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AVRUPA TOPLULUĞU ENSTİTÜSÜ
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THE COMPARATIVE ANALYSIS OF EU AND TURKISH LAWS IN THE ASPECT OF MERGERS & ACQUISITIONS

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HAYRİYE ELÇİN PEKER

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ABSTRACT

With this research under the title "The Comparative Analysis of European Union and Turkish legislation in the Aspect of Mergers & Acquisitions" my purpose is to analyze company mergers and acquisitions, which is one of the methods that secures the companies that are the inevitable elements of commercial life survive in the pitiless competition atmosphere of the global economy in our day, by comparing and contrasting the Turkish and the European Union Legislation, and to analyze whether European Company Statute (Societas Europaea – SE) which was passed by the European Union Council Regulation No:2157 of 08.10.2001 will affect the mergers and acquisitions of companies which are settled in different Member States.

In EU the control of mergers and acquisitions are realized through Council Regulation No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation). The Commission decisions which are one of the legal basis of competition policy of EU determine the agreements which are exempted from competition rules. And the Commission Notices are aimed to give information on the improvements regarding competition policy. And also the decisions of European Court of Justice and Court of First Instance are the sources that set up the legal frame for common competition policy. The merger and acquisitions of the companies may create positive effects on competition in the markets such as upgroving of research and development, or restructuring attempts that reduce the costs. Also the companies' tendency is to merge in order to protect their power to compete. However, there are mergers that are against the competition which aim to abuse the dominant position or to strengthen the existing dominant position in the market. Although there is no provision regarding this issue in Treaty on the Establishment of European Communities, the control of the mergers and acquisitions is the significant part of European Common Competition Policy. Regarding the ECMR not all of the mergers and acquisitions

but "A concentration which would significantly impede 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, shall be declared incompatible with the common market".

EU has adopted an advance canvass system for the mergers that has community dimension. For the mergers which have national dimension the member states are authorized for advance canvass system.

In the light of new developments in EU regarding the private company law, after long efforts, the European Union Council has adopted European Union Council Regulation No: 2157 of 08.10.2001 about the functioning of a new company form named European Company Statute (Societas Europaea).

In order to compare the legislation systems in EU and Turkey regarding the mergers and acquisitions and the European Company Statute, in this research, first I analyzed company mergers and acquisitions in the extent of the European Union and Turkish Competition Laws, and after that I analyzed the legal documents on the establishment of Societas Europaea. And then, I compared and contrasted the legal advantages of company Mergers and Acquisitions for companies in the extent of competition law, with the novelties that SE will bring, and in this respect I tried to provide a new legal perspective for companies.

ÖZET

Bu tezi yazmaktaki amacım, ticareti hayatın vazgeçilmez unsurları olan şirketlerin günümüz küresel ekonomisinde acımasız rekabet ortamında ayakta kalmalarını sağlayan yöntemlerden biri olan Şirket Birleşmeleri ve Edinimlerini Türk ve Avrupa Birliği Hukuku açısından karşılaştırmalı olarak incelemek ve 08.10.2004 tarihinde yürürlüğe giren 2157 Sayılı 08.10.2001 tarihli Avrupa Birliği Konseyi Tüzüğü ile kabul edilen Avrupa Şirketi (Societas Europea)'nın farklı Üye Devletlerde yerleşik şirketlerin birleşme ve edinimlerine etkisinin olup olmayacağını incelemektir.

Avrupa Birliği'nde birleşme ve devralmaların kontrolü 20 Ocak 2004 tarihli 139/2004 sayılı Konsey Tüzüğü ile gerçekleştirilmektedir. Rekabet Politikası'nın yasal dayanakları içinde bulunan Komisyon kararları, belirlenen rekabet kurallarından muaf tutulacak anlaşmaları belirlemektedir. Komisyon duyuruları ise, rekabet alanındaki gelişmeler konusunda bilgi vermeyi amaçlamaktadır. Ortak Rekabet Politikası'nın gelişiminde çok önemli bir rol üstlenen Adalet Divanı'nın ve ilk Derece Mahkemesi'nin kararları da yasal çerçeveyi belirleyen en önemli kaynaklar arasındadır. Şirketlerin birleşme ve devralmalar yoluyla bir araya gelmeleri, piyasalarda olumlu etkiler yaratabilmektedir. Örneğin, araştırma ve geliştirme ya da maliyeti düşüren yeniden yapılanma girişimleri gibi olumlu sonuçlar ortaya çıkabilmektedir. Şirketlerin de eğilimi, rekabet gücünü korumak amacıyla, birleşmek yönündedir. Ancak, rekabete aykırı, hakim durum yaratmaya ya da varolan hakim durumu güçlendirmeye yönelik birleşmeler de söz konusu olabilmektedir. Avrupa Topluluklarını Kuran Anlaşma'da, bu konuya ilişkin herhangi bir hüküm bulunmamasına rağmen birleşme ve devralmaların denetimi, AB Ortak Rekabet Politikası'nın çok önemli bir bölümünü oluşturmaktadır. Birleşme Tüzüğü'ne göre bütün birleşme ve devralmalar değil, ancak "sonucunda, iç Pazar veya onun önemli bir bölümünde etkili rekabetin önemli ölçüde engellendiği bir durum yaratan veya güçlendiren, Topluluk boyutuna sahip bir yoğunlaşmanın iç Pazar'la bağdaşmaz ilan edilmesi" gerekmektedir.

