason lying behind the failings of 1920s and the Nazi power was the heavy concentration and misuse of power. After a thorough and detailed analysis they came to the conclusion that the lack of an effective and enforceable legal framework led to the economic, social and political corruption in Germany and that it could only be prevented by a strong legal system which prevented the accumulation and misuse of private economic power. It should be noted that their only focus was not just upon these economic and political failures but also on the theoretical and intellectual failures in perceiving them. They strived to make the flaws clear so that they would never repeat in the future.

While searching for answers to these problems, they applied to the basic values of liberalism for guidance but they did not simply borrow them. They did not desire to go on with the already consumed and corrupt institutions and concepts of the past. Therefore, they added additional elements that transformed the liberal tradition.

The ordoliberals' aim was to lay the foundations for a different kind of society. A society in which individuals could be protected from unfair state intervention. A society in which concentration of political power could be prevented by a maximized participation in the public decision making. Gerber summarizes the ordoliberal vision of society by "the rejection of the past and by the search for a 'third way' between democracy and socialism."¹⁴⁷ The ordoliberals sought to protect individual freedoms through checking the authority of the public institutions since their power had a natural tendency to be misused against individuals.

Ordoliberals' most important influence upon the Community competition law had probable been about the role of economy in the society. At a period where there had been no precedent of a supra-national competition law, at a period when neither the drafters of the competition provisions in the Paris and Rome Treaty nor the 'Founding Fathers' had

¹⁴⁶ For a detailed historical Freiburg School analysis, David J. Gerber, *op.cit.*, pp.232-265.

¹⁴⁷ *Ibid.*, p.239.

been totally sure as to which example they should take as a model for this giant initiative, they had enlightened the path for the establishment of the foundations of a European wide competition law.

The two liberal principles that they had accepted were that competition is necessary for the economy and that economic freedom is an essential accompaniment for political freedom. They defended the idea that private decision making in the economy based on the market realities and values would constitute a more productive, more dynamic and healthier economic structure and that this would reduce the State's intervention and the power of government within the economy. The Ordoliberals claimed that these two principles would protect Europe from the repetition of the totalitarian disasters.

But it was not sufficient for the Ordoliberals to protect the individual against the state power. As noted before, it should be emphasized that the Ordoliberals did not defend a *laissez pare laissez faire* liberalism. A classical liberal would argue that a market, free of any outside intervention would promote economic growth and provide social welfare. The Ordoliberals on the other hand were for the idea that the state power was not the only threat to the well being of the individual. The German experience during the Weimar period had shown that concentration and misuse of too much economic power could also destroy the foundations of the society.¹⁴⁸

The State, stemming from its nature, held too much power that should be checked carefully for the sake of the individual. However, the State, again stemming from its nature, was also the only address to provide protection for the individual against the assaults carried out by private economic power groups. The Ordoliberals concluded that therefore, the State itself needed to be strong against the influences of private power and pressure groups.¹⁴⁹

¹⁴⁸ Ibid., p.240.

¹⁴⁹ Ibid.

The conclusion that should be drawn out of this theoretical framework is that the social goals played the most important role in the Ordoliberal philosophy and that they had a clear priority compared to the classical economic goals pursued by the general principles of competition. It would not be wrong to conclude that the Ordoliberals' main concern was humanistic rather than purely economic. This does not mean that the Ordoliberals did not aim at all to reap the benefits of economic growth and efficiency. Instead they claimed that the system that they had defended would create a fair and effective competition which would generate rapidly improving economic performance within the Community. They only stated that such competition should be regulated by law and the envisioned conditions to function properly.

These whole detections alone had not been an ultimate goal for the Ordoliberals but rather means to reach the broader goal of a plural, democratic and integrated society based on social security and social justice.

As Gerber puts it;

"For[the Ordoliberals] them, the economy was the primary means for integrating society around democratic and humane principles, but it could perform this role effectively only if it had certain characteristics. The market had to function in a way that all members of society perceived as fair and that provided equal opportunities for participation to all..."¹⁵⁰

These detections alone are sufficient to indicate the reasons why the drafters of the competition law provisions of Paris and Rome Treaty had been under such Freiburg influence. Their challenge was similar to that of the Freiburg School scholars. One had to revive a country devastated by war and establish the foundations of a democratic society while the other had the difficult task of integrating different peoples under a supranational umbrella and hold them together around humanistic principles.

¹⁵⁰ Ibid., p.241.

The great initiative of creating an integrated Europe required a solid and satisfactory theoretical framework and the Freiburg School provided so. The theory and practice caught together in the right place and the right time. The process of European integration served as a means to spread the Freiburg School values. Beginning from the earliest stages of European integration initiative, the Freiburg School theoretically dominated the stage.

The ideal of an integrated Europe and a Common Market was not a Freiburg School dream, but Ordoliberals contributed enormously to the achievement of these goals with their intellectual support. It should be repeated once again that general Freiburg School principles and goals were very well suited to the goal of European integration.¹⁵¹ This hard mission required a well functioning market economy, well regulated however by rule of law. This principle, being at the heart of the Freiburg School ideas, was exactly what the 'Founding Fathers' were looking for. The envisaged system where a Union wide competition law accompanies the market and turns it into a means for social integration lies at the heart of the Ordoliberal idea and Freiburg School and it turned out to be a great success as years passed by.

Gerber states that without an appreciation of ordoliberal concepts, the economic policy in the Union can not be understood and is likely to be misunderstood.¹⁵² It would not be wrong to conclude that if it had not been for the Freiburg School and the Ordoliberals, the great integrated Europe initiative would not have been such a success.

6.4.2. The Period Between 1970-1989: The Test of Freiburg School

The second period which is to be scrutinized is from 1970 to 1989. This is a period where the crucial foundational period of the Community and a community competition law is over. In 1973, United Kingdom, Ireland and Denmark joined the European Economic Community. Despite the fact that the doubts and the concerns about the future of the

¹⁵¹ Ibid., p.264.

¹⁵² Ibid., p.265.

Community 'initiative' had proven wrong, it was still early to speak about a certain success. The Community still had to face difficult phases throughout the 1970s and the first half of the 1980s. Weitbrecht evaluates this as the reason lying behind the relatively slow development during this period.¹⁵³

Freiburg School had seen a means to protect the economic freedoms of the actors of the business world in Article 85 of the Treaty. The difference between hardcore cartels and forms of economic cooperation had not been fully appreciated yet. Despite the fact that it was not the Commission's priority, some hardcore cartel cases had still been prosecuted. The results were arguable. Fines were relatively low and it was hard to uncover the cartels. However, with the intention of providing the economic environment that the Freiburg School had envisaged, the Commission took the necessary steps and issued block exemptions of vertical restraints for instance.¹⁵⁴

The fascinating developments occurred within the field of Article 86. Much of Commission's focus had been upon this Article as the scope and limits of this Article had been expanded and interpreted in such a way that gave the Commission and The Court of Justice -and the Community in general- the upper hand against the Member States in a very 'polite' and 'silent' way. It might have been a somehow risky initiative since Member States could 'revolt' against the principles and concepts set forth by Court of Justice in *Continental Can*, *Hoffman / La Roche*, *Michelin I* and *Tetra Pak* cases. The expansion of the framework of this Article also made it possible for the Commission to control the concentrations as well. It should be remembered that there existed no specific concentration control regulations during that period despite serious studies, proposals and initiatives.

It soon appeared that these were temporary solutions though. It was soon evaluated that the Common Market goal was an uneasy task with both national competition law systems and a Union Competition Policy sometimes conflicting with each other. Especially

¹⁵³ Andreas Weitbrecht, *op.cit.*, p.83.

¹⁵⁴ Commission Regulation 1983/83 on the application of Art.85 (3) of the Treaty to categories of exclusive distribution, [1983] OJ L173/1., Commission Regulation 1984/83 on the application of Art.85 (3) of the Treaty to categories of exclusive purchasing. [1983] OJ L173/5.

the lack of a Union wide concentration control mechanism started to emerge as a real problem. The then competition commissioner Peter Sutherland addressed the issue and stated that there was no way that the Commission could become the major competition law enforcing institution unless concentration control had solely remained within the hands of the national competition authorities.¹⁵⁵ His statement further continued with a concealed 'threat' that in case the Council remained reluctant to pass the proposed concentration control regulation, control activities had to be carried out by Article 85 of the Treaty in compliance with the Court of Justice's interpretation in *Philip Morris*.¹⁵⁶ This was a reaction against the clear legislative intent of the European Council not to grant the Commission the authority and competence to control concentrations. It soon proved out that the Council's efforts were in vain.

The period ended with the enactment of the Regulation numbered 4064/89. Concepts such as the *substantive test criteria* and the *creation or strengthening of dominant position* had all been borrowed from the German competition law. It should be noted that these concepts had also been the product of the Freiburg School theoretical framework.

Therefore, it might be concluded that the Freiburg School and the Ordoliberal ideas continued and even increased their influence within the competition law system of the Union even after passing the test according to time and the economic and political developments within the Union. Weitbrecht evaluates this adoption of concepts originally belonging to German competition law under ordoliberal influence as the *last triumph in what had been 30 years of Germanic influence on the development of European Union competition law*.¹⁵⁷

¹⁵⁵ Andreas Weitbrecht, op.cit., p.84.

¹⁵⁶ European Court of Justice, 17 November 1987, Joined Cases 142 and 156/84, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61984CJ0142>, (last access: 06.01.2015)

¹⁵⁷ Andreas Weitbrecht, Ibid.

6.4.3. The Period since 1990: The Success of Freiburg and Evolution into Chicago School

It is generally accepted that the modernization process of the Union competition law started in the middle of 1990s. Creation of an integrated market had remained as a major objective of the Union until the mid 1980s. During the period -between early 1970s and mid 1980s- which had been scrutinized within the previous chapter, competition law system of the Union had not changed significantly. As noted though, the pressure upon the Council for the enactment of a concentration control regulation resulted with the breaking of the Council's reluctance in granting the Commission the authority to act as the "exclusively competent" authority with regard to concentration control. This new development would definitely bring new dimensions within the relationship between the Union and the Member States. Therefore, the beginning of this period should be considered as the enactment of the Council Regulation on control of concentrations at last in 1989.

However, the starting point of Gerber with regard to this period is the Single European Act concluded in 1986.¹⁵⁸ He points out to the fact that this development brought a fundamental change within the relationship between the Union competition law and the national competition laws. He emphasizes the fact that all assessments and evaluations upon national competition laws started to take Union competition law system into consideration beginning from the conclusion of this Act.

The author of this thesis is for the view that the main shift in the Union competition mechanism had been the product of the "economic based analysis" which started with the concentration control procedure. It should be noted that this concentration control procedure had been regulated by the EUMR. This economic based control mechanism which took the concepts of market power, relevant market and the effects of the undertakings upon the market into consideration gradually resulted with the adoption of a more consumer welfare based competition law system under the influence of American Chicago School. A process of Americanization has begun and the Commission started to

¹⁵⁸ David J. Gerber, *op. cit.*, p.392.

have its own consumer welfare based interpretation. Therefore, it would be appropriate to determine the starting period of the influence of the American Chicago School with enactment of the EUMR.

The Chicago School basically states that the major purpose of competition law is to ensure that consumer welfare is not distorted by the activities of the undertakings and governments. A "more economics approach" objective, gradually started to become the major concern and center of the overall competition policy of the Union.

Some authors make a distinction as to the "old" and "new" competition law of the Union. The "new" competition law of the Union is generally claimed to have started as the Union adopted a more economic based understanding of competition policy after the enactment of the concentration control regulation. Schweitzer claims that this "new competition law" has benefited from the enlightenment of a 'more economic approach' and so focuses upon the goal of consumer welfare maximization. It has left behind the 'contaminated' goals of integration of the "old competition law."¹⁵⁹

There are various reasons for this shift in the Union's understanding. The most obvious reason is that the most important goal of integration had been somehow achieved in the 1990s as the barriers to free movement and free trade had been successfully eliminated. The dream of the 'Founding Fathers', an integrated Europe looked close and safe after serious concerns and threats. Further unification attempts were on the way as the Community leaders agreed upon the terms of Maastricht in 1991. In addition, waves of concentrations had made the undertakings and peoples of Europe more 'European' and less 'national'.¹⁶⁰ These developments resulted in a serious increase in the Commission's power and competence in confidently enforcing the enacted concentration control regulation.

Weitbrecht evaluates the Commission's new powerful status as follows;

¹⁵⁹ Heike Schweitzer and Kiran Klaus Patel, op.cit., p.207.

¹⁶⁰ David J. Gerber, op.cit., p.370.

"The ability of the Commission to pass judgment on the biggest mergers occurring in Europe, in fact in the world, catapulted the Commission into a position of power and importance that no competition agency in Europe had ever enjoyed."¹⁶¹

This change and restructure in the competition law system brought together several questions though. As the major goal of integration which had dominated the 40 years of Union had been left behind, the objectives of the Competition Policy of the Union needed a clear redefinition. The views of Chicago School had been a quick response to these searches. If the integration goal had been successfully achieved, the competition policy of the Union should then turn its face towards the classical objectives of competition law. It had been thought that several other benefits pursued by competition, which had been in the shadow of the integration goal, should now have been stressed.

These changes might best be seen in the statements of the then leader of the Union Commission Mario Monti;

"Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare. By supporting the competitive process, the Merger Regulation plays an important role in guaranteeing efficiency in production, in retaining the incentive for enterprises to innovate, and in ensuring the optimal allocation of resources. Europe's consumers have been the principal beneficiaries of the Commission's enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result."¹⁶²

In fact, Monti was so determined in pursuing these new goals that he had stated in a previous speech that even concentrations seriously damaging the positions of other

¹⁶¹ Andreas Weitbrecht, op.cit., p.84.

¹⁶² Mario Monti, "Europe's Merger Monitor", **The Economist**, November 9, 2002. <http://www.economist.com/node/1429439>, (last access: 06.01.2015).

competitors would be encouraged as long as the process results to the advantage of the consumers;

“The goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market... Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.”¹⁶³

This shift in EU Competition Policy can also be seen within the statements of Advocate General F.G. Jacobs within the *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG* case. These statements are important to indicate that these new goals have also been adopted by the Court of Justice;

It is important not to lose sight of the fact that the primary purpose of Article 8 [2] is to prevent distortion of competition -and in particular to safeguard the interests of consumers -rather than to protect the position of particular competitors.¹⁶⁴

This approach is approved by the statements of Neelie Kroes the then competition commissioner;

“...ultimately the aim is to avoid consumers harm. I like aggressive competition -including by dominant companies- and I don't care if it may hurt competitors- as long as it ultimately benefits consumers. This is

¹⁶³ Mario Monti, “The Future For Competition Policy in the European Union”, **Commission Press Release**, SPEECH/01/340, 10 July, 2001.

¹⁶⁴ European Court Of Justice, 26 November 1998, 7/97, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0007>, (last access: 06.01.2015) par.58.

*because the main and ultimate objective of Article 82 is to protect consumers..."*¹⁶⁵

It should be noted that the competition policy of the Union is still going on with this consumer welfare based objectives and interpretation. Akman criticizes the concept of 'consumer welfare' -or better to say the meaning given to the concept by the Commission and the Court of Justice- by stating that although the concept is referred as the ultimate objective of EU Competition Law, the mentioned and used concept in fact refers to the 'customer welfare'.¹⁶⁶ She suggests that the major aim of EU Competition Law should cover a 'total welfare' objective where the welfare of the producers is not neglected so as to they keep their motivation to invest and innovate.

It should be noted that these detections do not mean that the precedents of the previous periods of Court of Justice belong to the 'old competition law' and are invalid. Instead, the continuity of fundamental principles of competition law principles laid out by either the Commission or the Court of Justice has not been affected by the changing schools over time.¹⁶⁷ This is another proof that even from the very beginning, the Union competition policy has never departed from the universal values and principles of competition law philosophy in general and that it had a sound and strong character.

6.4.5. A Comparative Analysis of Turkish Competition Law

The Turkish competition law is generally following the framework of the Union Competition Law. This choice stems from the fact that Turkey's accession process has been a tool in the integration of Turkish economy with the world.¹⁶⁸ As the influences of globalization increase all around the world, the role and importance of Turkish competition law within the transactions that bear an international dimension increases as well.

¹⁶⁵ Neelie Kroes, "Preliminary Thoughts On Policy Review Of Article 82", **Speech at the Fordham Corporate Law Institute**, http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en, (last access: 06.01.2015)

¹⁶⁶ Pinar Akman. "'Consumer' versus 'Customer': The Devil in the Detail", *Journal of Law and Society*, June 2010, Volume 37, Number 2, p.343.

¹⁶⁷ Heike Schweitzer and Kiran Klaus Patel, op. cit., p.229.

¹⁶⁸ Uğur Özgöker, op.cit., p.91.

When the historical background of Turkish Competition Policy and Competition Law is scrutinized, it is obvious that the process is the product of the Turkish accession process. The three important documents with regard to Turkey's accession to the Union – namely Ankara Agreement concluded in 1963¹⁶⁹, The Additional Protocol concluded in 1970¹⁷⁰ and the 1/95 numbered Association Council decision- have provisions and commitments on Turkey's behalf to make Turkish Competition Law in compliance with the Union *acquis*.