Avrupa Birliği, Topluluk boyutu olan birleşmeler ile ilgili ön inceleme sistemi oluşturmuştur. Ulusal boyuttaki birleşmeler için ise üye devletlerde ön inceleme yapılmaktadır.

Avrupa Birliği Şirketler hukuku alanındaki yeni gelişmeler ışığında, uzun çabalardan sonra, Avrupa Birliği Konsey'i Avrupa Şirketi'nin faaliyete geçmesi için 08.10.2001 tarihli Konsey Tüzüğü'nü Kabul etmiştir.

Şirket birleşme ve devralmaları ve Avrupa Şirketi konusundaki Avrupa Birliği ve Türkiye hukuki düzenlemelerini karşılaştırmak amacıyla öncelikle Avrupa Birliği ve Türk Rekabet Hukuku çerçevesinde Şirket Birleşmeleri ve Edinimlerini inceledikten sonra Avrupa Şirketi kuruluşuna ilişkin hukuki belgeleri inceledim. Daha sonra gerek rekabet hukuku kapsamında şirket birleşme ve edinimlerinin şirketlere sağlayacağı hukuki avantajlar ile Avrupa Şirketi'nin getireceği yenilikleri karşılaştırarak şirketlere yeni bir hukuki perspektif sağlamaya çalıştım.

LIST OF ABBREVIATIONS

CMLR	Common Market Law Review
CONSTITUTION	Turkish Constitution
EC	European Community
EEC TREATY	Treaty Establishing the European Community
ECJ	European Court of Justice
ECMR	European Commission Merger Regulation
ECR	Official Reports in English of Cases decided by the European Court of Justice
e.g.	Example
EU	European Union
OJ	Official Journal
SE	Societas Europea (The European Company)
SINGLE MARKET	The internal market of EU
SMEs	Small and Medium Size Enterprises
TLO	Turkish Law of Obligations
TTC	Turkish Trade Code
R&G	Research and Development
RG	Resmi Gazete
UK	The United Kingdom
US	The United States

TABLE OF CONTENTS

INTRODUCTION

Market system begins with the free market economy first introduced by Adam Smith. The essence of market system is the freedom of decision and conduct of economic units. However, the first condition of an economic unit to have the authority of decision concerning productive factors is to possess the property of those productive factors. Thus, private property makes up the prerequisite of market economy. Establishing a link between decisions made independently by economic units necessitates a process of competition. Thus, competition makes up another important prerequisite of market system. Economic unit in the process of competition instantly evaluates the conditions in the market, and makes an independent decision. This view, which makes up the basis of the classical liberal system proposed by Adam Smith, was that the economic system would operate better if everything were to be left on its own accord in the society instead of a state interference. Now that economic life was a part of the natural system, any interference into that system would result in an imbalance in the system.

But capital accumulation and the fact of corporation developed in order to share the risk of commercial life obliged state interference into markets. By the end of the 19th century, markets of the western world, and therefore the other markets of the world fell under the control of big monopolies and trusts now that the state interference was deficient. Near the end of the 19th century, a competition law in the modern sense of the term first passed in the United States of America (Sherman Act 1890). Hence, an inevitable interaction developed between the science of economy and competition policy and competition laws. Although monopolization is still regarded as natural by some economists, this paradigm that explains cases like secret agreements between firms, price arrangements and abnormal profit making in terms of structural factors, obstacles in access to market, product differentiation etc. makes up the theoretical basis of wealth economy.

In those times, competition policies and competition laws were reduced to detecting the ones that violated competition in the market by secret or open agreements and prohibiting them. After 1950s, some opinions were put forward in order to find different solutions to certain competition problems, and there was consensus that certain agreements and conditions

restrict competition and they should be prohibited. Recent studies have concentrated on the conditions of firms with higher market shares, along with intercompany marriages and company acquisitions.

Liberal economic philosophy on the basis of competition anticipates that markets will develop and social wealth will increase through competition. The first modern Competition Law was passed in 1890, in the United States of America. The concept of competition makes up the basis of Competition Law. Competition is the way to determine the better ones in social life when it is not known. Competition, which is the method to determine the best, also brings about the maximum number of new social values. Adam Smith, being one of the founders of liberal economy, had likened competition to the attitudes of rivals in a contest, and evaluated competition as the activity of firms to conform to the change in the market. According to Smith, competition can be defined as enterprises' making the activities of others more difficult in order to make profit. In the science of economy, the beginning of the application of mathematical thinking since the 19th century has also provided a different content to the conception of competition.

In the modern theory of economy, what is meant by competition is that it is a form of market, free from the personalities of its practitioners, in which the price of the commodity is determined according to supply and demand. In order to talk about competition market or only about competition, it is necessary that there should be plenty of buyers and sellers, anyone concerned should be informed about the market, and that the commodity should be divisible and homogenous. And the dominant view among liberal economists is that competition is a definition about the structure of the market. According to this view, the concept of competition is relevant not only for the conditions in which there are plenty of buyers and sellers, none of whom has the power to affect the market on its own, but also for the conditions in which enterprises operating in the same market, for example, determine the price of sale, or the production quotas. The enterprises have abolished competition through agreement; however, the fact that they are still rival enterprises has not changed. In order to protect their benefits, in addition to having to control the actions of the other, they will also try to make more profit by neglecting the articles of contract between them as long as it is not noticed. It is suggested that the condition is not different even when there is not any agreement between them and that the economic dependency between them eliminate