As the 1/95 numbered Association Council decision eliminated the barriers against free trade between Turkey and the Union such as the taxes, tariffs and quotas. The need of synchronization of Turkish competition provisions with the Union *acquis* became such that the process resulted with the 4054 numbered Turkish Protection of Competition Act in 1994.¹⁷¹ The Act consisted of concepts and provisions generally adopted from the Union competition law and policy.

A look upon the economic structure of Turkey is mandatory at this point. One of the key arguments of this thesis is that the economic and material structure dominating Europe had paved the way for the emergence of a unique European Competition Law and a concentration control regime. It was noted within the “History of Concentrations” chapter that the general economic view in United States and Europe had generally gone hand in hand while there existed no strong evidence that economy of Turkey followed the concentration waves dominating the periods.

The economic view in Turkey, when the Act of Protection of Competition was enacted was in no way similar to that of the Union. Turkish economy in the 90s did not have the essential free competition conditions. A strong competition culture did not exist as

¹⁶⁹ Agreement establishing an Association between the European Economic Community and Turkey, (Ankara Agreement), O.J. C 113, 24.12.1973.

¹⁷⁰ Additional Protocol, O.J. C 113, 24.12.1973.

¹⁷¹ Rekabetin Korunması Hakkında Kanun, Kanun No: 4054, Kabul Tarihi: 07.12.1994, Yayımlandığı Resmi Gazete Tarihi: 13/12/1994, Numarası: 22140. English Text available at: <http://www.wipo.int/wipolex/en/details.jsp?id=3874>, (last Access: 06.01.2015).

the market had been generally dominated by either the State or few economic actors under the protection of the State.¹⁷² The State dominance in the economy and strict rules and barriers against a free market had started to be reduced since 1980s with aggressive economic reforms and restructuring.

However, the free market economy initiative which had started after 1980s had not resulted with a just and productive market functioning under the principle of effective competition. Not only consumers but also the entrepreneurs of the economy had to be protected against the damages of these trust-like structures. The need to regulate the markets and fix the flawed structure of the economy necessitated the protection of free competition through the enactment of a Competition Act.

This need coincided with the obligations stemming from the international agreements that concern Turkey's accession to the Union. These obligations and the overall market structure had generally been ignored as the law makers of Turkey did not consider the issue "urgent" until the Association Council decision made such reluctance impossible.

Therefore, unlike the Union, it is not possible to speak about a unique competition law and concentration control regime which had emerged as the products of a deep intellectual debate that aimed to bring solutions to economic and social problems in Turkey.

The Competition Act regulates the establishment of an independent national competition authority, its competences and the relevant procedure in the investigation and decision making process that it should comply with. The Competition Authority is indeed authorized to take effective measures to protect and provide free competition within the country. It has the sufficient economic resources and institutional independence necessary to fulfill such a comprehensive task.

¹⁷² Helin Berfin Akyüz, *op.cit.*, p.12.

However, probably because of the lack of intellectual debate that should have lied within the background of Turkish competition law, competition policy has not yet been integrated within the general legislation framework.¹⁷³ There is also a lack of public opinion upon the benefits and uses of competition, competition policy and the institutions. Because of the lack of conceptual debate, such as the scope of undertakings, the Act cannot be fully enforced against already existing State monopolies. This is a result of the fact that competition law in Turkey had not been the product of past struggles and experiences which strongly affected the public but rather a up-to-down regulation to fulfill the obligations stemming from international agreements.

This does not mean that there is no structural progress within Turkish economy and that competition law did not contribute to it. Aggressive privatization programs seriously reduced the State's share in the overall economy. The number and influence of private economic actors seriously increased. The Competition Authority in some cases took bold and effective decisions and contributed to the overall consumer welfare. The Authorities' efforts to provide a public wide conscience on competition law still continue with serious works and studies.

However, the structural habits and flaws still go on. The State still protects and supports its favorite "star companies" in giant civil engineering projects and provides enormous cash flow and advantages to them. The issue, although being at the heart of competition law, is not yet comprehensively addressed.

¹⁷³ Uğur Özgöker, *op.cit.*, p.91.

CHAPTER 7. THE DEVELOPMENT OF CONCENTRATION CONTROL IN EU AND TURKISH LEGAL ORDER

It is an interesting thing to notice that whole European Union *acquis communautaire* did not have any specific concentration control provision up until 1989. This should be the starting point for any discussion regarding the history of European Union's treatment for the control of concentrations.¹⁷⁴

As Banks puts it;

*“This omission of a merger control provision from the Treaty is not surprising, given European economic thinking at that time... Mergers –especially mergers across national boundaries- were seen as part of the process of European integration and as necessary to enable European industry to adapt to the new dimensions of the Common Market and to compete effectively against large foreign (notably American enterprises.”*¹⁷⁵

The control of concentrations, ever since the conclusion of the Treaty of Rome¹⁷⁶ in 1957 has been carried out by substitute, alternative and temporary solutions (namely Articles 81 and 82) until the need for a specific concentration control regime became so great and imminent that the end result of this era was the inevitable enactment of the first Council Regulation on concentration control; Regulation numbered 4064/89.

¹⁷⁴ Karen Banks, “Mergers And Partial Mergers Under EEC Law”, [Electronic Version] *Fordham International Law Journal*, 1987, Volume 11, Issue 2, 255-309, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1177&context=ilj> , (last access: 06.01.2015), p.256.

¹⁷⁵ *Ibid.*, p.257.

¹⁷⁶ Treaties Of Rome: EEC and EURATOM Treaties, Signed: 25 March, 1957, Entered into Force: 1 January 1958.

Jones makes a simple and clear distinction among Article 81 (101), Article 82 (102) and the European Union Merger Regulation by stating that Article 81 (101) deals with the joint conduct (these joint conducts being agreements, concerted practices or decisions) of two or more undertakings, which aim to prevent, restrict or distort competition while Article 82 (102) focuses on a single firm conduct (this single firm conduct being the abuse of a dominant position of an undertaking). Jones states that European Union Merger Regulation on the other hand deals with changes to the structure of competition resulting from corporate reorganizations between undertakings.¹⁷⁷ It should be noted that this is an understanding which makes the distinction according to the concept of ‘undertaking’. There were no such clear distinctions in the beginning of European Union Competition Regime. It required great amount of effort to build up a concentration control regime out of substitute provisions intended for different purposes.

Throughout this chapter, this era of substitute and alternative solutions will be scrutinized, together with the debates and discussions of the Member States on the status of the concentration control regime and also the failed initiatives to create a specific concentration control regulation.

Throughout other Chapters; the relevant Concentration Control Regulations and the latest initiative of the Union, on a more simplified concentration control regime, together with the political, economic and social circumstances which gave birth to them shall be analyzed.

7.1. Article 66 of the Treaty of Paris

As noted before; the period between the Treaty of Rome which was concluded in 1957 and the emergence of the 4064/89 numbered Merger Regulation in 1989, there existed no specific control of concentration provision within the entire European Union *acquis*

¹⁷⁷ Alison Jones. “The Boundaries of an Undertaking in EU Competition Law”, *European Competition Law Journal*, 2012, 8(2), p.301.

communautaire and that control of concentrations had been carried out via temporary and alternative solutions such as the elastic use and interpretation of other Competition Law provisions within the case law of European Court of Justice. During this period, the Commission, with all its other difficult tasks aside, hand in hand with the European Court Of Justice, created a Union wide Concentration Control regime (out of no specific provision, regulation etc, making use of no previous similar experience) that nobody can deny the contributions to the integration of the Member States and the formation of a Common Market.

What is more interesting than all this hard endeavor is the fact that the very same contracting states, in the Treaty of European Coal And Steel Community¹⁷⁸ (Treaty of Paris) concluded in 1951, had included a specific and detailed control of concentration provision in the Treaty.

Paragraph 1 of Article 66 of the Treaty of Paris; although it did not dare to explain the details of the concept of concentration, stated that any transaction that would have in itself the direct or indirect effect of bringing about a concentration within the territories of the contracting member states should be submitted to the prior authorization of the High Authority.

The article goes on to state that this obligation of submission is valid and effective through a wide range of circumstances including the cases where the transaction is carried out by a person or an enterprise, or a group of persons and enterprises, where the transaction concerns a single product or different products and whether the transaction occurs in the form of a merger, acquisition of shares or assets, loan, contract or any other means of control.

The paragraph further states that the details of the control procedure and the scope of the concept of control is deemed to be regulated by a Regulation drafted by the High

¹⁷⁸ Treaty Establishing the European Coal And Steel Community, Signed: 18 April, 1951, Entered Into Force: 23 July 1952, Expired: 23 July 2002.

Authority after consultations with the Council. It can be said that beginning from a very early phase, the idea of granting the competence and the jurisdiction to a High Authority, to determine the details of the concentration control procedure has been embodied within the article.

Despite the fact that article 66 does not directly pronounce the term of “dominance” (except its last paragraph) as is widely used now within the European Union Competition Law; it states within paragraph 2 that the High Authority will grant authorization to the concentrations that do not influence prices, control or restrain production or marketing, or impair the maintenance of effective competition in a substantial part of the market for such products, or evade the rules of competition resulting from the application of the Paris Treaty, by establishing an artificially privileged position involving a material advantage in access to supplies or markets. The paragraph further states that the High Authority will take into account the size of the other enterprises of the same nature within the Member States to correct the disadvantages resulting from the inequality in the conditions of competition.

Article 66 grants the High Authority the power to subject her authorization of the concentration transaction to any condition that is appropriate for the purposes of the Article and to impose fines and address to the High Contracting Member States the recommendations necessary to obtain. The High Authority has been given the power to establish the illegal character of a concentration through a decision and order the separation of the enterprises or assets, concentrations of which had been found harmful and illegal. Any persons with direct interest had been given the right to appeal against such High Authority decisions before the Coal And Steel Community Court. This appeal process would suspend the effects of the High Authority decision until a final ruling by the Court.

One interesting point is that the High Authority may itself take the measures of execution and suspend the exercise of the rights attached to the unlawfully acquired assets or to the unlawfully concentrated enterprises, in case the interested parties to the

concentration either fail to fulfill their obligations or ignore the recommendations foretold by the High Authority.

The seventh paragraph of the article states that to the extent necessary, the High Authority is empowered to address to public or private enterprises with a dominant position in the relevant market, constituting obstacles against effective competition, any kind of recommendations which aim to prevent the use of such dominant position for purposes contrary to the purposes of the Treaty. The paragraph further states that in case such recommendations are not fulfilled satisfactorily within a reasonable period, the High Authority will take the necessary steps and precautions stated within the Article. Although the wording of the paragraph never includes the term and concept of “abuse of a dominant position” as it is stated within the later Article 102, the mentioned and emphasized circumstances and breaches against which necessary measures are to be taken are pretty much alike. Article 66, as noted before, comprises several similar concepts and terms with the modern European Concentration Control Regime.

It is very interesting to see that this very article 66 of the Paris Treaty, comprised a lot of other major vital similar elements of the current European Union Competition Law as well, upon which a huge doctrine has been formed after years of case-law and experience; such as the concept of control, the concept of relevant market and market power, the procedure of submission before a High Authority before the authorization of the concentration transaction, the concept of abuse¹⁷⁹, the concept of dominant position etc.

Parallel to this detection; and actually going far beyond it; it would not be wrong to conclude that this very article might well have comprised the seeds of the later concentration control regime, foreseen by the “Founding Fathers of the Union” and which had a chance to be applied only decades later through various concentration control regulations.

¹⁷⁹ David J. Gerber states that this “abuse” concept within the article is actually different than the concept within “the abuse of dominant position” and that it corresponds to a basic abuse meaning that had been developed before the 1929 Depression.

Despite the fact that some authors claim the opposite that Article 66 did not have a direct influence on the evolution of the European Union Concentration Regime and that the European Coal And Steel Community experience did not play a major role in the enactment of the upcoming merger control regulations at the Community and national levels¹⁸⁰; it is a fact that the European Coal and Steel Community experience, (even though it might be true that it did not have a strong effect due to the lack of a strong Community wide policy enforcing the concentration control provisions) became a central point of reference during the Treaty of Rome negotiations.¹⁸¹ This determination should always be beared in mind while analyzing the historical evolution and application of Article 85 and 86 within the European Concentration Control Regime.

7.2. Article 85 and 86 of the Treaty of Rome

It was noted within the analysis of Article 66 of the Treaty of Paris that the article contained rules on concentration control and that it created power and jurisdiction for the High Authority to prevent the misuses of dominant position. The wording of the Article contained within itself the seeds of the future European Union Concentration Control Regime and therefore it had similarities with the later Article 86 of the Treaty of Rome.

7.2.1. The Reasons behind the Exclusion of Specific Concentration Provisions

A comparison between Article 85 of the Treaty Of Rome and Article 65 of the Treaty of Paris indicates similarities as well. Both articles, generally speaking prohibit agreements in restraint of trade. It would not be wrong to conclude that Article 65 of the Treaty of Paris somehow corresponds to Article 85 of the Treaty of Rome.

It should be emphasized here that the central goal with the drafting of these articles was to control the power of the undertakings -enterprises as mentioned within the text- especially within the heavy industry sectors.¹⁸² One view supports that the inclusion of these rules had been motivated by the desire to prevent the resurrection of the German coal

¹⁸⁰ David J. Gerber, op.cit., p.340.

¹⁸¹ Kiran Klaus Patel and Heike Schweitzer, op.cit., p.5.

¹⁸² David J. Gerber, op.cit., p.337.

and steel industry giant, whose commercial character and ability to concentrate easily made the inclusion of such concentration control provisions necessary.¹⁸³

Similar to this view, Vernon states that;

*The reasons... [for Articles 65 and 66] are to be found only partly in the drafters' adherence to competition as an economic way of life. More important, perhaps, was the concern of the drafters that cartel [and concentrations], if permitted to develop, might become the real political power of the Community and might constitute a challenge to the Community's sovereignty.*¹⁸⁴

In any case; it is clear that the drafting of the two articles aim to protect competition in order to prevent the concentration of too much power in the hands of European (mostly German) enterprises.

Stemming from the fact that concentration control and the prevention of abuse of a dominant position were major priorities of Article 66, it would not be wrong to conclude that this Article was the product of a strong American influence, since it comprised concepts, brought forward within Sherman and Clayton Act of the United States, being translated into French administrative terms.¹⁸⁵ The reflections of a serious anti-trust approach of American Competition Law are indeed pretty obvious.

But if the High Contracting Parties to the Treaty of Paris cared so much about the prevention of cartels and dominant positions within the Coal And Steel Industry, what was the reason why they got away from this approach and the goal of achieving it via concentration control and that they did not include any specific concentration control provision within the Treaty of Rome?

¹⁸³ Andreas Weitbrecht, op.cit., p.82.

¹⁸⁴ Raymond Vernon, op.cit.

¹⁸⁵ Andreas Weitbrecht, op.cit., p.82.

One answer to this question is explained due to the German influence upon the Treaty. This one possible answer is that Germany was just about to conclude the legislation of its own national competition law during the very same days of the entry into force of the Treaty of Rome and that legislation had a specific concentration control regime within. This view suggests that Germany, being a High Contracting Member State of the Treaty, strictly regulating the control of concentration procedure herself, might have created the idea that there existed no necessity anymore to regulate concentration control through a Member State wide regulation. This view also asserts that this result was achieved through the influence of the Freiburg School, in other words the ‘Ordoliberal’, according to whom the *establishment of a competition law was an important part of the “economic constitution”, which also includes the freedom to conclude contracts and the guarantee of property rights and which insures the economic action of every actor.*¹⁸⁶

Some authors on the other hand correlate the omission of a specific merger control provision to the European economic thinking at that time. Banks asserts that the main economic goal of the then European Economic Community was to provide economies of scale in an enlarged European market and concentrations were seen as a tool to achieve this goal.¹⁸⁷ This is a period where the Competition Policy of the Community was evaluated to be a huge part of the overall economic policy of the community that would enable the European industry to adapt to the new circumstances of a Common Market and compete against large American companies.¹⁸⁸ The Contracting Member States might refrain from including concentration control provisions which had the potential to prevent the formation of such effectively competing undertakings.

In any case, it is a reality that should not be ignored that the European Competition Policy in general had to be elastic to satisfy the need to stand against the challenges of a newly formed and never ever tried before Union. This omission therefore should be judged

¹⁸⁶ Ibid., p.82.

¹⁸⁷ Karen Banks, op.cit., p.257.

¹⁸⁸ M. Hans von der Groeben, “Competition Policy as Part of Economic Policy In The Common Market”, **Commission Press Release**, 14 June 1965, http://aei.pitt.edu/54163/1/IP_%2865%29_111.pdf, (last Access: 06.01.2015)

according to the upcoming developments within both European Competition Law in general and specifically within the concentration control regime. Throughout the upcoming chapters, this elasticity and the practical solutions of the Union to overcome the hardships that stem from the absence of a separate concentration control regime shall be scrutinized.

7.2.2. The 1966 Memorandum

The absence of a specific concentration control mechanism and concentration control provisions within the Treaty of Rome raised questions within the European Economic Community. More importantly, Article 86 was very little used during the EEC's first decade stemming from the fact that the concept of "abuse" was vague and that officials of the Commission and judges of the European Court were reluctant to apply vague concepts.¹⁸⁹

The major aim of the Community, focusing on the creation of undertakings, effective and strong enough to compete with its American opponents in the market, there existed no strong incentive to apply concentration control provisions which would prevent the birth or growth of European Champions or which would hamper those undertakings' ability to compete internationally.¹⁹⁰

The lack of enforcement under Article 86, resulting from either the economic understanding of the Community during the early 1960s or the gap within the scope and content of the concepts within the provision, directed the Commission to attempt to establish a theoretical framework of the concepts within the provision and their applicability to certain concentration transactions.

After a debate upon the inadequacy of Article 85 and 86 to satisfy the need for a practical mechanism that aims to control the probable "abuse" concept by a dominant undertaking, the Commission decided to address the question through asking academic

¹⁸⁹ David J. Gerber, *op.cit.*, p.356.

¹⁹⁰ *Ibid.*

experts to prepare a report upon the relationship between the policy on Article 85, 86 and the policy on the concentration of undertakings.¹⁹¹

7.2.2.1 The Treatment of Article 85 in the 1966 Memorandum

Briefly to say; the Report stated that Article 85 could not be applied to concentrations. The Report defined the concept of concentration to cover any kind of transaction in which several firms are brought together under a single economic management at the expense of their economic independence. The report even counted several types of concentrations such as the acquisition of holdings by one company in another, the total or partial acquisition of another company's capital assets, and the merger of two or more legally independent companies into a new company.

The Report counted several reasons why Article 85 was not a proper tool to use for the Control of Concentrations: One major concern was that the use of Article 85 would result in the prohibition of too many concentrations since Article 85 prohibited the restrictive agreements as a rule. Concentrations on the other hand had been exceptionally forbidden when they result in an unacceptable degree of market power. One other concern was upon the boundaries of the concept of agreement. The concept of "agreement" with its meaning set forth within Article 85 could not be evaluated to occur between the undertakings which are the relevant parties to a concentration. Such an approach would not be reasonable since the 'agreement' between the concentrating parties do not refer to the concept of an 'agreement' that occur between the Parties who in bad faith come together to be a part of a transaction or concerted practice that would restrict and impede effective competition. One other concern was upon the exemption criteria set forth within Article 85 (1). The Report stated that the exemption criteria set forth within Article 85 (1) could not be valid for concentrations since the effects of the concentration cannot be evaluated and measured beforehand like the concerted agreements. The indispensability criteria of Article 85 (3) (a) on the other hand has also been construed to be inapplicable since concentrations

¹⁹¹ EEC Commission, Memorandum sur le Probleme de la Concentration dans le Marché Commun, 1 December, 1965, *Revue Trimestrielle de Droit Européen* 651-677.

require a complete elimination of competition between the concentrating parties. There is therefore no way for the Commission to detect the less restrictive means or some other alternative that would realize the achieved benefits instead of a concentration. The Report also concluded that the ‘prohibited agreements’ being absolutely void ever since its beginning’ status, regulated within Article 85 (2) is totally against the concept of concentration. Application of such a sharp principle would create a fear and reluctance on behalf of the concentrating parties to enter into such risky transactions.¹⁹²

While making these detections; the Report took into account the system and the objectives of Article 85. Therefore; the Report was for the view that the Article was drafted with the intention to prevent the restrictions on effective competition with regard to the obligations concerning the market practices. That was the reason why prohibition of such practices was in principle; with exceptions fulfilling specifically determined conditions. Concentration control on the other hand aims to control the market structure in general; it is not concerned with the separate agreements of undertakings concerning their daily businesses. Article 85 however, aims to prohibit competition restricting agreements even when no large amount of market power is involved since they too are contrary to the public interest.

This approach stems from the understanding that greatest efficiencies are deemed to be realized through decentralized planning when every actor within the economy makes their entrepreneurial decisions and economical choices with a free and undamaged will. The practices set forth within Article 85 however; agreements to fix the prices, agreements of market sharing etc. are condemned from the very beginning, principally considered to bring inefficiencies and damage the public good immediately. It would not sound just to treat concentrations, majority of which begins with only pure economic purposes and motivations to provide efficiencies to the concentrating parties, the same way as the concerted practices of Article 85, the Report concluded.

¹⁹² Karen Banks, *op.cit.*, p.258.

7.2.2.2. The Treatment of Article 86 in the 1966 Memorandum

An analysis of the Report's treatment of Article 85 revealed that the Report's approach included a distinction as to the scope of the concept of "agreement" and what the wording and the objectives of the Article aim to achieve.

Since Article 85 applies only to agreements which govern the market behavior of undertakings but not to agreements which aim to change the organizational structure of the mentioned undertakings, it was excluded by the Report, from being applied as a part of the concentration control mechanism of the Community.

What then was the Report's treatment of Article 86 since this Article aimed to prevent the misuse of the structural and organizational change and power of an undertaking?

Briefly to say; the Report concluded that this article could apply to concentrations, where the end result of the transaction was the monopolization of the market. The Report emphasized that what was prohibited was not acquiring a dominant position but rather the misuse and abuse of that dominant position. While pointing out this detection however; The Report states the fact that in case an undertaking, already having a dominant position within the relevant market, concentrates with another undertaking; the end result of the transaction being the total elimination of competition within that market, there needs to be an automatic assumption that there is an abuse.

This approach sounds reasonable since the very likely and probable effects of such a transaction are similar to that of a concerted practice regulated under Article 85 of the Treaty but that these effects stem from a serious structural change within both the undertakings concerned and the market.¹⁹³ The Report stressed the fact that such a monopolistic situation removes the motivation of technical progress and that it leads to a limitation of production and uncontrollable increase in the prices with the aim of reaping

¹⁹³ Karen Banks, *op.cit.*, p.264.

maximum profits to the detriment of consumers since there is no effective competition and an oligopolistic competition environment.

The Report's understanding, might be criticized from several points, first of which is its being inconsistent.¹⁹⁴ Despite the stress within the Report that the similarity of the heavy results stemming from a structural change foreseen within Article 86, with the heavy results that stem from concerted agreements of the undertakings foreseen within Article 85, made the inclusion and application of Article 86 within the Community's concentration control mechanism necessary; the Report clearly excludes the application of Article 85 contrary to these very similar outcomes. These similar heavy results have not become an enough ground for the application of Article 85 provisions within control of concentrations. Although Article 86 clearly did not contain all of the mentioned obstacles which prevented the inclusion of Article 85, the question of whether similar obstacles lying within Article 86 could have also made inclusion impossible has not been properly debated.

One other criticism might be about the facts that no clear contribution or explanation upon the concepts of dominance and abuse; as the wording of the Article 86 necessitates, is given by the Report. What is understood upon the analysis of the Report on Article 86 is that, reaching a dominant position after lawful commercial activities and agreements is legal unless it results with a total elimination of competition.

Still, it would not be wrong to conclude according to these criticisms that the limits of lawful dominance and unlawful dominance and the answer to the question of where the limits of abuse start and end had been still unclear after the Report. It should not be forgotten however that this approach might be a conscious act of the Commission to leave the task of drawing the conceptual framework to the case law of the European Court of Justice.

Despite these criticisms, there are other views that the interpretation within the Report contributed a lot to the conceptual framework of the Community competition law

¹⁹⁴ Ibid., p.266.

and that this interpretation has been tested afterwards (and become successful) by the European Court of Justice. Gerber, for instance states that the Report contained two basic principles concerning the interpretation of the abuse concept which established the framework within which subsequent developments took place in the following years. The first, being a starting point; was that abuse occurs where a dominant firm utilizes the possibilities that stem from its position of dominance to obtain benefits that it could not have benefited if there had been effective competition within the Market.¹⁹⁵ The second principle was that there existed an abuse in case the activities of the dominant undertaking had been contrary to the objectives of the Treaty.

7.3. Relevant Case Law

The findings of the Report and the Commission, concerning the transactions which have been evaluated within the scope of Article 85 and 86 would soon be tested before the European Court of Justice. After the analysis of the Report's treatment of Articles 85 and 86 within the previous chapter, the European Court of Justice's interpretation and understanding concerning the Commission's findings and theoretical framework shall be scrutinized throughout this chapter by taking a look upon some of the cornerstone cases.

7.3.1. Continental Can

As noted before, the Report's findings and the Commission's understanding of Article 86 were soon to be tested before The European Court of Justice. The Continental Can decision of the ECJ¹⁹⁶ provided the vital support for Article 86 to truly come to life and become an effective tool. Until the Continental Can decision, application of European Union competition law was only limited to Article 85.¹⁹⁷ The Court confirmed the Commission's perspective that there could have been several different forms of abuse of a dominant position and that abuse may occur in the form of concentrations.

¹⁹⁵ David J. Gerber, op.cit., p.357.

¹⁹⁶ European Court of Justice, 21 February 1973, 6/72, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61972CJ0006>, (last access: 06.01.2015).

¹⁹⁷ Sigfrido M. Ramirez Perez and Sebastian van de Scheur, op.cit., p.38.

The facts of the case might be summarized as follows: American based manufacturer Continental Can, carrying out activities in the market for light metal containers for meat and fish products possessed a dominant position according to the Commission. The Commission held that the undertaking abused that dominant position as it took control of the largest undertaking operating in the same field in Benelux, only one year after it had taken control of another undertaking in the same sector in Germany, through its European subsidiary Europemballage.¹⁹⁸

Continental Can was a cornerstone in the Union Competition Law in illuminating the scope and aims of the concepts. The Court confirmed the fact the goals of articles 85 and 86 had been the same. Both articles aimed for the maintenance of effective competition within the Common Market.¹⁹⁹

An important detection made by the Court was that the list of abuses in article 86 had been counted in an exhaustive manner. How abuse might occur therefore is an issue that should be carefully analyzed in each specific case. If the already existing dominant position of an undertaking is strengthened at such a level that the consumer's freedom of choice and the objectives of the Treaty are clearly endangered, irrespective of any fault, the undertaking might be considered to abuse its dominant position.²⁰⁰ With these findings, the Court had confirmed the Commission's understanding and approach that since the concept of abuse had not been clearly defined in Article 86, it became necessary to take account the objectives and purposes of the Treaty.²⁰¹

The cornerstone interpretation of the Court was her rejection of the view that Article 86 was only concerned with the exploitative behavior of a dominant undertaking.²⁰² Instead, the Court held that structural changes in the market could also be evaluated within

¹⁹⁸ Ibid., p.35.

¹⁹⁹ Continental Can Judgement, par.11.

²⁰⁰ Ibid., par.12.

²⁰¹ Ibid., p.226.

²⁰² For the Court's current interpretation of Article 86 (Article 102), see; Nazzini, Renato. "Google and the (Ever-stretching) Boundaries of Article 102 TFEU", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.5, pp.301-314.

the scope of that article. The Court held that the strengthening of the dominant position of an undertaking may also be an abuse within the framework of Article 86 and be prohibited “*regardless of the means and procedure by which it is achieved*”.²⁰³

It should be noted that the wording of the judgment is indeed very carefully chosen. By emphasizing the fact that abuse shall be prohibited regardless of the means and procedure by which it is achieved, the Court paved the way for Article 86 to be applied for control of concentrations in case there is an elimination of residual competition.²⁰⁴

7.3.2. Hoffman-La Roche

The legal status established by the Continental Can judgment proved to be difficult to apply in different cases though. In the Continental Can issue, the market share of the undertaking concerned were nearly up to 90 %. The Commission and The Court had evaluated a causal link with that much of a market share and the concept of abuse of a dominant position. What then would occur with regard to concentrations that would actually distort competition but not reach such enormous market shares to fall within the scope of Article 86?

The Court’s reaction against this question was expanding the scope and limits of the abuse criteria. In Hoffman-La Roche²⁰⁵, the Court stated that the concept of abuse was an objective concept relating to the behavior of an undertaking in a dominant position.²⁰⁶ The degree of dominance however should be such that it may influence the structure of the market where, as a result of the very presence of the undertaking concerned the degree of competition is weakened. Their dominance should be such that it shall have the effect of

²⁰³ Ibid., par.29.

²⁰⁴ Karen Banks., op.cit., p.270.

²⁰⁵ European Court of Justice, 24 May, 1977, 107/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0107>, (last access: 06.01.2015)

²⁰⁶ For details upon the concept of ‘abuse’ within the context of Article 102 and a criticism of the Union Courts' interpretation of the concept, See; Pinar Akman, **The Concept of Abuse in EU Competition Law: Law and Economic Approaches**, First Edition, Hart Publishing, 2012.

hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.²⁰⁷

Although the facts regarding Hoffman La Roche had not been about concentration control, the expansion of the abuse concept has marked the beginning of a steady interpretation by the Court even in concentration cases that fall within the scope of Article 86.

7.3.3 BAT Ltd and RJ Reynolds

It was noted within the 1966 Memorandum that Article 85 had not been evaluated to be a proper tool for concentration control. This was the dominant understanding for a long time within the Union. Article 86 had been easily used to catch concentrations by undertakings in a dominant position in *Continental Can*. However, it took much longer for the Courts to apply Article 85.²⁰⁸

The Court, in the *BAT and Reynolds v. Commission* judgment radically changed the traditional view that article 85 could not be applied to agreements even though such agreements ended up with the acquisition of ownership of the shares of the undertaking that is a party to the agreement.

Furse summarizes the facts and raising issues of the case as follows:

The issue was whether Article 81 could be applied to an agreement between cigarette manufacturers including Rembrant Group, which had a controlling interest in Rothmans, and Philip Morris which would have given Philip Morris a strong degree of control over the Rembrant tobacco division²⁰⁹.

²⁰⁷ Hoffmann La Roche Judgement, par.91.

²⁰⁸ Paul Craig and Grainne de Burca, *op.cit.*, p.1027.

²⁰⁹ Mark Furse, **The Law of Merger Control In The EC and The EU**, First Edition, Hart Publishing, 2007, p.5.

The Court held that under certain circumstances, a share acquisition agreement can also fall within the scope of Article 85.²¹⁰ The Court concluded that similar agreements which lead to concentrations in the market could be reviewed in the light of the application of Article 81.²¹¹

These cases indicate that the lack of a specific concentration control regulation pushed the Commission and the Court to use alternative methods to both increase their effect upon Member States and react to the phenomenon of concentrations which impedes the overall goal of integration of the Union and an establishment of a Common Market.

7.4. The Proposed Regulation on Concentration Control

The apparent inadequacy of Article 86 in concentration control and the need for a specific concentration control regime led the Commission to fill this gap and submit before the European Council a proposal for a regulation on concentration control shortly after the Continental Can judgment in 1973.²¹² The justification of the proposal had been indicated as the growing number of concentrations in the Union.²¹³ The process of restructuring of European Industry gave rise to new merger waves²¹⁴ –as noted within Chapter 1.4- and they had a serious potential to distort the competition. The limited powers of the Commission and the broad interpretations of Article 85 and 86 started to be insufficient to deal with these transactions.

The legal ground of the proposal had been indicated as Article 235, under which the Community might have given itself the competences necessary for the attainment of the

²¹⁰ For the recent interpretation of the European Court of Justice of the boundaries of Article 101 (ex Article 85), See; Louis Vogel, "The Recent Application of European Competition Law to Distribution Agreements: A Return to Formalism?", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.6.

²¹¹ Mark Furse, op.cit., p.6.

²¹² Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings, O.J. C 92/1 (1973)

²¹³ For details on the Proposed EEC Merger Regulation; see; Franz G. A. Van Kraay, "Proposed EEC Regulation On Control Of Mergers", [Electronic Version] *The International and Comparative Law Quarterly*, April 1977, Vol.26, No.2, 468-480. <http://www.jstor.org/stable/758469> (last access: 06.01.2015)

²¹⁴ Horst Satzky, "The Merger Control Regulation of the European Economic Community", [Electronic Version] *The American Journal of Comparative Law*, Autumn 1990, Vol.38, No.4, 923-948. <http://www.jstor.org/stable/840617> (last access: 06.01.2015), p.925.

objectives of the Treaty where the Treaty itself does not grant the necessary competences. One other legal ground had been Article 3 (f) of the Treaty, which required the Community to establish a system ensuring that competition in the common market was not distorted.²¹⁵

The Proposal was actually the ‘first draft version’ of the 4064/89 Regulation, without the amendments proposed –but again not enacted- in 1982²¹⁶, 1984²¹⁷ and 1986²¹⁸. Its scope was determined according to the aggregate turnover thresholds.²¹⁹ The incompatibility with the common market criteria would be determined according to the acquisition of power to hinder effective competition.²²⁰ One interesting provision is the possibility of “individual exemptions”.²²¹ According to the Proposed Regulation, exemptions might have been granted in relation to a concentration that is indispensable to the attainment of a priority of the Community. The procedural rules included similar time limits and prior notification condition.

Despite the fact that Member States had acknowledged the necessity of a Community wide concentration control regime, they disagreed on the boundary between EU and national concentration control and the precise form of EU control.²²² The main controversies seemed to focus upon the “excessive” use of Article 235, whether or not public enterprises should be included within the scope of the Regulation or not, the requirement of prior notification and the possible conflicts between the National Competition Authorities and the Commission.²²³

The political opposition, stemming from the reluctance of Member States, resisted the Commission’s pressure for the enactment of a concentration regulation for almost 20 years. Only at the end of 1989, the Council finally agreed upon a Regulation which only

²¹⁵ Karen Banks, *op.cit.*, p.279.