competition. According to the science of economy, competition can be defined as a form of market in which the data flow is full, the commodity is homogenous, and no buyer or seller has the power to affect the price or total amount of supply on its own, and entry and exit is free. And the subject of Competition Law is taking the measures necessary to actualize the conditions of competition, and providing the enterprises operating in markets, in which these conditions are not actualized, behave as if operating in competition market. That is why Competition Law involves not only the activities of the enterprises in order to violate the conditions of competition, but also the activities to control the market in markets that do not actualize the conditions of competition. The subject of Competition Law is the activities of the enterprises in order to violate the conditions of competition, and the activities to control the market in markets that do not actualize the conditions of competition. Competition Laws involve articles to protect the markets from any kind of interference, which means both private people's and state interference, and to provide the development of the markets in their natural constitution. Since competition is important for reducing the loss in social wealth to zero or minimum, it has also been the basis of commercial life in democratic states adopting a liberal economic system, and has been the basic data in determining the financial policies of that state. Therefore, in state systems that adopt liberal economic philosophy, it is in the state's functions to provide and control that the markets operate according to competition rules.

When the fact of competition is treated in terms of market activities, the determination of the price in the market changes personal arbitrariness to social preferences, and results in some economic benefits. The reason of the defense of competition is the fact that it is the most effective method known in attaining such benefits as expected from competition. According to liberal economists, competition is the most effective method in actualizing economic productivity. What is meant by economic productivity here is the most rational use of the restricted resources. Competition is a free choice system. Competition is the method of individuals that constitute the society to determine their preferences in the market, and therefore the most important social aspect of competition is that it puts an end to arbitrariness and is a democratic system that brings about the total preferences of the individuals that constitute the society. The people, who join in state government by voting, reflect their opinions and wishes in economic life within the free market system. On the other hand, it is a widely acknowledged fact that people or groups who are economically too powerful do or

will try to direct the political mechanism according to their own profits, which constitutes an important threat toward the system of democratic election. While competition system highlights social preferences, it also constitutes a guarantee for the development and continuance of democracy.

Although the economic consequences of competition began to be comprehended in the 20th century, competition law has a longer history. In the basis of all competition law rules that attempts to actualize and protect competition, there is the thought to protect the consumer. It is suggested that competition is for the maintenance of the consumers' paying less money by promoting productive efficiency and technical developments, and bringing forward some restrictions on the profit margin. All the effects of competition's economical consequences on the consumer are for the benefit of the consumer, including the efficiency in the use of the resources.

After the second half of the 19th century, the view that competition is only for the benefit of the consumer has been laid aside as a consequence of the developments observed on the science of economy, and competition law gained a different quality. According to the science of economy, what is really meant to be achieved by competition is economical efficiency. Another important consequence of competition market is the prevention of the centralization of economic power, and the maintenance of the generalization of this power in society in a widespread way. Competition enables economic preferences to be made by the consumers. But in markets that restrict competition, in the determination of production amounts and price, the way the commodity supplied is evaluated by the consumers is not important. When the economical preferences are made by the monopolizing firm or the enterprises that restrict competition instead of the consumers, the ones that hold the economic power also become dominant over political life. Another social effect of competition is that it totally corresponds to the freedom of choice and opportunity. In markets that restrict competition and in monopoly market, the freedom of choice of the consumers is virtually restricted. While in competition market, the consumers are to choose freely from any of the commodities supplied by rival firms and to make a contract with any firm they like, they are deprived of this opportunity in monopoly market. Competition market is a system in which there is no restriction for new enterprises to enter into the market, and people can perform any activity they like in the scope of their ability, capability and knowledge. Whereas in markets

that restrict competition, the enterprises that control the market may make it harder to enter into the market by increasing the obstacles of entering into the market by methods such as commercials and commodity differentiation in order not to share their privileged situations with others. And this leads to the impairment of equality of opportunity in commercial life, and results in the society's deprivation of the enterprising spirit in the individuals.

The subject of competition law is competition in economic life. That is why, in terms of the competition law policy, it is equally important to determine the economic consequences of competition, as well as what economy means according to the science of economy. One of the major economical benefits of competition is the maintenance of efficiency in production. Competition forces enterprises to produce cheaper, which means with a lesser use of resources. Competition is the most influential method in the maintenance of efficiency in the distribution of resources, and by supplying the distribution of the resources restricted in natural life according to the desire of the consumers to possess each and every product and the economical value they endow to the particular product, and therefore they maintain the increase of general happiness and wealth. Today, there is a consensus that the most important economic consequence of competition is the maintenance of the efficiency of the use of resources.

In a certain market, the ones with the expectation of benefit from the restriction of competition are the sides of agreements that restrict competition. Enterprises which operate in these markets, but not being included in any competition restricting agreement or union of conduct are also harmed by the restriction of competition like the consumers. The purpose of the sides that restrict competition is to gain more than the normal profit like a monopolistic firm by controlling the supply and price in the market.

The restriction of competition may come about in three ways: First, the enterprise becomes a dominant power over the market and forces the other firms to withdraw from the market, and maintains the price according to its own costs. Monopoly and monopolization is an important method of restricting competition. Another way of restricting competition is the agreement of enterprises operating in the market, and therefore restricting competition.