²¹⁶ O.J. C 36/3, 1982

²¹⁷ O.J. C 51/8, 1984

²¹⁸ O.J. C 324/5, 1986

²¹⁹ Art. 1(2)

²²⁰ Art 1(1)

²²¹ Art 1(3)

²²² Paul Craig and Grainne de Burca, *op.cit.*, p.1046.

²²³ For details; see; Karen Banks, *op.cit.*, p.283-284

allowed the Commission to take into account ‘the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition’.²²⁴ The Council’s unofficial policy of inaction against the enactment of a Union wide concentration control regime and regulation had been finally overcome.

7.5. Regulation 4064/89

The Recital of the Council Regulation (EEC) No:4064/89, states that; whereas articles 85 and 86, while applicable according to the case-law of the Court of Justice to certain concentrations, are not, however sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. The Council also acknowledges in the Recital the goal of completion of internal market in 1992 and that a concentration control system is essential in instituting ‘a system ensuring that competition in the common market is not distorted’. In order to establish such an instrument, it is stated that a new legal instrument should be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community. One interesting emphasis within the Recital is that the Regulation would become the only instrument applicable to such concentrations.

An overview of the Regulation reveals that; the Regulation did not need to be approved or implemented by national legislation since it had been directly applicable in all Member States of the Community. Its scope of application included European as well as non European undertakings.²²⁵ The Regulation authorized the Commission to review concentrations fulfilling the stated criteria and the thresholds. While it had been noted that concentrations within the scope of the Regulation could only have been blocked only if they created or strengthened a dominant position, as a result of which effective competition would be significantly impeded in either the Common Market or in a substantial part of it,

²²⁴ Thorsten Kaseberg and Arthe Van Laer, “Competition Law and Industrial Policy: Conflict, Adaptation and Complementarity”, Kiran Klaus Patel and Heike Schweitzer (Ed.), in **The Historical Foundations Of EU Competition Law** (162-190), Oxford: Oxford University Press, 2013, p.187.

²²⁵ Horst Satzky, op.cit., p.923.

they still had been subject to mandatory notification prior to their consummation and a waiting period following the notification.²²⁶ Despite the fact that the Commission had exclusive jurisdiction in concentration review, Member States had also been authorized to take appropriate measures to protect certain legitimate interests other than those stated by the Regulation and to apply their national competition laws if the Commission has referred a notified transaction to the competent authorities. In addition, concentrations not fulfilling the criteria and the thresholds stated within the Regulation would remain subject to Member States' control.²²⁷

Gerber states that the Regulation represents the single most important addition to European competition law since its inception.²²⁸ He further states that the introduction of the system has 'transformed the landscape' of competition policy in Europe. The authority to deal with large concentrations became centralized within the European Union Commission while it had been scattered among national competition authorities before. This fact alone granted the Commission an enormous economic and political power as it became the central authority in determining the major economic decisions of the Union. The consequences of the enactment of a concentration control regulation did not only emerge with regard to competition law. It also contributed a lot to the Commission's becoming the strongest economic and political actor in Europe. An actor decisions of who, could have tremendous and irreversible impacts upon the economies of the Member States.

7.6. Regulation 139/2004

The first years of coming into force of the Regulation 4064/89 has been described as the "years of discovery" by Levy²²⁹. During this initial period, several legal and practical issues have emerged and the Commission strived to address and resolve this wide range of questions. The real effect of the Regulation 4064/89 and the authority granted to the

²²⁶ Ibid., p.946.

²²⁷ Ibid., p.947.

²²⁸ David J. Gerber, op.cit., p.379.

²²⁹ Nicolas Levy, "EU Merger Control: From Birth To Adolescence", *World Competition*, 2003, Vol. 26, No. 2, 195-218, KluwerLaw Database, (access: 06.01.2015), p.202.

Commission had a chance to be tested as early as 1991 when the Commission for the first time prohibited the concentration of Canadian based de Havilland and Aerospatiale SHI.²³⁰

As years passed by, the Commission proved itself in standing against political pressures stemming from the Member States and in leading the national competition authorities in establishing a Union wide competition culture. In addition, the process of international cooperation with other anti-trust authorities, such as United States federal agencies has commenced.²³¹

The Commission had tried to resolve the shortcomings and problematic issues arising out of the application of the old Regulation. The scope of the Regulation had been expanded with the 1997 revision to include the formation of all types of full function joint ventures. This was a period when the Commission was appreciated for being flexible in addressing the emerging issues in a fast and effective manner. However, the Commission's application of procedural rules and remedies has become more rigorously as its confidence increased. These developments gave birth to several criticisms. Most important of all, the Commission's being the investigator, prosecutor and at the same time the judge in the concentration review process has been questioned. These concerns gave birth to a search of reform within the concentration control system. The Commission adopted a Green Paper on the review of the Merger Control Regulation in 2001.²³² The Commissioner Mario Monti explained the rationale behind the Green Paper as the need "to adapt the rules to the realities of an increasingly globalised business environment and to an enlarging Union"²³³ This statement reveals the fact that the globalization wave and economic developments led to the concern that a reformed concentration control regime had been necessary to meet the challenges stemming from market integration, global concentrations and the upcoming enlargement process of the Union.

²³⁰ European Commission, Case IV/M.53, Commission Decision of October 2, 1991.

²³¹ Nicolas Levy, *op.cit.*

²³² Green Paper on the Review of Council Regulation 4064/89, COM (2001), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0745>, (last access: 06.01.2015)

²³³ Mario Monti, Commission Press Release IP/01/1795 of 11 December 2001.

The Commission approved a detailed concentration control package at the end of 2002. The package had a comprehensive revision of the Old Regulation, a Horizontal Concentration Guideline and a Best Practise Guideline. Commissioner Monti stated that the envisioned system will be "a model to be emulated worldwide."²³⁴ After several negotiations with Member States' national competition authorities, with minor changes, the package has been adopted by the Council in late 2003 and come into force on May 1, 2004.

The "New Regulation" aimed to establish a more practical and flexible mechanism. Simplification of case allocation between Commission and Member States and prevention of multiple filings had been one objective for instance. The gap with regard to undertakings that do not create a position of single firm dominance but raise market power concerns, which had emerged during the application of the "Old Regulation", had been filled as the Recital 25 of the Regulation clarified the scope of the Regulation within this area. The Recital stated that such concentrations in oligopolistic market structures should also be effectively controlled under the Regulation.

The adoption of Horizontal Merger Guidelines, together with the Regulation clarified the assessment of such transactions. It also provided predictability, legal certainty and transparency to the assessment of concentrations by the Commission. Parallel to the understanding of a "more economic approach", a more technical substantive analysis and additional economic data and information requirements had been introduced.

In order to accelerate the decision making process, new units and bodies had been established within the Commission. In addition, new control mechanisms had been introduced to prevent errors within internal decision making.

The major concerns and predicted challenges with regard to the "New Regulation" might be summarized under three titles.²³⁵ The jurisdictional concern was that the level of thresholds in the Regulation would result in an enormous increase in the Commission's

²³⁴ Mario Monti, Commission Press Release IP/03/1621 of 27 November, 2003.

²³⁵ Nicolas Levy, *op.cit.*, p.217.

work load as the accession of 10 more member states had been on the way. The substantive concern was that the shift in the New Regulation's understanding of dominance, which aimed to fill the "gap" mentioned above would not reap the predicted benefits and be too sharp a sword. It was feared that the criteria of "significantly impeding effective competition" was kind of vague and that it might have been useless in dealing with transactions which do not give rise to dominance but nevertheless cause unilateral effects in the markets. The procedural concern was that the possibility of extension of Commission deadlines at the request of the notifying parties would lead to a serious lengthening of review process. The Regulation was criticized for giving rise to additional delays and therefore causing extra costs and uncertainty.

The Regulation managed to survive all these challenges though. It proved to be a certain success. Other than its ability to stand the economic and political pressures, it proved to set forth a flexible and practical structure that would technically endure the difficulties of complex transactions. As it is stated within the conclusion chapter of the *Staff Working Paper of Report on the functioning of Regulation No 139/2004*²³⁶, the procedural mechanisms provided by the Regulation such as the jurisdictional thresholds and the set of other corrective mechanisms have provided an appropriate legal framework for allocating cases between the Union level and the Member States. It is also stated that this framework has in most cases been effective in distinguishing cases that have a Community relevance from those with a primarily national nexus, in pursuit of the objectives of "one-stop-shop" and the principle of the "more appropriate authority".²³⁷ The Report also states that the pre-notification referral mechanisms set forth within the Regulation have considerably enhanced the efficiency and jurisdictional flexibility of concentration control in the Union.²³⁸

²³⁶ European Commission, Communication From The Commission To The Council – Report On The Functioning Of Regulation No:139/2004, Brussels, 30 June 2009, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009DC0281>, (last access: 06.01.2015)

²³⁷ Ibid., par.44.

²³⁸ Ibid., par.45.

The Regulation is the product of nearly 60 years of Union experience in competition law and concentration control. It had a long time coming though. After years of political struggle between the Commission and the Member States and the Council, after years of handling control of concentrations by expanding the scope of Article 81 and 82, the Union finally had a separate concentration control regulation and mechanism first with the enactment of Regulation 4064/89. The "New Regulation" seems to carry the torch forward as it proved to be a certain success against the challenges posed by the greatest enlargement wave that occurred in 2004. It also proved to be a success in contributing to the achievement of the goals of creating a competition model that would serve as a model to the entire world.

7.7. Development of Concentration Control in Turkey

Despite the fact that the history of the studies upon Competition Law in Turkey could be traced back to the early 1970s, the 4054 numbered "Act on the Protection of Competition" entered into force after a long time in 07.12.1994.²³⁹ As the first Chairman of Turkish Competition Authority, Prof. Tamer Müftüoğlu detects; Turkey had been the only OECD country without a competition act in the 1990s.²⁴⁰ Italy had been the last OECD country –before Turkey–to enact a competition act in October 10, 1990.

The act had been an important element of the legislation integration package that Turkey had undertaken together with the entry into force of the 1/95 numbered Association Council decision. The Association Council had been established as the fundamental decision making body to carry out the accession process and make the necessary regulations by the Ankara Agreement and the Additional Protocol. In addition to these basic duties, the Association Council might also make recommendations and review the consequences derived from the association regime periodically. Turkey had tried to fulfill some of her obligations stemming from the Ankara Agreement and the Additional Protocol

²³⁹ Pelin Güven, **Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme Ve Devralmaların Denetlenmesi**, 2. Baskı, Ankara, Yetkin Yayınları, 2003, p.27.

²⁴⁰ Tamer Müftüoğlu, "Rekabet Kanunu ve İki Yıllık Uygulaması", **Rekabet Dergisi**, Vol.1, No.1, (March 2000), p.5.

like discounts in Customs taxes according to the calendar envisaged by the Association Council.

The 1/95 numbered decision, which is known by the public as the “Customs Union” in general, determined the conditions belonging to the last period of the Customs Union. These conditions were beyond those of a classical customs union as defined within the Ankara Agreement. In addition to obligations concerning foreign trade such as abolishment of custom taxes and compliance with the Union’s customs tariff applied to third countries, several legislation integration obligations had also been emphasized. New acts concerning customer protection and intellectual property rights had also been introduced. The act on the protection of competition had also been the product of this process.

It should be noted that the enactment of the act had not been an artificial imposition of the Association Council. The status of the Turkish economy and the free market economy conditions, which had been applied since the early 1980s, necessitated the careful regulation of competition within the country. The economy indeed had serious flaws such as the lack of a competition culture and fair competition conditions and dominance of state owned enterprises enjoying competition distorting privileges.²⁴¹ The act therefore had been equipped with several means, bodies and provisions which aimed to fulfill the objectives of a just, fair and economically well functioning market.

A separate ‘competition board’ for instance, which would operate within the national competition authority, which would be responsible for the enforcement of the competition provisions as the decision making body, had been formed. (With a 27 month delay after the act came into effect.) The members of the board had been appointed in February 2, 1997. The national competition authority announced that it has completed its structuring according to the provisional article 2 of the act with a directive and swiftly

²⁴¹ Helin Berfin Akyüz, *op.cit.*, p.12.

commenced its application reviewing activities after the announcement in November 5, 1997.²⁴²

The legal ground of the act could be found within article 167 and article 172 of the 1982 Constitution of Turkey. It is stated within the first paragraph of article 167 that;

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

According to the article, the State has an obligation to take the necessary measures to fulfill the objectives that competition law in general pursues. Within the context of concentration control, it is the State's duty to prevent the formation of cartels that would distort a fair competition within the market. The same approach might be seen within the wording of Article 172 as well. It is stated within Article 172 that;

"The State shall take measures to protect and inform consumers; shall encourage their initiatives to protect themselves."

Thus; it would not be wrong to conclude that the legal grounds of Turkish competition law regime carry both economic centered and consumer centered characteristics. The same understanding might be observed within Article 20 of the Act as well. The article states that a national competition authority is to be established in order to *ensure the formation and development of markets for goods and services in a free and sound competitive environment.*

²⁴² Tamer Müftüoğlu, op.cit.

Of course, it should be noted that Turkish competition regime, unlike the regime of the Union, did not pursue a separate integration goal. It might be argued however that the implementation of a specific competition and concentration control mechanism indeed not only contributed to the liberalization of Turkish economy and thus creation of a more competitive and market oriented economic structure but also to the Turkish accession process. This might be evaluated as a proof of Freiburg School doctrine that competition law is also a tool for creating a more liberalized and plural society.

It should be noted that even before the enactment of a distinct act on protection of competition and specific provisions upon concentration control, Turkish Constitutional Court had a judgment that provided the stay of execution of the 3974 numbered act on the privatization of Turkish Electricity Organization.²⁴³ It is interesting to see that one of the dissenting votes of the judges referred to the statements of the then Energy and Natural Resources Minister:

*“In case you privatize the Turkish Energy Organization... there shall emerge a danger of cartelization. That is; if you privatize all production facilities and all distribution facilities of the Turkish Energy Organization as a whole, there will be a certain cartelization threat. The aim of the code therefore is not to sell the Turkish Energy Organization as a whole but rather provide the takeover of different facilities when needed and thus create the formation of competing undertakings.”*²⁴⁴

Such judgments are clear signs of the concerns against a distorted competition and a need for a specific competition act in Turkey. At this point, a similarity between the European Court of Justice and Turkish Justice Authorities might be assessed. Just as the

²⁴³ Pelin Güven, op.cit., p.28.

²⁴⁴ Turkish Constitutional Court, 11 April 1994, 1994/43, Anayasa Mahkemesi Kararları Dergisi, Sayı 30, Cilt 1, p.199.

European Court of Justice flexibly used Article 82 (and article 81 in some rare cases) to prevent the distorting effects of concentrations in the absence of specific concentration control provisions, Turkish Constitutional Court used the competition articles within the Constitution to prevent the harmful effects of cartelization.

At this point, the act and the secondary legislation to it should also be examined within the framework of concentration control. Article 7 of the Act 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 Article goes on to state that the Competition 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 for them to become legally valid. Within this framework, several different regulations and communiqués have been issued, with a wide range of subjects varying from detecting the details of the takeovers via privatization, to the exemptions of the types of takeovers carried out by the state owned enterprises and the details of the review procedure of several types of takeovers.

The article is a clear reflection of Article 102 of the Treaty of Lisbon. This similarity should be evaluated within the scope of Turkish obligations which stem from articles 32, 33 and 39 of the 1/95 numbered Association Council decision.²⁴⁵ These articles state that Turkey is under the obligation to provide the enforcement of the principles which have been established throughout the application of the Union competition law and concentration control regime in Europe. The articles emphasize the importance of

²⁴⁵ Pelin Güven, *op.cit.*, p.96.

compliance in concentration control case law and precedents as well. Such had been the endeavor of Turkish competition authority throughout the years.

The results and case law are yet too early to make a certain conclusion. However, it would not be wrong to conclude Turkish concentration control regime is following the footsteps and experiences of the Union in many aspects. The principles of the Union concentration control regime have been adopted and constantly applied in Turkey. The current experience shows no conflicting interests though. It would not be wrong to conclude that Turkey and Turkish competition authority has passed the test of establishing a separate competition law, competition authority and a concentration control mechanism in compliance with the Union's experience.

CHAPTER 8. COMPARATIVE ANALYSIS OF THE CONTROL OF CONCENTRATION PROCEDURES IN EUROPEAN UNION AND TURKISH LAW

At this point of this thesis, the procedural issues regarding the Merger Regulation and their effect –if there is a any- to the Turkish Rules of Control of Concentrations shall be scrutinized. As is already indicated at the History of Concentration Control chapter, the current Merger Regulation is the product of an evolutionary process. The inadequacy of ex article 81 and 82 in satisfying the need for an effective control of concentrations, a separate review and control mechanism had caused the emergence of a separate Merger Regulation.

8.1. The Procedure of Concentration Control in European Union

There may be questions about the Procedural Rules regarding Control of Concentrations? Are they also the product of an evolutionary process? Are the procedural rules somehow related with the substantive developments in this area? Has there been any interactive relationship between the Turkish Control of Concentrations rules and European Union Control of Concentration rules? Answers to these questions shall be seeked through examining the procedural rules and the economic, financial, political and legal developments that lead to these regimes.

The main legislative texts for control of concentrations are the EC Merger Regulation and the Implementing Commission Regulation. There are however several other texts such as "The Notices and Guidelines" and "The Best Practise Guidelines" and "Studies of the Directorate General".²⁴⁶ Each text in its own way contains important rules and principles.

²⁴⁶ Such texts and legislation might be found within; "EU Competition Law Rules Applicable To Merger Control", http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf (last access: 06.01.2015)

First, the general principles of European Union Concentration Control Regime and then the Procedure of Concentration Control shall be analyzed.

It should be noted here that on December 5, 2013, the European Commission adopted a new set of rules which aim to simplify its review of concentrations under the Merger Regulation. This simplifying initiative had been carried out by the Commission to speed up the investigation phase of the concentrations at the European Union level and to make the notification and review processes easier for the undertakings. So it would not be wrong to conclude that the evolutionary process is still going on.

The Notice on Simplified Procedure and the Implementing Commission Regulation has been revised to allow a greater percentage of concentrations to enjoy the simplified review and detailing the information compulsory for the notification. The public consultation occurred with a wide target group of citizens, public authorities, organizations and the business community and consumer interest associations who had direct experience in applying the European Merger Regulation. The consultation process took place between 27.03.2013 and 19.06.2013.²⁴⁷

The main goal behind these consultations was to gather views from the target group on a proposal to simplify the procedure for notifying mergers under the Merger Regulation. This initiative might be seen as the continuation of the efforts of the Commission to make the control of concentrations procedure -all administrative procedures in general- less bureaucratic and more business friendly as it is stated within paragraph 4 of the Notice that by following the procedure outlined within the Notice, the Commission aims *to make Union merger control more focused and effective*.

What rules and differences does the new simplified procedure comprise? Shortly to say; undertakings can use a shorter notification form for certain categories of mergers which could create competition problems. The Commission can then clear these cases

²⁴⁷ Commission Notice in a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, O.J. C 366/5, 14 December 2013.

without an extensive market investigation. The Commission is now preparing to make this new set of rules and the simplified procedure as the case -and not the exception- in light of experience and the merger guidelines in the future.

These new rules are in force as of January 1, 2014. These rules had not been old enough to offer a great amount of case law and application while this thesis was being written.

First; the principles that govern the Concentration Control Procedure and then the Procedure, with its relevant phases and steps, shall be analyzed throughout this Chapter.

8.2. The Principles That Govern the Control of Concentrations Procedure

Levy states that the Control of Concentration Procedure in EUMR stands upon four principle pillars²⁴⁸: (1) The European Commission being the sole authority, the authority with exclusive competence to review the concentrations with a Community dimension; (2) the involvement and liability of the Parties of the Concentration transaction within the control process, that is to say; the mandatory notification of the concentrations with a Community dimension by the concentrating parties; (3) the consistent application of market-oriented, competition based criteria; (4) legal certainty through timely decision-making. Reflections of these general principles shall be explained in detail throughout this title.

It should be noted that the EUMR, is to be applied to the *lasting changes in corporate control*. It was stated beforehand within the Concept of Concentration chapter that this “change of control on a lasting basis” element was a mandatory one in order for a transaction to be deemed as a concentration. Therefore, the procedure of concentration control shall first start with effective detection of the existence of the concentration.

The EUMR specifically emphasizes the fact that its scope covers Concentrations with a community dimension. Article 1 to the EUMR points out when a concentration has a

²⁴⁸ Nicolas Levy, op.cit., p.197.

Union dimension and when not, through detections of aggregate world-wide and union wide turnover thresholds. Concentrations with a Community dimension, that is to say; Concentrations that meet these “size tests”, bring together several liabilities on behalf of the concentrating parties. These concentrations are subject to mandatory notification to the Commission irrespective of the fact that they have a Union-wide effect or not.

Recital 34 to the EUMR, states the legal ground of this mandatory notification as the need to ensure effective control. In order to achieve this goal, the concentrating parties are under the serious obligation of giving prior notification of the concentration with a community dimension to the Commission, following either the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

It should be noted that EUMR further expands the limits of prior notification as containing even the prior notification of the *intention* to enter into an agreement for a proposed concentration in case there is the possibility that the intended agreement would result in a concentration with a Community dimension.

In addition to the specific turnover thresholds, Recital 8 to the EUMR states that, significant structural changes within undertakings, the impact of which goes beyond the national borders of any one Member State shall also be the subject of review exclusively by the Commission, through the application of the ‘one-stop shop’ system and in compliance with the principle of subsidiarity in general.

Concentrations not covered by the EUMR however are in principle within the jurisdiction of the Member States. In exceptional cases, the Member States may request the referral of a concentration with a Community dimension to its National Competition Authority from the Commission and the Commission may request the referral of a concentration that does not have a Community dimension. In any case, just as the Recital 13 and 14 points out, there should be a close cooperation between the National Competition Authorities and the Commission during the appraisal of concentrations. However, it would not be wrong to conclude that just as in similar other circumstance, the European

Commission is indeed jealous to share its competences and authority with the Member States.

This approach might be best seen in the special need to stress the fact that although it is stated within Recital 8 that “Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.”, Recital 18 goes on that “The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefore.” The Recital 17, in addition stresses the fact that the Commission should be given exclusive competence to apply the Regulation with the only limitation of review by the Court of Justice.

The concentrations with a community dimension are subject to strict and short deadlines. The prescribed time-periods within the EUMR should be carefully followed during the control procedure. The breach of this obligation in the form of failure to notify, late notifications or notification of improper and incorrect information might give rise to serious fines.

Parties to the Concentrations have an active role within the control procedure. They are encouraged to defend themselves and provide the necessary documents during the review and control procedure. This approach stems from both the effort to speed up the review procedure and provide the right to defense and the right to be heard before the relevant authorities to the concerned parties.

The Commission’s review of concentrations has two basic elements: The first one is the substantive test about whether the concentration significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. This activity requires a satisfactory analysis of the relevant market as well.

The Commission, despite its other broad range of competences, is not empowered to exempt or authorize, on public interest or other grounds, concentrations that are considered incompatible with the common market despite the fact that it may condition its approval of the transactions.²⁴⁹ One important principle is that all decisions of the Commission under the EUMR are subject to judicial review by the Union courts.

There are however other specific principles which are valid for the control of concentrations in European Law. Some of these principles are fundamental values which stem from the Treaty and universal legal values. They will also be analyzed within the upcoming titles.

8.2.1. Subsidiarity

Article 5 of the Lisbon Treaty states that the limits of Union competences are governed by the principle of conferral and that the use of Union competences is governed by the principles of subsidiarity and proportionality.

The principle of conferral is simply the Union's acting within the competences conferred upon it by the Member States in the Treaties. It means that the competences not conferred upon the Union in the Treaties remain with the Member States.

The principle of subsidiarity means that in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The importance of these general principles is emphasized within the Article 8 of the Commission Notice on Case Referral. It is stressed that the system of merger control established by the Merger Regulation, including the mechanism for re-attributing cases between the Commission and Member States is consistent with the principle of subsidiarity.

²⁴⁹ Nicolas Levy, *op.cit.*, p.198.

Therefore, decisions that concern the case referrals should be in compliance with this principle.

Parallel to these explanations, Recital 11 to the EUMR, stresses the fact that the rules governing the referral of concentrations from the Commission to Member States and from the Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity.

8.2.2. More Appropriate Authority

It would not be wrong to conclude that this principle can be evaluated as a reflection and sub principle of the principle of subsidiarity. Recital 14 to the EUMR states that the Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority in order to avoid multiple notifications and therefore loss of time and energy.

Article 9 of the Commission Notice states that in principle, jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is the more appropriate for dealing with a concentration. But how and under which circumstances will this evaluation occur? The Commission Notice says that the specific characteristics of each case and the tools and expertise available to the authority should all be taken into consideration. In addition, a careful focus of any impact on competition resulting from the concentration should is deemed necessary.

This principle should also be read in line with the general effort to decrease the loss of time and energy that is spent on the case referral system. That is the reason why the possible administrative efforts, relative cost, time delay, legal uncertainty and the risk of conflicting assessment that might emerge as a result of multiple investigations carried out by different authorities should all be taken into consideration while detecting the more appropriate authority.

8.2.3. One Stop Shop

The principle of ‘one-stop-shop’ and the benefits inherent in it is at the core of the EUMR.²⁵⁰ The provision of a non-stop-shop brings advantages to both competition authorities and the businesses. One authority, dealing with all issues stemming from a concentration increases administrative efficiency, avoids duplication and fragmentation of enforcement effort together with incoherent treatment concerning the investigation, assessment and possible remedies by different authorities. It is also advantageous for the undertakings since it reduces the costs and burdens stemming from several filing obligations. This principle also eliminates the risk of conflicting decisions of different authorities and thereby contributes to the legal certainty.

According to the ‘one-stop-shop’ principle, concentrating undertakings shall be subject to either the Union *acquis communautaire* or the national legislation of the Member States and that they shall not be subject to both regimes at the same time.²⁵¹

8.2.4. Legal Certainty

Legal Certainty is an essential principle to build the credibility of the referral system to avoid conflicting decisions that concern mutual jurisdiction issues during the phases of concentration control.

The Commission Regulation therefore states that due account should be taken of the importance of legal certainty regarding jurisdiction over a particular concentration. Referral should therefore normally only be made when there is a compelling reason for departing from ‘original jurisdiction’ over the case in question, particularly at the post-notification phase. Similarly, if a referral has been made prior to notification, a post-notification referral in the same case should be avoided to the greatest extent possible.²⁵²

²⁵⁰ EUMR, Recital 11.

²⁵¹ Pelin Güven, op.cit., p.97.

²⁵² Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139 / 2004 on the control of concentrations between undertakings, O.J. L 133/1, (2004), Recital 9.

Article 14 of the Commission Notice points out to the importance of the legal certainty principle especially during this pre notification referral stage since it is vital that pre-filing referrals should in principle be confined to those cases where it is relatively straightforward to establish the scope of the geographic market and / or the existence of a possible competitive impact, so as to be able to promptly decide upon such requests.

8.2.5 Confidentiality

It is noted within 802/2004 numbered Commission Regulation that Article 287 of the Treaty and Article 17 (2) of the EUMR as well as the corresponding provisions of the EEA Agreement require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. It is also noted that the same principle must also apply to protect confidentiality between the notifying parties.

In order to prevent the disclosure of business secrets, the Regulation states that they should be submitted under a separate cover and referred to in the notification as an annex. It is also noted that all such annexes must be included in the submission in order for a notification to be considered complete.²⁵³

8.3. The Phases of Concentration Control Procedure in the European Union

The principles that govern the control of concentrations procedure had been scrutinized within the previous chapter. It should be noted that all of these principles should be taken into consideration while carrying out the several phases and steps of the control procedure. In order to fully grasp the detailed concentration control mechanism established within the European Union competition law, these separate phases and steps, together with its procedural rules should be carefully analyzed. The aim of this chapter is to put forward the different steps and phases of the concentration control procedure.

²⁵³ Ibid., *Annex I*, Par.1.5.

8.3.1. Notification

Article 4 of the European Union Merger Regulation regulates the phase of prior notification of concentrations and the pre notification referral at the request of the notifying parties. The main objective behind the regulation of notification of concentrations is to ensure an effective control. In order to fully examine the notification phase, first the pre notification referral phase should be thoroughly analyzed. Recital 16 to the EUMR and article 4 should be read together.

Recital 16 to the EUMR states that in order to improve the efficiency of the system for the control of concentrations within the European Union, the undertakings in the first place should be granted the chance to request referrals to or from the Commission before the official notification. In such cases, the Commission and the national competition authorities should decide within short and clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that member state which presents all the characteristics of a distinct market.

It is stressed however that the undertakings at this phase should not be required to demonstrate that the effects of the concentration would be detrimental to competition. In addition, a concentration at this phase should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. It can be said that these rules stem from the sensitive balance between the National Authorities and the Commission, in other words from the sensitive balance of competences between the Member States and the Union.

Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be

referred to the Commission. The Recital states that such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. These rules are especially important at a time when cross border concentrations have a wide effect that expands beyond the borders of a single country.

The Recital goes on to state that where a concentration, which is capable of being reviewed under the competition regimes of three or more Member States, is referred to the Commission prior to any national notification, and no Member State competent to review the case, expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not however be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

Article 4 of the EUMR should be read in line with the Recital 16. It expresses that Concentrations with a Community dimension shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

It is also expressed that notification may be also made where the undertakings show the Commission their good faith intention to conclude an agreement. Same rules apply in the case of a public bid where the intended bid will somehow result in a concentration with a Community dimension.

Therefore, it would be possible to notify any time prior to the implementation of an agreement, public bid or acquisition of a controlling interest even though they have not yet been completely concluded as long as it can be indicated that their plan for the proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings

concerned, or in the case of a public bid, where they have publicly announced an intention to make such a bid.²⁵⁴

What about the party that will fulfill the notification? Which party's obligation is it to fulfill the obligation to notify? It can be said actually that the answer to this question is dependent on the type of transaction that occurs. So the type of the concentration transaction has an important effect upon the notification process. Article 2 of the Implementing Commission Regulation refers to the Article 4 (2) to the EUMR which states that joint notification must be made by the concentrating parties in true merger cases or by those acquiring control in other cases.

The Implementing Commission Regulation, Regulation 802 / 2004 and Form CO regulate the details of how the notifications should be made and the information regarding the undertakings and the transactions which are necessary to submit to the Commission. Recital 5 states that it is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration. The format of the submission is stated within the article 3 (2) of the Regulation 802 / 2004 and the Commission Communication published in the OJ C 251 / 2 numbered Official Journal. One original signed paper form must be submitted together with five paper copies and 32 copies in CD or DVD-Rom format.

Form CO comprises 11 sections which sets forth how the information requested must be submitted. It should be noted that a great amount of information is necessary for an effective analysis in compliance with the tight deadlines that bind the Commission. Therefore the form asks for information regarding the description of the concentration transaction, information about the parties, details of the concentration transaction, information about ownership and ownership and the character of control and all other supportive documentation including the Due Diligence reports, reports that indicate the financial power and the market value of the merging undertakings, the legal aspects of the

²⁵⁴ Alison Jones and Brenda Sufrin, *op.cit.*, p.898.

transaction, the potential of the companies and the intention behind the concentration transaction etc.

Similar to the issues that concern the competition law in general, an appropriate definition of the affected markets either financially or geographically is important in the Control of Concentrations procedure. Therefore, information on market definitions, and reports that set forth the current status of the relevant market and the overall market context and efficiencies and cooperative effects of a joint venture should also be submitted at this stage.

The parties to the concentration transaction should also sign and submit a declaration that should accompany the notification.

This list of documents shows that this notification phase is costly and time consuming. Therefore, the failure to grant the amount of time and means to the undertakings to prepare the mentioned documents might jeopardize the completion of the concentration transaction from the very beginning stage.

An issue that should not be underestimated is that during this stage, if all the mandatory information is not supplied, the notification will not be completed and the concentration transaction will be stuck at the first phase. The Commission decision will be delayed since the tight time limits and deadlines commence only after the notification is totally fulfilled.²⁵⁵

Directorate General Competition Best Practices on the conduct of EC Merger Control Proceedings²⁵⁶ regulates that pre-notification discussions with the Commission are

²⁵⁵ Ibid., p.899.

²⁵⁶ European Commission Directorate General For Competition, “Best Practises On The Conduct Of EC Merger Proceedings”, 20 January 2004, <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>, (last access: 06.01.2015)

always possible and essential and that they are an important part of the control and review process.²⁵⁷

Pre-notification discussions may enable the undertakings to prepare more thoroughly for the upcoming stages and reduce the risk of an incomplete notification. It may also reduce the amount of information that the parties are required to provide in a notification.

The Commission's Best Practices Guidelines are the official documents to answer the issues arising from the procedural applications and lead the parties to prepare a detailed draft and final Form CO. In addition, a Short Form which takes place at the Attachments of the Implementing Commission Regulation is in force for the transactions that do not raise competition concerns. What is meant by these comprises the transactions where there are no horizontal overlaps or vertical or neighboring market relationships or where these overlaps or relationships are small. In order to deal with these transactions, the Commission Notice on a simplified procedure for the treatment of certain concentrations should also be taken into account.

There is a severe fine for the negligence of the notification obligation under Article 14 (2) of the EUMR. The article states that the Commission has the authority to impose fines by a decision, not exceeding 10 % of the aggregate turnover of the undertakings concerned where either intentionally or negligently they fail to notify a concentration following the procedure that has already been pointed out, prior to the implementation of the transaction.

The article contains an exemption which is expressed in article 7 (2) of the EUMR. This article regulates that the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 of the EUMR is acquired from various sellers shall not be prevented upon the conditions set forth in

²⁵⁷ Ibid., p.2.

paragraph 1 of Article 7 as long as the concentration is notified to the Commission pursuant to Article 4 without delay and that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3 of Article 7.

Paragraph 3 of Article 7 should be read in line with paragraph 2 since it regulates the derogations granted by the Commission. It states that the Commission, upon request by the parties to the concentration transaction grants a derogation from the notifying obligations and others imposed in paragraphs 1 and 2 of Article 7. The article states that this request shall include solid arguments and reasons. The article also states that derogation may be applied for and granted at any time before the notification.

In order to exemplify this phase of the procedure and the after effects and results of its negligence, a concrete example from the Commission's case law should be evaluated. The concentration transaction between the famous Samsung and the American AST Research Inc. is a good one.