Hence, while the firms operating in the market act together like a monopoly, they also retain their independence. Activities in order to restrict competition are divided into two according to the sides of this activity such as the horizontal and vertical restriction of competition. According to this division, competition restricting agreements between enterprises that operate in different levels of the market, such as the manufacturer, wholesale dealer and the retail dealer, are called as vertically competition restrictive agreements. On the other hand, competition restricting agreements between enterprises that operate in the same level are called horizontally restrictive. In both restrictive types, the sides of the agreements retain their economic and legal independence. A third practice for the restriction of competition is the merger of enterprises that operate in the same level or different levels in one entity, or the acquisition of one enterprise by another. Mergers and acquisitions are subjected to a different regulation from the monopolies and competition restricting agreements in competition law. Because they may have attempted to reach an optimum size through merger and therefore to increase efficiency they are subject to different legal arrangements.

Today, as a result of the technological development and the obligation introduced by globalization, companies take the necessary measures for mergers and acquisitions in both national and international scale in order to compete in the market. Except competition, which is one of the most important reasons of company marriages that have increased significantly in recent years, the companies are being sides of mergers and acquisitions for various reasons, such as to have a stronger position in the market, to have access to a new product market or a new geographical market, or to avoid bankruptcy. Whatever reasons there may be, company mergers and acquisitions has various outcomes from an economical, social and environmental perspective. When mergers and acquisitions are taken from an economical perspective, they result in some impacts on rivals, clients, consumers and the whole of the economy. These impacts of mergers and acquisitions, can be both positive concerning the increase of economical welfare by way of the reflection of the low prices and high quality that arise from the efficiency in production and distribution to the clients and to the whole of the economy, and they can also be negative concerning the decrease in the number of subjects in the market and in the variety of products, and therefore resulting in outcomes such as the restriction of the choices of clients and the increase of prices.

In this respect, mergers and acquisitions are directly effective on competition in the market, and the outcomes of these operations may conflict with the sought benefits of competition. That is why mergers and acquisitions that have direct effects on competition in various ways are controlled by legal norms both in the European Union and in our country.

The European Company Statute (Societas Europaea) which was passed by the European Union Council Regulation No: 2157 of 08.10.2001 is one of the symbols of the European Union concerning the creation of a single market in the extent of the Union, and on which many years of labor was spent, and which consequently was realized in 2004. It was aimed with Societas Europaea to prevent the structural complication of international Companies and to make a company with a "SE" status to be able to register any country of the European Union; and thus it paved the way for companies to benefit from many advantages, and especially the advantages on taxes.

The purpose of this thesis is the comparative analysis of "Mergers and Acquisitions" in Turkish and the European Union Laws, concerning the legal structures and the regulations of legal entity, and also the legal structure of European Company Statute which was passed by the European Union Council Regulation No:2157 of 08.10.2001, and taking into considerations the novelties that it has introduced, the analysis of whether or not it can be regarded as an alternative to company mergers and acquisitions which have become quite popular today.

In the direction of this purpose, company mergers and acquisitions are analyzed in a contrastive method in the extent of the European Union and Turkish competition law rules, without touching on the dimensions of tax law and labor act in detail, but by making attributions when necessary.

The thesis is composed of three chapters, except the introduction and the conclusion. According to this, in the first chapter a general view on Turkish and the European Union Competition Law is aimed to be presented, and then in the second chapter company Mergers

and Acquisitions will be analyzed comparatively in the legislation of Turkish and the European Union Competition Law. Finally, in the third chapter, legal regulations on European Company Statute, the novelties it has introduced and whether European Company Statute can be an alternative to company mergers and acquisitions, will be aimed to be analyzed without touching on the dimensions of tax law and labor act.

CHAPTER I
COMPETITION LAW

A. GENERAL

In recent years, it has become an economically usual situation for undertakings which are active in commercial life to join with another undertaking or other undertakings permanently for various purposes; like increasing their profits, to become more efficient or to secure their positions in the market. The wave of globalization and the resulting fact of competition forces undertakings to join with others in order to withstand the irresistible conditions of competition of foreign markets; and thus in many sectors, "company marriages" and other institutional mergers fall on the agenda; especially among undertakings that are active in sectors involving large capitals like banking, oil, cement etc.[1]

In this way, there are many economical and social reasons that force undertakings which act in the same sector or in different sectors, to join permanently in an institutional structure. From the economical aspect, merger means more power and the advantage of competition. The increase of capacity following merger enables to attain the most efficient production for some commodities and thus to make the cheapest production. In addition to this, the means for technical information and finance increase after merger; and this makes it easier for the undertakings to step into different investment areas, especially into sectors that require high investment expenditures. This condition is also valid for research and development (R&G) activities that require high technical information and financial resources.[2]

Since mergers and acquisitions can be in both national and international scale, it would be true to say that these have various effects and benefits. While mergers that take

[1] Keremcem Sanlı, ***Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği,*** Rekabet Kurumu Yayınları, Yayın No: 49, 2000, p. 314
[2] Sanlı, p. 315

place in national scale provide domestic undertakings the possibility to compete better in foreign markets; mergers that take place in the international platform has various benefits for the economy of the country like the introduction of foreign capital, the creation of new employment areas, the transfer of technology and the increase in exportation. Besides, mergers and acquisitions are regarded as an important means to overcome the economical inactivity created by periods of depression and the following company bankruptcies.[3]

Despite the aforesaid benefits, these mergers and acquisitions between undertakings may result in some negative effects on competition in the market. It is true that after the merger, generally there is no increase in capacity; but on the contrary, there is a decrease in the number of subjects that employ economical activities in the market[4], which results in the decrease of competition and the increase in economical concentration. Especially mergers that take place between undertakings that have high shares in the relevant market (rivals), may result in the weakening of small and medium scale undertakings and a great decrease in competition in the market. On the other hand, while vertical mergers and acquisitions provide a convenience in terms of distribution and putting on the market in the relevant market, they also carry the danger of creating an important obstacle of entrance into the relevant market. Besides, it is also true that the concentration of economical power permanently in certain centers has negative effects not only on the economical order, but also on social and political life.[5]

For these reasons, it is anticipated in Competition Law that regulations should be made concerning the control of mergers and acquisitions, permanent relations between undertakings that result in the decrease of competition in the market. In this respect, the seizure of an undertaking by another undertaking (or more undertakings), the union of two independent mergers in the structure of a new merger or some other institutional relations like joint

[3] Dr. Ateş Akıncı, ***Rekabet Hukuku Açısından Birleşme ve Devralmaların Kontrolü*** Rekabet Kurumu Perşembe Konferansları, 2000, p.3.
[4] Sanlı, *p. 315*
[5] Harun Ulu, ***Birleşme ve Devralmalarda Ortaya Çıkan Rekabet Sorunları ve Koşullu İzin,*** Rekabet Kurumu 3. Dönem Rekabet Uzmanları Tezi, Yayın No: 146, 2004, p.16.

ventures[6] is under the control of competition authorities. The control of company mergers and acquisitions those are directly effective on competition by changing the structure of the market is one of the most important duties of competition authorities. In this regard, mergers and acquisitions are controlled in our country as well, by Article 7 of the Act on the Protection of Competition numbered 4054 ("Turkish Competition Act")[7].

The competition authorities, by taking into consideration various elements; such as the market shares of mergers that are involved in the merger and acquisition, the characteristics of the market in which the operation will take place and the relevant product etc., guess at the effect of the operation in the market and decide depending on this guess concerning the operation. As a result of the evaluations, mergers and acquisitions that are concluded not to be effecting the competition negatively are authorized. However, if there may be any possible negative effects of a merger and acquisition in the market, there is also the possibility that this operation may not be authorized. The duty of competition authorities is to provide and protect the conditions of competition and their interference in the commercial preferences of the undertakings that do not violate competitive rules contradicts the needs of free market economy. Since the prohibition of mergers and acquisitions by competition authorities is a directly effective decision on the commercial strategies of the relevant undertakings, the prohibition of the aforesaid operations sometimes may bring more restrictions to mergers than the necessary and sufficient precautions to protect the competitive environment and may result in the over-interference to the freedom of mergers to make decisions. The prohibition of mergers and acquisitions may also result in the hindrance of the possible positive effects of these operations on competition in the market and the increase of effectiveness of the relevant undertakings. For all these reasons, before the competition authorities take the decision of prohibition which restrict such commercial decisions of undertakings greatly, it is convenient for them to analyze whether there are any other alternatives in order to overcome the competitive problems caused by the operation.[8]

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[6] A contractual agreement joining together two or more parties for the purpose of executing a particular business undertaking. All parties agree to share in the profits and losses of the enterprise. For further information see Lerzan Kayıhan, *"**Rekabet Hukuku Uygulamalarında Ortak Girişimler**"* Rekabet Kurumu 1. Dönem Uzmanlık Tezleri Serisi, Yayın No: 87, 2003.

[7] 4054 Sayılı Rekabetin Korunması Hakkında Kanun, RG Date: 13.12.1994, RG No: 22140.

[8] Ulu, p.8.

In the Turkish Law, Article 7 of Turkish Competition Act, concerning mergers and acquisitions aims to control the market structure in general. The underlying principle of this regulation is to overcome the gathering of economic power around certain centers and to prevent the economical concentration that result in a structural change in the market.[9] That is why, whatever legal appearance it may have, any permanent relationship that results in the decrease of competition in the market by the concentration of economical power institutionally, theoretically it might be evaluated in the extent of Article 7.

B. THE DEFINITION OF COMPETITION LAW AND HISTORICAL BACKGROUND

In the teaching of the Competition Law, competition is defined as "the relationship between undertakings that sell the same type of goods or services in the same period to a certain group of consumers." [10]

According to European Union Commission, competition is the best stimulant of economic activity, since it guarantees the widest possible freedom of action to all. An active competition policy, pursued in accordance with the provisions of the treaties establishing the European Communities, makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision making machinery, competition enables enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement of living standards and employment prospects within the countries of the Community. From this point of view, competition policy is an essential means for satisfying to a great extend in the individual and collective needs of our society. [11]

The European Commission with his 18th Report on Competition Policy, stated that, """" *an effective competition policy is the sole means of making the most of the potential offered by the completion of the large market and thus, by increasing competitive pressure, of*

[9] Arif Esin, ***Rekabet Hukuku,*** ESC Yayınları, 1998, p.15
[10] D.G**.** Goyder, ***EC Competition Law***, Oxfod: Clarendon Press., Oxford EC Law Library 1998, p.9.
[11] P.S.R.F. Mathijsen, ***A Guide to European Union Law***, Sweet&Maxwell 1995 , p.215

producing a more competitive economy. More competition will also strengthen the position of European industry in both world and domestic markets. Without such a policy, there is the risk that community consumers would be able unable to enjoy the promised benefits of a large integrated market."""""[12]