Samsung had acquired control over the American undertaking, but had failed to notify the Commission of the transaction in due time. Since the controlling occurred without the Commission's permission and authorization, Commission held that the transaction had been in breach of the Union rules.²⁵⁸

During this stage, serious fines had been imposed in several cases and in order to increase the effectiveness of the system, the fining thresholds had been subsequently increased by the Regulation 139 / 2004. In June 2009, the Commission imposed a 20 million Euro fine on Belgium's largest electricity supplier Electrabel for acquiring control over one of France's largest electricity producer Compagne Nationale du Rhone ("CNR")

²⁵⁸ Commission Decision of 18 February 1998, Case IV / M.920, [1999] OJ L225/12.

without notification to the Commission. Its failure to notify and obtain clearance caused this record fine.²⁵⁹

What makes this case important is not only the record amount of fine imposed by the Commission. The factual analysis of the case demonstrates that despite the fact that the notified and proposed part of the concentration transaction between the two undertakings, which is to take place in the future, actually had been cleared by the Commission, the Commission still imposed the fine for the part that had not been notified. This is a clear sign of the importance and vitality of this beginning phase of the Control Procedure in the eyes of the Commission.

Considering the increase in the fining threshold, it would not be wrong to conclude that similar heavy impositions might be anticipated.

8.3.2. Pre-Notification Reasoned Submissions

Recital 6 to the Implementing Commission Regulation states that, EUMR allows the undertakings to request in a reasoned submission, prior to notification, that a concentration fulfilling the requirements of that Regulation be referred to the Commission by one or more Member States, or referred by the Commission to one or more Member States as the case may be.

The Recital also expresses that it is important to provide the Commission and the competent authorities of the Member States concerned with sufficient information in order to enable them to assess, within a short period of time, whether or not a referral ought to be made. Therefore, the reasoned submission requesting the referral should contain specific information.

²⁵⁹ Electrabel had first acquired an additional minority share in CNR which resulted in it holding a 49.95 per cent. This was the 2003 acquisition which the parties had failed to notify. On the other hand, the anticipated acquisition of the remaining shares in 2008 had been notified to the Commission on the ground that it would grant sole control. Although this last anticipated acquisition had been cleared by the Commission, the failure to notify the first acquisition, even though it would not result with sole control, became the reason of this record fine.

It is clearly understood from the wording that this phase and these rules concern the jurisdictional issues between the Member States Competition Authorities and the Commission as to the competences. The turnover threshold criteria set out in Article 1 (2) and (3) do not clearly settle the issue as they do not divide jurisdiction between the Commission and the Member States Competition Authorities in every different case. In addition to that, it was acknowledged by the Commission that the allocation of the jurisdiction according to the numerical turnover thresholds would not be sufficient in every case.

Therefore the EUMR touched upon this issue which emerges at the very beginning of the Procedure of Control by first recognizing the possibility that the existing thresholds might cause a wrong allocation of jurisdiction, and then introducing a flexible mechanism for the transfer of cases between the Commission and the Member States National Authorities.

By acknowledging this jurisdictional problem, EUMR, enables the parties to a concentration transaction to apply to the Commission through *reasoned submissions* and ask her to clarify the competence between either the Member State National Authority or the Commission. It should be noted that these reasoned submissions should be submitted before the Commission before the notification at the Union or national level. Details of the reasoned submissions are set forth in the Implementing Commission Regulation.

In addition to that, the Commission has issued a notice on case allocation²⁶⁰, which sets forth the details of the referral mechanism and provides guidance on the system.

Article 4 of the EUMR, provides the general rule of referral in such a way that, concentrations with a Community dimension within the scope of the Regulation should be notified to the Commission prior to their implementation and following the conclusion of

²⁶⁰ European Commission, Commission Notice on Case Referral in respect of concentrations, O.J. C 56/2, (2005)

the agreement, the announcement of the public bid or the acquisition of a controlling interest.

The second paragraph goes on to state that where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or in the case of a public bid, where they have publicly announced an intention to make such a bid as long as the intended agreement or bid would result in a concentration with a Community dimension, notification may also be made.

The second paragraph describes the persons or undertakings that are under the obligation to inform the Commission. The parties to the merger can jointly notify the concentration together with those acquiring joint control. The paragraph states that in general, notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertaking.

After examining these points and the scope of the notification obligation with regard to the persons and undertakings, the fourth paragraph should be scrutinized to indicate the details of the referral mechanism. It should be noted that while Article 4 (4) and (5) draws the general framework, the *Commission Notice on Case Referral in respect of concentrations* deals with the details of the referral system. Therefore, both texts should be read and analyzed together.

8.3.2.1. Request for Referral to a National Competition Authority

Article 4 (4) provides that, the parties to a concentration has the option to make a reasoned submission that the concentration may significantly affect competition in a distinct market in a Member State and should be examined in whole or in part by that Member State. It should be noted that to be evaluated within the scope of this provision, concentration should have a Community dimension and that the submission should be made prior to the notification to the Commission. In such case, the Commission should inform the relevant Member State without delay and the relevant Member State has a period of 15 working days to express agreement or disagreement with the request to refer

the case. It should be noted that where that Member State takes no such decision within this period, it shall be deemed to have agreed.

The details of this submission lodged by the parties to the concentration are set out within the Commission Notice. This reasoned submission has a triggering effect for the pre-notification referrals.²⁶¹ There are two requirements from the parties to the concentration during this phase. First of which is to verify that the relevant legal requirements set out in the Merger Regulation are fulfilled and second, whether a pre-notification referral would be consistent with the guiding fundamental principles of the Referral Mechanism.

The Commission has a period of 25 working days from receiving the reasoned submission to determine whether or not to refer the case unless the Member State disagrees. If she fails to take a decision within the mentioned time period, similar to the approach that the Member States are deemed to agree with the request to refer the case in case they take no decision at all; she is deemed to have adopted a decision to refer the case as well. The Commission will take into account the criteria set out in its notice on case referral while adopting such a decision.

The Commission Notice states that the Community jurisdiction in the field of concentration control is defined by the application of the turnover related criteria set out in Article 1 (2) and 1(3) of the EUMR and that while dealing with concentrations, the Commission and Member States do not have a concurrent jurisdiction. It stresses the fact that the EUMR establishes a clear division of competence with regard to the turnover thresholds criteria; that concentrations with a Community dimension, concentrations above the turnover thresholds in Article 1 of the EUMR, should fall within the exclusive jurisdiction of the Commission. Concentrations that fall below the thresholds however remain within the competence of the Member States and that the Commission has no jurisdiction to deal with them under the Merger Regulation.

²⁶¹ Ibid., par.15.

8.3.2.2. Request for A Referral to the Commission

Article 4 (5) of the EUMR, provides that, in case a concentration which does not have a Community dimension, is capable of being reviewed under the national competition laws of at least three member states, the parties might make a reasoned submission that the concentration should be reviewed by the Commission.

When such referral occurs, the concentration might not be implemented by the parties until the Commission review under article 4 (5) is over. The Commission should transmit the referrals to the Member States without delay. The Procedure then enables the Member States to express their disapproval of the transmission within 15 working days.

The procedure is over upon such disapproval of a Member State. In case no such disapproval occurs, it is accepted that the concentration has a Community dimension. That is the point where the jurisdiction of the Commission starts and no Member State may apply its national concentration control provisions from then on.

There are pros and cons to this type of request for referral. The advantage is that if no Member State has any objection, the parties to the concentration might be saved multiple notifications and the transaction might be deemed to have a Community dimension. The disadvantage is that even if one Member State objects, the procedure is terminated. In order to minimize such risks, the Commission's Notice on case allocation provides guidance on the question of when a referral of the case to the Commission is likely to be considered appropriate.²⁶²

8.3.3. Suspension

In general, suspension is the interruption of an operation, whether it be physical, legal or otherwise, for a certain period of time, pending further examination of the situation to prevent potential harm. Within the framework of EUMR, suspension refers to the cessation of concentration operation by the Commission pending the investigation of the

²⁶² Alison Jones and Brenda Sufrin, *op.cit.*, p.901.

notified transaction. Suspension is an important instrument in controlling the concentration activities in an economic sector and preventing any sort of concentration activities that would impede the open market economy principles which are in breach of the Union competition rules. In fact, “it was a condition of German support of the EUMR initially that a concentration should be suspended pending investigation of the concentration.”²⁶³

Article 7 (1) of the EUMR states that a concentration with a community dimension as defined in article 1, or which is to be examined by the Commission pursuant to article 4 (5) shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under articles 6 (1) (b), 8 (1) or 8 (2) or on the basis of a presumption according to article 10 (6).

The commission has the power to permit derogation from suspensory effect following a request. The Commission occasionally used this power to allow rescue operations requiring quick closure during the financial and economic crisis.²⁶⁴ Article 7 (3) states that such a request should be reasoned. It is also stated that the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.

It should be noted that such derogation might be applied for and granted at any time, either before notification or after the transaction.

8.3.4. Phase I Investigation

As it has been mentioned above, suspension is a temporary interruption of an operation pending further examination of the situation to prevent a potential harm. It follows that when a notification concerning a concentration is received, it should be examined or investigated by the Commission as soon as possible.

²⁶³ Ibid., p.902.

²⁶⁴ Ibid.

But what are the criteria for the Commission's appraisal of a notified concentration? What are the factors that the Commission will take into consideration while investigating a concentration?

Castaldo, in a nutshell answers these questions;

"In order to assess the competitive effects of a concentration, the Commission compares the competitive conditions that would result from the transaction with the conditions that would prevail without it. In most cases the competitive conditions at the time when the Commission looks at them, ie before the completion of the transaction, constitute the relevant comparison for this evaluation... in some cases, the Commission may take into account future changes to the market that can be reasonably predicted in order to assess whether a concentration significantly impedes effective competition."²⁶⁵

These stated appraisal principles give birth to other questions. The differences and the similarities of Article 101, Article 102 and the EUMR during the appraisal of concentrations require further elaboration.

While assessing a concentration, the Commission takes into account whether a concentration can be expected to distort effective competition through the creation or enhancement of a dominant position. If the assessment indicates that the concentration is most likely to significantly impede competition, than it is to be prohibited. Commission's understanding in this regard differs from its interpretation of Article 102.

²⁶⁵ Giorgio Castaldo and Aleko Bogdanov, "The Nynas Case: The Interplay Between the Failing Firm Defence and the Counterfactual Method", *The Journal of European Competition Law & Practice*, 2015, Vol.6, No.5, p.324.

The Commission's assessment under Article 102 would focus upon whether the dominant undertaking's conduct harms the competitive process by foreclosing efficient rivals and / or whether the conduct has countervailing efficiencies.²⁶⁶

Unlike Commission's appraisal of Article 102, the appraisal under the EUMR does not require abusive conduct of the undertaking. If the economic end result of the concentration operation amounts to such a level of dominant position which will be harmful to the effective competition within the market, the transaction is than to be disapproved even though there is no active and abusive conduct of that position within the scope of Article 102. The creation of a dominant position which would significantly impede and lessen competition through concentrations is itself prohibited under the EUMR.

What than is the case for Article 101? Agreements between undertakings, establishing a full function joint venture within the meaning of Article 3 of the EUMR might also bear a character of coordination of anticompetitive behavior. Such operations might be the subject of a Article 101 type analysis. In such cases, the procedural rules, for example the time tables of inquiry set forth within the EUMR are to be followed even though the Article 101 type analysis aims to establish whether the operation is compatible with the common market. The exemptions set forth within Article 101 are also taken into consideration during such analysis. If the operation does not enjoy the exemptions stated within Article 101 (3), it is to be declared incompatible with the common market. This means that even if a concentration operation is subject to the procedural rules set forth within the EUMR, they might be substantially appraised according to Article 101.

The time limits for initiating proceedings and decisions are stated within article 10 of the EUMR. Phase I decisions should be taken within 25 working days after the notification is received. It is stated within article 10 (3) that without prejudice to article 6 (4), the decisions referred to in article 6 (1) shall be taken within 25 working days at most.

²⁶⁶ Romano Subiotto QC and David R. Little and Romi Lepetska, "The Application of Article 102 TFEU by the European Commission and the European Courts", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.4, p.282.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with article 9 (2) or where, the undertakings concerned offer commitments pursuant to article 6 (2) with a view to rendering the concentration compatible with the common market.

It is also noted that decisions pursuant to article 8 (1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

Without prejudice to article 8 (7), decisions pursuant to article 8 (1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to article 8 (2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

It is also noted that the periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has to request information by a decision pursuant to article 11 or to order an inspection by a decision pursuant to article 13.

Article 10 (5) states that where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to the stated time limits, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6 (1). The concentration shall be re-examined in the light of current market conditions.

Finally Article 10 (6) states that where the Commission has not taken a decision in accordance with Article 6 (1) (b), (c), 8 (1), (2) or (3) within the prescribed time limits, the

concentration shall be deemed to have been declared compatible with the common market without prejudice to Article 9.

Article 10 which sets out the time limits for initiating proceedings and decisions, aims to complete the procedure related to suspension as soon as possible. Especially paragraph (6) ensures that the time limits should be carefully followed and that any delay regarding this matter will result with the clearance of the concentration, that is to say, the transaction will be deemed in line with the EUMR.

8.3.5. Phase II Investigation

. The time limits for initiating proceedings and decisions are stated within article 10 of the EUMR. Phase I decisions should be taken within 25 working days after the notification is received.

On the other hand “in complex cases, the time period may be extended to a maximum of 125 working days.”²⁶⁷ Occasionally however the time period may be extended even beyond the statutory timetable if the Commission ‘stops the clock’ on account of the parties’ failure to respond to requests for information by a stipulated time period. Such was the case for instance regarding *Schneider/Legrand*²⁶⁸ where the Commission stopped the clock on account of the failure of the parties to respond to 322 questions within 12 calendar days which would amount to 5 working days.

As noted within the Phase I section, if no decision is taken within the prescribed period, the concentration is deemed to be compatible with the EUMR.

Considering different cases, it is stated within Article 8 that the Commission, at the end of the proceedings, may either declare the concentration to be compatible with the common market or declare that the concentration, following modification might be compatible with the common market. Conditions and attachments might be attached to the

²⁶⁷ Ibid., p.905.

²⁶⁸ Commission Decision of 10 October 2001, Case COMP/M.2282.

decision to ensure that the concentrating undertakings shall comply with the commitments they have entered into with a view to rendering the concentration compatible with the common market. In this case, it should be noted that such decisions might be revoked if the parties breach their commitments. If the transaction fails to pass the applied tests, the Commission is to declare the concentration to be incompatible with the common market.

One statistical data should probably be noted here. As Leveques puts it; in Europe, 76% of concentrations reviewed in Phase II had been prohibited, abandoned or cleared with conditions. In other words the rate of full clearance without any condition whatsoever had been 24%.²⁶⁹

8.3.6. Review by the Court of Justice

The Commission has long been criticized as being both the prosecutor and the judge at the same time during the investigation period of a notified concentration. This does not mean however that the Commission is the final authority to approve or reject a concentration despite its exclusively competent nature. The decisions of the Commission are subject to judicial scrutiny by the Court of Justice. Judicial review is an important check and balance mechanism against the Commission's exercise of its great powers since Court of Justice has the power to review all decisions of the Commission.²⁷⁰ It is stated within Article 16 of the EUMR that;

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic

²⁶⁹ François Leveque, "Merger Control: More Stringent in Europe than in the United States?", Ecole Nationale Supérieure des Mines de Paris, Centre d'économie industrielle, CERNA Working Paper – November 2007. <http://www.cerna.ensmp.fr/Documents/FL-MergerEUvsUS.pdf> (last access: 06.01.2015), p.4.

²⁷⁰ Michael Harker, Sebastian Peyer and Kathryn Wright, "Judicial Scrutiny of Merger Decisions in the EU, UK and Germany", *International and Comparative Law Quarterly*, January 2011, Vol.60, Issue 01, p.99.

penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

The mentioned article 229 is now article 263 of TFEU. A party to a concentration may institute proceedings against a Commission concentration control decision according to this article. In addition, third parties like the competitor of the concentrating parties or any other third party that is to be affected by the given commitments may appeal the Commission decision in case the decision is of direct and individual concern to them.²⁷¹ The wording of the article confirms this detection;

“any natural or legal person... against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”

So the concentrating parties, employees of the concentrating undertakings, competitors and Member State governments are among those who shall have a standing to challenge a Commission decision. In *RJB Mining plc v. Commission*, the Court had stated that;

*“an undertaking is concerned by a Commission decision [and therefore may institute judicial proceedings for its annulment] that allows benefits to be granted to one or more undertakings which are in competition with it.”*²⁷²

With regard to the Union Court’s review, as Parisi puts it; the Courts’ standard of review accords the Commission some deference in appraising issues that involves economic assessments and that this standard is often referred to as the “manifest error”

²⁷¹ Alison Jones and Brenda Sufrin, op.cit., p.978.

²⁷² European Court Of First Instance, 31 January 2001, T-156/98, par.59.

rule.²⁷³ The Court's standard had been set forth within the *Tetra Laval/Sidel* judgement as follows;

“The basic provisions of the [ECMR], in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations. Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with a conglomerate effect.”²⁷⁴

²⁷³ John J. Parisi, “A Simple Guide To The EC Merger Regulation”, <http://www.ftc.gov/system/files/attachments/key-speeches-presentations/ecmergerregsimpleguide.pdf>, (last access: 06.01.2015), p.18.