In Article 3 of Turkish Competition Act[13], under the title of "Definitions" of the Competition Law, competition is defined as:

> *"""the competition that enables to make free decisions between undertakings in the goods and services markets"""*

Since competition policies are important for providing effective distribution of resources, they also have an important quality in terms of increasing the social welfare. In liberal economic systems, that competition should be determined freely and directly within the conditions of the market, without any interference within or outside the conditions of the market is highly important. The Competition Law is also important in this sense.[14]

The Competition Law has many definitions within the doctrine. According to one opinion, practices such as agreements and decisions in order to effect the market in terms of certain commodities and services, restrictive practices and monopolies that misuse the power in the market, and all the regulating and prohibitory norms in order to overcome competitive restrictions that are against the law in situations when the free competitive order is impaired is defined as competitive restrictions or law of monopolies.[15]

According to another opinion, the fundamentals of liberal economical system are based upon the principle of free competition, and Competition Laws are the state's means of interference which are established in order to protect free competition.[16]

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[12] Mathijsen, p.215
[13] 4054 Sayılı Rekabetin Korunması Hakkında Kanun, RG Number 22140, RG Date: 13.12.1994
[14] Pelin Güven, ***Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme ve Devralmaların Denetlenmesi***, Yetkin Yayınları 2003, p.20
[15] Ergun Özsunay***, Kartel Hukuku*** İstanbul: Fakülteler Matbaası, Yayın. No: 3361, Hukuk Fakültesi Yayın No: 694, 1985, p.4.
[16] İ. Yılmaz Aslan, ***Rekabet Hukuku ve Rekabetin Korunması Hakkında Kanun***. Bursa Ekin Kitabevi Yayınları, 1997, p.1,2.

Regarding an other opinion, Competition Law is defined as the branch of law that has the basic aim to establish and to protect free competition order in the markets of goods and services, that prevents the misuse of the dominant position with agreements, decisions and practices that restricts competition in order to protect competition, that which contains the necessary organizations and inspections in order to control mergers and acquisitions that decrease competition significantly by creating dominant positions or by strengthening their dominant position.[17]

Competition Law is one of the branches of law of mixed quality. Since it is one of the branches of law under the title of Economical Public Law, it is closely related with both economy and public law. On the other hand, it also contains sentences concerning private law. And in recent years, it has been under the classification of the law of economy. [18]

We see that the first important legal regulation concerning Competition Law came into existence in the USA. Sherman Act[19], which was accepted in 1890 and was the first act concerning Competition Law, is made up of two chapters. While the first chapter mentions the agreements that restrict competition, the second chapter contains monopolization. Concerning the control of mergers and acquisitions, Clayton Act[20] and Federal Trade Commission Act took effect in 1914. Changes have been made in acts that took effect beforehand by Robinson Patman Act in 1936 and by Celler Kefauver Act in 1950s.[21] In Sherman Act, the restriction of competition was not mentioned, but "commercial restriction" was mentioned. Which restrictions fall within the limits of Clayton and Federal Trade Commission Acts was determined by the principles derived from later events, and for the first

[17] Güven, p. 20.
[18] Turgut Tan, ***Ekonomik Kamu Hukuku***, Ankara, Türkiye ve Orta Doğu Amme İdaresi Enstitüsü Yayınları, No: 210, 1984, p.1.
[19] The Sherman Antitrust Act (1890) Competition Policies lay down a legal frame for protecting, supporting and in some cases for the composition of the competition in goods and service markets. The first of these legal arrangements or the first written one is Sherman Act which came into force in 1890 and which was arranged according to the agreed upon competition policies. For further information see Ali Ilıcak, ***Sherman Antitröst Yasasının Ortaya Çıkışı: Yanılsamalar ve Gerçekler***, Rekabet Kurumu Uzmanlık Tezleri, 2003.
[20] Clayton Antitrust Act, 1914, passed by the U.S. Congress as an amendment to clarify and supplement the Sherman Antitrust Act of 1890. It was drafted by Henry De Lamar Clayton. The act prohibited exclusive sales contracts, local price cutting to freeze out competitors, rebates, and interlocking directorates in corporations capitalized at $1 million or more in the same field of business, and intercorporate stock holdings.
[21] Prof. Dr. M. Tamer Müftüoğlu, ***Rekabet Kanunu ve İki Yıllık Uygulaması.*** Rekabet Kurumu Rekabet Dergisi, No:1, 2000, p.6.

time in "Standard Oil"[22] case, it was mentioned that the law "should be applied only to commercial restrictions that restrict competition in an unacceptable way", and some Market conducts have by no means any positive economic outcomes, and for this reason it cannot be acceptable, per se it should be prohibited, and thus the connection with competition was made.[23]

In Western Europe, the regulations made in the area of Competition Law were made in much more later periods. Today, in most of the member nations of the European Union, there are legal regulations concerning Competition Law. And in our country, the Competition Law took effect as later as 1994. After the Competition Board was founded in 1997, it has been carried on effectively.[24]

C. THE PURPOSE OF COMPETITION LAW

Competition is an essential requirement of a free market economy. It encourages efficiency among producers and suppliers by providing consumers with a choice of goods and services at the best possible price. Whereas unregulated competition in a free market leads inevitably to monopoly and other undesirable practices. A company which is aggressively competitive will seek to win as large a share in the market as is possible and in so doing reduce the competition it faces. If the company is too successful, it may in time completely eliminate any competition. Another problem, which may arise, is that companies may find it more profitable to cooperate with each other than to compete. Companies within a particular industry may form a cartel to fix minimum prices for their products or restrict production, denying consumers the benefit of a competitive market. Thus, it is necessary to regulate the

[22] Standard Oil Company was founded by John D. Rockefeller in Cleveland, Ohio in 1870, and, in just a little over a decade, it had attained control of nearly all the oil refineries in the U.S. This dominance of oil, together with its tentacles entwined deep into the railroads, other industries and even various levels of government, persisted and intensified, despite a growing public outcry and repeated attempts to break it up, until the U.S. Supreme Court was finally able to act decisively in 1911. ***Standard Oil Co. of New Jersey v. United States***, 221 U.S. 1 (1911), was a case in which the Supreme Court of the United States found Standard Oil guilty of monopolizing the petroleum industry through a series of abusive and anticompetitive actions. The court's remedy was to divide Standard Oil into several competing firms.

[23] İ. Yılmaz Aslan, ***Amerikan Rekabet Hukuku Sistemi,*** Rekabet Kurumu Perşembe Konferansları, Yayın No:39, 1999, p.68- 69.

[24] Güven, p.22

competitive process in order to maintain a healthy free market, which serves the interest of consumer, and free market as well.

In order to present the purpose of Competition Law, it will be noted that first of all, the concept of market should be analyzed. The Market is shortly defined as "the web of exchange made up of buyers and sellers"[25].

There is no specification for "market" in Turkish Competition Act, however, in the Merger Communiqué[26] we can find some evidences regarding the definition of "market".

According to Article 4 of Merger Communiqué;

The geographical market which consists of a considerable part of the country is the region where the enterprises display activity on supply and demand of the goods and services, the competition conditions are sufficiently homogeneous and especially as the competition conditions differ appreciably from neighbor regions which can be easily separated from those regions. During the geographical market evaluation, the factors such as; especially the characteristics of the goods and services and barriers of entry deriving from consumer preferences, the market shares of the enterprises from relevant and neighbor markets or noticeable differential of goods or services prices are taken into consideration. For the determination of the relevant goods market, the goods and services which are the subject of merger and acquisition, its price in the estimation of consumers, intended use and the market which consists of goods and services that deemed as the same in intended use and quality are taken into consideration; and also the other factors that have the potential to have effect on determined market.[27]

Those expressions are nearly the same with the expressions stated in ECMR[28]. In the Merger Communiqué, generally demand side analyze is adopted, further more supply side analyze is never mentioned. Only by stating "other factors" it is mentioned that the factors

[25] Zeynel Dinler, ***Mikro Ekonomi***, Ekin Kitapevi Yayınları 2002, s.210.
[26] 1997/1 sayılı Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ, RG Date 12 Ağustos 1997, RG No: 23078.
[27] Murat Çetinkaya, ***İlgili Pazar Kavramı ve İlgili Pazar Tanımında Kullanılan Nicel Teknikler***, Rekabet Kurumu 1. Dönem Rekabet Uzmanları Tezi, Yayın No: 86, 2003, p.24.
[28] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation) *Official Journal L 24, 29.01.2004, pages 1-22*

other than demand will be taken into consideration. Regarding demand side analyze, especially "the price of the good, its characteristics and intended use" is taken as a criterion. In the determination of the geographical market, by mentioning "homogeneous competition conditions", it is state that, during the determination of the borders of the market, the factors such as, especially, the characteristics of the good, barriers for entry, the differential of market and price shares will be taken into consideration. In *Hoffmann-La Roche Case*[29] ECJ has stated that,

""*The concept of relevant market specifies that there will be an effective competition between the goods which compose a portion of the market in real. This entails the requirement of sufficient convertibility between the goods which takes place in the same market regarding the ratios of the usages of those goods.*"",

In the same way, in the merger of *Aerospatiale/Alenia/de Havilland*[30], the Commission has declared that the relevant goods market covers, all the goods that can be exchanged or substituted by the consumers regarding the characteristics of the goods, prices and intended use.[31]

In the market, sellers and buyers can both come face to face and communicate through telephone, fax and internet which have become widespread in our day. While markets are divided as local markets, regional and national markets and international markets according to their extent, according to the qualities of goods and services, they are divided into two as goods and services markets in which goods and services are bought and sold, and factor markets in which production factors necessary for production (such as labor market, market of natural sources and capital market) are bought and sold. And according to competition, a division is made as perfect market and imperfect market.[32] While perfect market is defined as "the atmosphere in which sellers and buyers exchange under certain circumstances and without any obstacles", in this market which is hard to come across in real life, four conditions are necessary for the market to exist. These are "the atomist condition" which reveals that there are numerous sellers and buyers in the market, "the Homogeneity Condition" which means that the goods or services in question are all the same even though

[29] Hoffmann-La Roche & Co. AG v. Commission, Case 85/76, 1979 ECR 461(CJ).
[30] Aerospatiale/Alenia/de Havilland , Case IV/M.53, OJ C 334, 1991.
[31] Çetinkaya, p. 28.
[32] Güven, p.23.