²⁷⁴ European Court Of Justice, 20 May 2010, 12/03, 13/03, <http://curia.europa.eu/juris/liste.jsf?num=C-12/03&language=en>, (last access: 06.01.2015), supra note 45, par. 38-39.

What happens when a Commission decision is annulled? In such a case; the Commission has to examine the concentration from the very beginning in the light of the current market conditions. The parties in such case should put in a new notification, additional information to the original notification or where the original notification has not been completed, a certification that verifies there are no changes.

The last remarks about the judicial process should be upon its efficacy. Despite the tight deadlines in the Commission's decision making, the judicial review is in most cases a lengthy process. The Court's 'fast-track' procedures however have speeded decisions in some cases. This long lasting process has not prevented the relevant parties from challenging Commission decisions however. As Parisi puts it; over half of the Commission's 20 prohibition decisions had been appealed and quite a few clearance decisions had been challenged by third parties as of 2010.²⁷⁵ This is a clear sign that the Union Courts' review process is an unalienable part of the concentration control regime of the Union.

8.4. The Procedure of Concentration Control in Turkey

The fundamental legislation regarding the procedure of concentration control procedure in Turkish law is the 4054 numbered Act on Protection of Competition and the 2010/4 numbered Communiqué on Mergers and Acquisitions requiring the approval of the Competition Board. It should be noted at this point that the 6102 numbered Turkish Commercial Code regulates in detail, unlike the 6762 numbered old Turkish Commercial Code, the merger and acquisition transactions in accordance with the European *acquis*.

The content of article 7, which states that mergers and acquisitions that result in significant lessening of competition are illegal and prohibited had been analyzed before. The Communiqué on the other hand lists the types of mergers and acquisitions which are subject to the Competition Board's review and approval. It should be noted that the Communiqué had been amended in 2012 by the 2012/3 numbered "Communiqué on the

²⁷⁵ John J. Parisi, *op.cit.*, p.19.

Amendment of the Communiqué numbered 2010/4”. The new Communiqué has amended the merger thresholds stated within article 7 of the old Communiqué. The new thresholds include; the aggregate Turkish turnover of the transaction parties exceeding 100 million lira and the Turkish turnover of at least two of the transaction parties each exceeding 30 million lira or the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million lira or the Turkish turnover of any of the parties in mergers exceeding 30 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million lira.

The implementing regulations and several other legislative texts set forth exemptions and special rules. For instance, 5411 numbered Banking Law provides an exception from the application of merger control rules for mergers and acquisitions of banks. The exemption is subject to the condition that the market share of the total assets of the concentrating banks does not exceed 20 per cent. Another rule is that mandatory acquisitions by public institutions as a result of financial distress do not require a pre-merger notification. The intra corporate transactions are not notifiable either. Acquisitions by inheritance are not subject to merger control and acquisitions made by financial securities companies solely for investment purposes do not require a notification, subject to the condition that the securities company does not exercise control over the target entity in a manner that influences its competitive behavior and multiple transactions between the same undertakings realized over a period of two years are deemed as a single transaction for turnover calculation purposes. They warrant separate notifications if their cumulative effect exceeds the thresholds, regardless of whether the transactions are in the same market or sector or not and whether they were notified before or not. It is obvious that some of these rules are clear reflections of Article 3 (5) of the EUMR which regulates the exceptions to the concept of concentration.

Turkish Competition Authority has published three new guidelines, namely the Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control²⁷⁶, the Guideline on the Assessment of Horizontal Mergers²⁷⁷ and Acquisitions and the Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions²⁷⁸. These guidelines should be evaluated within the framework of Turkish endeavor in harmonizing Turkish competition law with that of the European Union.

When the details of the procedure of concentration control are scrutinized; it is seen that unlike the European regime, there is no specific deadline for notifying the transaction. There is a suspension period on the other hand during which, whether or not the transaction is problematic under the applicable dominance test, the transaction is invalid unless the Competition Authority approves it.

Under the Turkish concentration control regime, filing of the concentration might be made either jointly or by one of the concentrating parties. In case the filing is carried out by one of the parties, that party is under the obligation to notify the other of the nature.

The Competition Authority publishes the notified transactions on its official website. The disclosed information only includes the name of the parties and their field of commercial activities. Therefore, once notified to the Turkish Competition Authority, the concentration will no longer be confidential. It might be construed that the scope of confidentiality of the control of concentrations procedure and of the gathered commercial information is broader in the Union law.

The Competition Board, after its first review of the notification will either decide to directly approve or to investigate the notified concentration further. It might be construed that this approach is a reflection of the Phase I and Phase II Investigations of the Union

²⁷⁶ Rekabet Kurumu, “Birleşme ve Devralma Sayılan Haller ve Kontrol Kavramı Hakkında Kılavuz”, Kabul Tarihi: 16.07.2013, Karar Numarası:13-45 / RM (9)

²⁷⁷ Rekabet Kurumu, “Yatay Birleşme ve Devralmaların Değerlendirilmesi Hakkında Kılavuz”, Kabul Tarihi: 04.06.2013, Karar Numarası: 13-33 / 448-RM (7)

²⁷⁸ Rekabet Kurumu, “Yatay Olmayan Birleşme ve Devralmaların Denetlenmesi Hakkında Kılavuz”, Kabul Tarihi: 04.06.2013, Karar Numarası: 13-33 / 449-RM (8).

regime. The Board is under the obligation to notify the parties of the outcome within 30 calendar days following the complete filing. In case the Board fails to make such notification, the decision is deemed to be an approval in accordance with the implied approval mechanism stated within the competition regulation. It should be noted that this approach is the opposite of the general principle of Turkish Administrative Law that in case the “administrative offices” do not respond, either positively or negatively, to an official demand or application, the demand and application is deemed to be refused.

The Board’s decision might be either an unconditional clearance or a prohibition. The Board may also hold a conditional approval. Such type of a decision might give the parties extra obligations and liabilities. In any case, the Board’s decision should be reasoned and be served to the notifying parties for further judicial review. The decision is to be published on the official website of the Competition Authority.

These final decisions of the Board are subject to judicial review in case the parties so seek and apply. Stemming from the administrative nature of the Board decision, the competent courts are Turkish administrative courts and the relevant judicial procedure is Turkish administrative jurisdiction procedure. The plaintiff may file a suit against the Board decision within 60 days of receipt of the reasoned decision. Filing a suit does not result with an automatic stay of execution of the Board decision. The Administrative Court might hold such a decision in case the plaintiff proves that the execution will result with irreparable damages and that it is highly probable that the Board decision would indeed violate the law.

While concluding; it should be noted that the Turkish procedure is not merely an imitation of the Union concentration control procedure. There are several reflections and similarities together with various differences. The effect of European regime should not be neglected in any case. However; it would not be wrong to conclude that the Turkish concentration control regime is not distinct and that it does not have its own characteristics. Several efforts in harmonizing the Turkish competition law and concentration control

regime with that of Europe are also under way. The interaction and the process between them are still going on.

CONCLUSION

It was noted within the Introduction part of this study that the aim of this thesis was to examine the concentration control regimes in the European Union and Turkey and that a comparative method was to be used to depict the framework of both regimes and put forward the differences and the similarities.

In order to reach a proper and satisfactory conclusion, the first step was to draw the conceptual framework of concentrations. The mandatory elements of concentrations within the context of the European Union Merger Regulation have been put forward together with exceptions of concentration-like operations. The case law of the Commission and the European Court of Justice has also been analyzed to exemplify the boundaries of the concepts. It is a fact that Article 7 of the 4054 numbered Protection of Competition Act and the *Communiqué upon Mergers and Acquisitions and Control* which has been issued based on this Article by the Turkish Competition Authority indicate that the conceptual framework of concentrations in Turkish Law is a clear adoption from the Union Law.

The motivation behind concentrations and the various types of concentrations, together with their impact upon the competition between the undertakings within the market have been analyzed within Chapter 2 and 3. Despite the fact that the general motivation behind concentrations are alike in both Turkey and the Union, the motivation of undertakings in Turkey differs from their counterparts in Europe since a lot of operations in Turkey had been carried out with the intention of surviving the often occurring economic crisis. Unlike the Union, economic crisis should be counted as a major motivator behind concentrations in Turkey.

It was a necessity to examine the history of concentrations as well. It has been detected that throughout United States and Europe, concentrations generally did not follow a steadily increasing or decreasing track but instead appeared in the form of waves in a

specific period. These waves had been the product of either the technological advances or the political and economic climate of the world during that very period. Concentration waves in Turkey however had been generally the product of nation-wide economic crisis. It had been concluded therefore that concentration waves in the Union and Turkey do not have a noteworthy interaction with each other –unlike the USA and the Union- except a relatively short time period of cash liquidity around the world from 2002 to the 2008 crisis.

Starting from that point, the roots of the need and the necessity to control the concentrations has been analyzed. It should be noted that the technological and economic developments resulted with accumulation of great capital in the hands of undertakings. This accumulation had both positive and negative impacts. Concentration of undertakings is not a direct problem in itself but it becomes one when the end result of the operation reaches a critical level where it hinders competition and / or disrupts the smooth operation of the market forces. Concentrations that have such a damaging impact should be carefully reviewed. This need to legally control the concentrations resulted with enactment of several competition law rules. But the story does not end there. The historical evolution of concentration control and the philosophical and legal contributions made by various schools, especially Freiburg School proves that concentration control and competition law in general can serve as the key to a properly functioning market and a plural, democratic and plural society. This shows that competition law is not just another branch of law but also a means to contribute to the democratization of a society, state and even the European Union.

While there are such benefits of concentration control, the main reason why there was no specific concentration control regime in the Union was because of competence battles between the Union and the Member States. Member States for a long time did not wish to delegate their national power and jurisdiction to control the concentrations to the Union. This is understandable from the point of view that states might have been jealous of not giving up their power of controlling the fates of giant economic actors and such valuable economic operations.

Therefore, stemming from these competence battles between the Member States and the Commission; control of concentrations, ever since the conclusion of the Treaty of Rome²⁷⁹ in 1957 had been carried out by substitute, alternative and temporary solutions until the need for a specific concentration control regime became so great and imminent that the end result of this era was the inevitable enactment of the first Council Regulation on concentration control; Regulation numbered 4064/89. Therefore it would not be wrong to conclude that the European Union Concentration Control regime was the product of long and deep struggles, controversies and theoretical debates and contributions. In other words, it originates from the very roots of the Union history, economy and social needs. This detection is not valid for Turkey.

Despite the fact that the history of the studies upon Competition Law in Turkey could be traced back to the early 1970s, the "Act on the Protection of Competition" numbered 4054 entered into force after a long time in 07.12.1994 after Turkey finally fulfilled some of her obligations stemming from Ankara Agreement and the Additional Protocol. The three important documents with regard to Turkey's accession to the Union – namely Ankara Agreement concluded in 1963, The Additional Protocol concluded in 1970 and the 1/95 numbered Association Council decision- indeed had obligations and commitments on Turkey's behalf to make Turkish Competition Law -together with several other laws and codes- in compliance with the Union *acquis*.

A separate 'competition board' which would operate within the national competition authority has been formed and its members have been appointed in 1997. The completion of the structuring of the competition authority and its commencement of the application reviewing activities could be possible at the end of 1997. There was nothing to prevent Turkey from fulfilling these obligations many years before but there was nothing to motivate or pressure her either. It was in a way like the idea of building up a concentration control regime –a competition law regime in general- had come to the minds of some

²⁷⁹ Treaties Of Rome: EEC and EURATOM Treaties, Signed: 25 March, 1957, Entered into Force: 1 January 1958.

people in the 60s and then suddenly forgotten for three decades. This brings us to the conclusion that the concentration control regime in Turkey is not the product of internal economic or legal dynamics of Turkey but rather a top-down adaptation from the Union. The desire of the then government of Turkey is the major reason behind the formation of a specific competition law regime. This certainly does not mean however that the competition law and concentration control regime in Turkey is an artificial structure and does not function effectively and properly. Its uses and contributions to Turkey's 'largely' free market economy and to the creation of a competition culture in the country are indeed enormous.

Turkish competition law is generally following the framework of the Union Competition Law. This choice stems from the fact that Turkey's accession process has been a tool in the integration of Turkish economy with the world. The need to regulate the markets and fix the flawed structure of the economy necessitated the protection of free competition through the enactment of a Competition Act. The role of Turkish accession process is undeniable within this context.

As the influences of globalization increase all around the world, the role and importance of Turkish competition law within Turkish legal order and international financial operations and corporate restructurings within Turkey increases as well. This trend seems to continue, as the Turkish accession process with the European Union goes (despite some stumbles on Turkey's behalf) hand in hand with the integration of Turkey's 'largely' free market economy with the world. Depiction of the framework of the concentration control and competition law regimes of the Union and Turkey reveal the fact that a competition law policy might be useful not only in economic and financial aspects but also in the democratization of the market and thus the society. Turkey has a lot to learn from the Freiburg School and the Ordoliberal contributions and experiences of Germany and the Union. The key to a democratic and plural society might lie within such an unexpected and irrelevant looking area that nobody has ever thought of.

BIBLIOGRAPHY

BOOKS

- Akman, Pinar. **The Concept of Abuse in EU Competition Law: Law and Economic Approaches**, First Edition, Hart Publishing, 2012.
- Akyüz, Helin Berfin. **Türk Rekabet Hukuku Kapsamında Şirketlerde Birleşme ve Devralmalar**, 1.Baskı, Ankara, Adalet Yayınevi, 2007.
- Craig, Paul and Grainne de Burca. **EU Law: Texts, Cases and Materials**, Fourth Edition, Oxford, Oxford University Press, 2007.
- Çelik, Orhan. **Şirket Birleşmeleri ve Birleşmelerde Şirket Değerlemesi**, 1. Baskı, Ankara: Turhan Kitabevi, 1999.
- Furse, Mark. **The Law of Merger Control In The EC and The EU**, First Edition, Hart Publishing, 2007.
- Gaughan, Patrick A. **Mergers, Acquisitions And Corporate Restructuring**, Fourth Edition; John Wiley & Sons, Inc., 2007.
- Gerber, David J. **Law And Competition In Twentieth Century Europe: Protecting Prometheus**, Fourth Edition, Oxford, Oxford University Press, 2003.
- Güven, Pelin. **Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme Ve Devralmaların Denetlenmesi**, 2. Baskı, Ankara, Yetkin Yayınları, 2003.
- Hovenkamp, Herbert. **Federal Antitrust Policy, The Law of Competition and Its Practice**, 3rd Edition, Thomson West, 2005.
- Jones, Alison and Brenda Sufrin. **EU Competition Law: Text, Cases, Materials**, Oxford University Press, Fourth Edition, 2011.

Lynch, Harry H. **Financial Performance Of Conglomerates**, First Edition, Boston: Harvard University Press, 1971.

Özgöker, Uğur. **Avrupa Birliği Rekabet Hukuku Ve Politikası**, 1. Baskı, İstanbul, Beta Yayınları, 2008.

Simon Bishop and Mike Walker. **The Economics of EC Competition Law. Concepts, Application and Measurement**, Third Edition, London, Sweet & Maxwell, 2010.

Petitt, Barbara S. and Kenneth R. Ferris. **Valuation For Mergers And Acquisitions**, Second Edition, New Jersey: Pearson Education Inc, 2013.

Roberts, Alexander William Wallace and Peter Moles. **Mergers And Acquisitions**, Edinburgh, Edinburgh Business School Heriot-Watt University, 2003.

THESES

Aşkın, Mehmet Devrim, “The Control Of Mergers And Acquisitions In EU And Turkish Competition Law”, (**Master Thesis**, The Graduate School Of Social Sciences Of Middle East Technical University, December 2006.)

Yaltı, Billur, “Kurumlar Vergisi Kanunu Açısından Sermaye Şirketlerinde Tasfiye, Birleşme, Nevi Değiştirme”, (**Yüksek Lisans Tezi**, İstanbul), 1987.

Yavuz, Rukiye Işıl, "An Integrative Perspective On Mergers And Acquisitions: Social Identity, Acculturation, Organizational Support, Rewards And Organizational Commitment", (**Master Thesis**, The Graduate School Of Social Sciences Of Middle East Technical University, June 2005.)

ARTICLES

Akman, Pinar. “ ‘Consumer’ versus ‘Customer’: The Devil in the Detail”, *Journal of Law and Society*, June 2010, Volume 37, Number 2, pp.315-44.

- Akdoğan, Evrim. “Türkiye’de 1988 – 2008 Dönemindeki Firma Birleşmeleri, Birleşme Dalgaları Ve Genel Tablo”, *Muhasebe ve Finansman Dergisi*, Ekim 2011.
<http://journal.mufad.org/attachments/article/632/8.pdf>, (last access: 06.01.2015).
- Banks, Karen. “Mergers And Partial Mergers Under EEC Law”, [Electronic Version] *Fordham International Law Journal*, 1987, Volume 11, Issue 2, 255-309,
<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1177&context=ilj>, (last access: 06.01.2015).
- Baskoy, Tuna. “Effective Competition and EU Competition Law”, [Electronic Version] *Review of European and Russian Affairs*, 2005, Vol.1, No.1,
<https://journals.carleton.ca/rera/index.php/rera/article/view/7/56>, (last access: 06.01.2015).
- Bender, Christian M. Georg Götz, Benjamin Pakula. “Effective Competition: Its Importance and Relevance For Network Industries”, Intereconomics 2001 Forum.
- Boone, Jan. “Effective Competition: A Benchmark For Competition Policy”, Dept. of Economics, Tilburg University, <http://dev3.cepr.org/meets/wkcn/6/6638/papers/Boone.pdf>, (last access: 06.01.2015).
- Capron, Laurence. “Historical Analysis Of Three Waves Of Mergers And Acquisitions In The United States (1887-1904, 1916-1929, 1950-1970): Triggering Factors, Motivations And Performance”, Academy of Management Conference Best Papers Proceedings, Management History division, Cincinnati, Ohio, August 1996,
<http://faculty.insead.edu/laurence-capron/documents/historical-analysis-of-three-waves-of-mergers.pdf>, (last access:06.01.2015).
- Castaldo, Giorgio and Aleko Bogdanov. “The *Nynas* Case: The Interplay Between the Failing Firm Defence and the Counterfactual Method”, *The Journal of European Competition Law & Practice*, 2015, Vol.6, No.5, pp 324-326.
- Cook, Christopher and Sven Frisch and Vladimir Novak. “Recent Developments in EU Merger Remedies”, *Journal of European Competition Law & Practice*, 2015, Vol.6, No.5, pp.351-364.

- Frazer, Tim. "Competition Policy after 1992: The Next Step", *The Modern Law Review*, Vol.53, No.5, New Perspectives on European Law (Sep., 1990), pp.609-623.
- Golbe, Devra L. and Lawrence J. White. "Catch A Wave: The Time Series Behavior Of Mergers" [Electronic Version] *Review of Economics And Statistics*, August 1993, Volume 75, Number 3, <http://www.jstor.org/discover/10.2307/2109463?sid=21105034792561&uid=4&uid=3739192&uid=2>, (last access: 06.01.2015).
- Gort, Michael. "An Economic Disturbance Theory Of Mergers", [Electronic Version] *Quarterly Journal Of Economics*, 1969, Volume 83, Number 4, <http://www.jstor.org/discover/10.2307/1885453?sid=21105034792561&uid=2&uid=4&uid=70&uid=2134&uid=3739192>, (last access:06.01.2015).
- Harford, Jarrad. "What Drives Merger Waves?" [Electronic Version] *Journal of Financial Economics*, 2005, Vol.77, <http://www.sml.hw.ac.uk/ms75/GP%20Papers/G132.pdf>, (last access:06.01.2015).
- Harker, Michael and Sebastian Peyer and Kathryn Wright. "Judicial Scrutiny of Merger Decisions in the EU, UK and Germany", *International and Comparative Law Quarterly*, January 2011, Vol. 60, Issue 01, pp. 93-124.
- Hawk, Barry E. "Antitrust in the EEC - The First Decade", *Fordham Law Review*, 1972, Vol.41, Issue 2, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2102&context=flr> (last access: 06.01.2015).
- Jones, Alison. "The Boundaries of an Undertaking in EU Competition Law", *European Competition Law Journal*, 2012, 8(2), 301-331.
- Kaseberg, Thorsten and Arthe Van Laer. "Competition Law and Industrial Policy: Conflict, Adaptation and Complementarity", Kiran Klaus Patel and Heike Schweitzer (Ed.), in *The Historical Foundations Of EU Competition Law (162-190)*, Oxford: Oxford University Press, 2013.

- Kroes, Neelie. "Preliminary Thoughts On Policy Review Of Article 82", Speech at the Fordham Corporate Law Institute, http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en, (last access: 06.01.2015)
- Kuenzler Adrian and Laurent Warlouzet. "National Traditions of Competition Law", Kiran Klaus Patel and Heike Schweitzer (Ed.), in *The Historical Foundations Of EU Competition Law* (89-124), Oxford: Oxford University Press, 2013.
- Leveque, François. "Merger Control: More Stringent in Europe than in the United States?", Ecole Nationale Supérieure des Mines de Paris, Centre d'économie industrielle, CERNA Working Paper – November 2007. <http://www.cerna.ensmp.fr/Documents/FL-MergerEUvsUS.pdf> (last access: 06.01.2015).
- Levy, Nicolas. "EU Merger Control: From Birth To Adolescence", *World Competition*, 2003, Vol. 26, No. 2, 195-218, KluwerLaw Database, (access: 06.01.2015).
- Martynova, Marina and Luc Renneboog. "Mergers And Acquisitions In Europe", European Corporate Governance Institute Working Papers In Finance, No:114/2006, http://www.ssrn.com/abstract_id=880379 (last access: 06.01.2015).
- Martynova, Marina. "Takeover Waves: Triggers, Performance and Motives", Tilburg University Discussion Papers, No: 2005/107, <https://pure.uvt.nl/portal/files/776337/107.pdf> (last access: 06.01.2015).
- McGeown, Paul and Aude Barthelemy. "Recent Developments in EU Merger Control", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.6, pp.450-453.
- Mitchell, Mark L. and J. Harold Mulherin. "The Impact Of Industry Shocks On Takeover And Restructuring Activity", [Electronic Version] *Journal of Financial Economics*, 1996, Volume 41, <http://www.sciencedirect.com/science/article/pii/0304405X9500860H>, (last access: 06.01.2015).
- Monti, Mario. Commission Press Release IP/01/1795 of 11 December 2001.

- Monti, Mario. "Europe's Merger Monitor", *The Economist*, November 9, 2002.
<http://www.economist.com/node/1429439>, (last access: 06.01.2015).
- Monti, Mario. "The Future For Competition Policy in the European Union", Commission Press Release, SPEECH/01/340, 10 July, 2001.
- Monti, Mario. Commission Press Release IP/03/1621 of 27 November, 2003.
- Müftüoğlu, Tamer. "Rekabet Kanunu ve İki Yıllık Uygulaması", *Rekabet Dergisi*, Vol.1, No.1, (March 2000).
- Nazzini, Renato. "Google and the (Ever-stretching) Boundaries of Article 102 TFEU", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.5, pp.301-314.
- Parisi, John J. "A Simple Guide To The EC Merger Regulation",
<http://www.ftc.gov/system/files/attachments/key-speeches-presentations/ecmergerregsimpleguide.pdf>, (last access: 06.01.2015).
- Perez, Sigfrido M. Ramirez and Sebastian van de Scheur. "The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge", Kiran Klaus Patel and Heike Schweitzer (Ed.), in *The Historical Foundations Of EU Competition Law* (pp. 19-53), Oxford: Oxford University Press, 2013.
- Rhodes-Kropf, Matthew S. Vishwanathan, David T. Robinson. "Valuation Waves And Merger Activity: The Empirical Evidence", 13 May 2004, 14th Conference on Financial Economics & Accounting (FEA), AFA 2004 San Diego Meetings, EFA 2003 Meetings Paper No.94, 5th Annual Texas Finance Festival,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=412680, (last access: 06.01.2015).
- Satzky, Horst. "The Merger Control Regulation of the European Economic Community", [Electronic Version] *The American Journal of Comparative Law*, Autumn 1990, Vol.38, No.4, 923-948. <http://www.jstor.org/stable/840617> (last access: 06.01.2015).

- Schleifer Andrei and Robert W. Vishny. "Stock Market Driven Acquisitions", [Electronic Version] *Journal Of Financial Economics*, June 2001, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=278563, (last access: 06.01.2015).
- Schweitzer, Heike and Kiran Klaus Patel. "EU Competition Law in Historical Context: Continuity and Change", Heike Schweitzer and Kiran Klaus Patel (Ed.), in *The Historical Foundations Of EU Competition Law* (pp. 207-230), Oxford: Oxford University Press, 2013.
- Schweitzer, Heike and Kiran Klaus Patel. "Introduction", Heike Schweitzer and Kiran Klaus Patel (Ed.), in *The Historical Foundations Of EU Competition Policy* (pp. 1-18), Oxford: Oxford University Press, 2013.
- Sevim, Adnan. "Şirket Birleşmelerinde Kurumsal Kaynak Planlaması (Enterprise Resources Planning –ERP)'nin Önemi", Haluk Sümer ve Helmut Pernsteiner (Ed.) *Şirket Birleşmeleri içinde* (327-360), İstanbul: Alfa Yayınları, 2004.
- Siems, Mathias and Gerhard Schnyder. "Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation", *Governance: An International Journal of Policy, Administration and Institutions*, July 2014, Vol.27, No.3, pp.377-396.
- Sjögren, Ing-Marie. "The Concept of Control Under The Merger Regulation", <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1561947&fileId=1565802> (last access: 06.01.2015).
- Subiotto QC, Romano and David R. Little and Romi Lepetska. "The Application of Article 102 TFEU by the European Commission and the European Courts", *Journal of European Competition Law & Practice*, 2015, Vol.6, No.4, pp.277-286.
- The New Researcher. "How and Why does the European Union Regulate Concentrations?", Summer 2010, Vol.3.
- Torre-Ensico, Isabel Martinez and Javier Bilbao Garcia. "Mergers and Acquisition Trends In Europe", [Electronic Version] *International Advances in Economic Research*, August 1996, Volume 2, Issue 3, 279-286.

- van Kraay, Franz G. A. “Proposed EEC Regulation On Control Of Mergers”, [Electronic Version] *The International and Comparative Law Quarterly*, April 1977, Vol.26, No.2, 468-480.
<http://www.jstor.org/stable/758469> (last access: 06.01.2015)
- von der Groeben, M. Hans. “Competition Policy as Part of Economic Policy In The Common Market”, Commission Press Release, 14 June 1965,
http://aei.pitt.edu/54163/1/IP_%2865%29_111.pdf, (last Access: 06.01.2015)
- Vogel, Louis. “The Recent Application of European Competition Law to Distribution Agreements: A Return to Formalism?”, *Journal of European Competition Law & Practice*, 2015, Vol.6, No.6, pp.454-461.
- Weitbrecht, Andreas. “The First 50 Years Of European Competition Law ”, [Electronic Version] *European Competition Law Review*, 2008, Issue 2, 81-88.

REPORTS

- Directorate For Financial And Enterprise Affairs, Competition Committee, Definition Of Transaction For The Purpose Of Merger Control Review, 18 June 2013.
- EEC Commission, Memorandum sur le Probleme de la Concentration dans le Marché Commun, 1 December, 1965, *Revue Trimestrielle de Droit Européen* 651-677.
- European Commission Directorate General For Competition, “Best Practises On The Conduct Of EC Merger Proceedings”, 20 January 2004,
<http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>, (last access: 06.01.2015)
- European Commission, “Ninth General Report on the Activities of the Community”, 1961,
<http://bookshop.europa.eu/en/ninth-general-report-on-the-activities-of-the-community-pbXK0259006/>, (last access: 06.01.2015).
- European Commission, Communication From The Commission To The Council – Report On The Functioning Of Regulation No:139/2004, Brussels, 30 June 2009, <http://eur->

lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009DC0281, (last access: 06.01.2015).

Commission of the European Communities, First Report on Competition Policy, 1971, http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf (last access: 06.01.2015).

Green Paper on the Review of Council Regulation 4064/89, COM (2001), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0745>, (last access: 06.01.2015)

DICTIONARIES

Etymology Dictionary, <http://www.etymonline.com/index.php?term=concentrate> (last access on 06.01.2015)

Glossary of terms used in EU Competition Policy, <http://bookshop.europa.eu/en/glossary-of-terms-used-in-eu-competition-policy-pbKD4402795/>, (last access on 05.01.2015).

LEGISLATION

Treaties

Treaties Of Rome: EEC and EURATOM Treaties, Signed: 25 March, 1957, Entered into Force: 1 January 1958.

Treaty Establishing the European Coal And Steel Community, Signed: 18 April, 1951, Entered Into Force: 23 July 1952, Expired: 23 July 2002.

Agreement establishing an Association between the European Community and Turkey, (Ankara Agreement), O.J. C 113, 24.12.1973.

Additional Protocol, O.J. C 113, 24.12.1973.

Acts

Rekabetin Korunması Hakkında Kanun, Kanun No: 4054, Kabul Tarihi: 07.12.1994, Yayımlandığı Resmi Gazete Tarihi: 13/12/1994, Numarası: 22140. English Text available at: <http://www.wipo.int/wipolex/en/details.jsp?id=3874>, (last Access: 06.01.2015).

Sherman Antitrust Act, 15 U.S.C 1-7., http://www.linco.org/sherman_txt.html, (last access: 06.01.2015)

Turkish Competition Authority

Rekabet Kurumu, “Birleşme ve Devralma Sayılan Haller ve Kontrol Kavramı Hakkında Kılavuz”, Kabul Tarihi: 16.07.2013, Karar Numarası:13-45 / RM (9).

Rekabet Kurumu, “Yatay Birleşme ve Devralmaların Değerlendirilmesi Hakkında Kılavuz”, Kabul Tarihi: 04.06.2013, Karar Numarası: 13-33 / 448-RM (7).

Rekabet Kurumu, “Yatay Olmayan Birleşme ve Devralmaların Denetlenmesi Hakkında Kılavuz”, Kabul Tarihi: 04.06.2013, Karar Numarası: 13-33 / 449-RM (8).

European Union Official Journal

EC Turkey Association Council, Decision No 1/95 on implementing the final phase of the Customs Union, O.J. L 35/1, 13 February 1996.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] O.J. L 24/1.

Commission Notice in a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, O.J. C 366/5, 14 December 2013.

Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139 / 2004 on the control of concentrations between undertakings, [2004] O.J. L 133/1,

Commission Regulation 1983/83 on the application of Art.85 (3) of the Treaty to categories of exclusive distribution, [1983] O.J. L173/1.

Commission Regulation 1984/83 on the application of Art.85 (3) of the Treaty to categories of exclusive purchasing. [1983] O.J. L173/5.

Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings, [1973] O.J. C 92/1.

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C 31/5.

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] O.J. C 265/6.

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] O.J. C 265/6.

Commission Notice on Case Referral in respect of concentrations, [2005] O.J. C 56/2.

Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, [1978] O.J. L 222/11.

CASE TABLE

Turkish Constitutional Court

Turkish Constitutional Court, 11 April 1994, 1994/43, *Anayasa Mahkemesi Kararları Dergisi*, Sayı 30, Cilt 1.

European Commission

European Commission, Case COMP / M.2510 of 24 September 2001.

European Commission, Case COMP/M. 1673 of 13 June 2000.

European Commission, Case COMP M.1806 of 26 July 2000.

European Commission, Case COMP / M. 2208 of 26 January 2001.

European Commission, Case IV/M.1383 of 29 September 1999.

European Commission, Case IV/M.53 of 2 October 1991.

European Commission, Case COMP/M.2282 of 10 October 2001,

European Commission, Case COMP/M.82 of 16 May 1991.

European Commission, Case IV / M.920 of 18 February 1998.

European Commission, Case IV/M.931 of 2 June 1998.

European Commission, Case IV/M.216 of 22 February 1993,

European Commission, Case IV/M.097 of 24 June 1991.

European Commission, Case IV/M.0093 of 24 June 1991.

European Commission, Case IV/M.157 of 5 October 1992,

European Commission, Case IV/M.970 of 6 May 1998.

European Commission, Case IV/M.397 of 7 March 1994.

European Commission, Case IV/M.452 of 9 June 1994.

European Commission, Case COMP/M.4942 of 2008.

European Commission, Case COMP/M.4854 of 2008.

European Court Of First Instance

European Court Of First Instance, 23 February 2006, T-282/02,

<http://curia.europa.eu/juris/showPdf.jsf?docid=65712&doclang=EN>, (last access: 06.01.2015)

European Court Of First Instance, 6 June 2002, T-342/99,

<http://curia.europa.eu/juris/showPdf.jsf?docid=104291&doclang=en>, (last Access: 06.01.2015).

European Court Of First Instance, 25 March 1999, T-102/96.

<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-102/96>, (last access: 06.01.2015).

European Court Of First Instance, 25 October 2002, T-5/02,

<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-5/02>, (last access: 06.01.2015).

European Court Of First Instance, 31 January 2001, T-156/98,

<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-156/98>, (last access: 06.01.2015).

European Court Of Justice

European Court of Justice, 13 February 1979, 85/76, [http://eur-lex.europa.eu/legal-](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085&from=EN)

[content/EN/TXT/PDF/?uri=CELEX:61976CJ0085&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085&from=EN), (last access: 06.01.2015).

European Court of Justice, 17 November 1987, Joined Cases 142 and 156/84, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61984CJ0142>, (last access: 06.01.2015).

European Court Of Justice, 20 May 2010, 12/03, 13/03, <http://curia.europa.eu/juris/liste.jsf?num=C-12/03&language=en>, (last access: 06.01.2015).

European Court of Justice, 21 February 1973, 6/72, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61972CJ0006>, (last access: 06.01.2015).

European Court of Justice, 24 May, 1977, 107/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0107>, (last access: 06.01.2015).

European Court of Justice, 25 October 1977, 26/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0026>, (last access: 06.01.2015).

European Court Of Justice, 26 November 1998, 7/97, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0007>, (last access: 06.01.2015).

European Court of Justice, 29 June, 1978, 77/77, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61977CJ0077>, (last access: 06.01.2015).