the firms that produce them are different, "the Mobility Condition" that clarifies that there is no hindrance of entrance and exit in the market, and "the Explicitly / Clarity Condition" that expresses that producers and consumers can have access to whatever knowledge they want in the market. In the perfect market, the state does not interfere in the market. In the absence of all or some of these conditions that enable perfect competition to exist, imperfect market comes into being.[33]

However, in market economy, markets are not directed by a central authority. Here, economy is directed by its own rules and its own dynamics as far as it is possible without any external interference. The most important element for market economy to improve is the existence of free competition order in the market. External influences on competition like the interference of the state on the markets, or agreements between undertakings that restrict competition, or internal influences within the market like the companies' misuse of their dominant position prevents the formation of free competition order in the market, and therefore the normal regulation of market economy. Except the maintenance economical practice, Competition Law has other purposes like protecting small undertakings against big undertakings, preventing the centralization of economical and political power, and maintaining easiness of entrance into the market. [34]

In Turkish Competition Law, in doctrine, it is mentioned that preventing the restriction of competition through agreements between undertakings, decisions of mergers of undertakings, harmonious actions, the obstruction of the misuse of the dominant position, or controlling the emergence of concentrations in the market through mergers and acquisitions, or the formation economical freedom and freedom of trade in the goods and services market, the maintenance of rationality and the active use of resources in distribution and production also exist among the purposes of Competition Laws. Again, in this respect, the promotion of consumer's welfare, the maintenance of technological development, the prevention of practices that affect development and trade, and that restrict competition, the encouragement of foreign investors to come to the country, supporting privatization and regulatory reform, the prevention of disruption in the order of competition with the interference of the state are

[33] Dinler, p. 210.
[34] İsmail Özarslan, ***Rekabetin Korunması Türkiye ve Avrupa'daki Uygulamalar Semineri***, İstanbul Ticaret Odası, Gümrük Birliği Bilgilendirme Toplantıları-2, Yayın No: 1996-7, 1995, p.5

among the purposes; and along with economical purposes, there exist social and political purposes such as the protection of small and medium scale firms called Small and Medium Size Enterprises (SMEs)[35] and the prevention of unemployment, as well.[36]

In the texts of positive law, and especially in EU legislation, and in Article 2 of Rome Treaty (Treaty Establishing the European Community – EEC Treaty) [37], the establishment of a common market between Member States, and the development of economical practices harmoniously in the whole of the Union through the harmonization of the economical policies of Member States, the maintenance of a balanced and continuous growth, the raising of living standards by increasing economical stability, and the further approximation of the relations between Member States are identified as the main purpose. In order to reach these purposes, it is mentioned in Article 3 of EEC Treaty that a system should be established in the Common Market to prevent the disruption of competition. Thus, it could be claimed that the purposes of competition rules of the European Union are political and economical, and these purposes are the abolishment of obstacles concerning trade between Member States, the raising of consumer's welfare to a higher level, the protection of the consumer, increasing the efficiency by making the resources utilized in the best way, the protection of consumers and small scale firms against the big economical power created by united undertakings by establishing a just and fair competition market, creating a single European market and protecting this market from the violations of undertakings concerning the prevention of competition.[38]

When we observe Turkish Law, in Article 1 of Turkish Competition Act, the purpose is defined as:

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[35] All industrial and commercial business enterprises which make an effort to stand on their own, despite their limited capital and marketing facilities, and with this effort produce and serve their own countries as well as the others are called Small and Medium Size Enterprise (SME). SMEs are affected by any kind of negativeness which arises with an economical crisis in their country for their financial difficulties and limited capacity, deficit and marketing reduction.

[36] Renan Baykan, ***Rekabetin Korunması Kanunu ile ilgili Görüş ve Öneriler,*** Rekabetin Korunması Türkiye ve Avrupa'daki Uygulamalar Semineri, İstanbul Ticaret Odası, Gümrük Birliği Bilgilendirme Toplantıları-2, Yayın no: 1996-7, 1995, p.50.

[37] Treaty of Rome Establishing the European Economic Community (EEC Treaty) is signed on 25.03.1957 by six west European Governments (Germany, France, Belgium, Holland, Luxembourg, and Italy). The Treaty, which gave EEC the qualification of being an international installation legally and effectively, came into force on 1 January 1958. Treaty of Rome consists of 248 articles, additions and protocols. The treaty which had 248 articles on 1958 had 300 articles on 1992 with Maastricht-European Community Treaty.

[38] Craig, Paul. Burca, De Grainne, ***EU Law Text: Cases and Materials***. Oxford University Press 1998. p. 891-892

""to prevent agreements, decisions and practices that obstruct or restrict competition in goods and services markets, and the misuse of undertakings of their dominant situation in the markets, and to make the necessary regulations and controls, and thus to protect competition.""

According to this, it is clearly emphasized in the Article that the main purpose is the protection of competition.

As a result, not only in the qualities of the EU Law, but also in Turkish Law the general purpose of competition is acknowledged as the increase of economical activity in an efficient way, the increase of consumer welfare by the increase of the qualities of goods and services, providing the entrance to foreign markets by removing the obstacles of entrance into the market, maintaining the means for small scale undertakings for competition against big undertakings, and providing a just competition environment by the encouragement of the entrance of foreign capital.[39]

D. THE HISTORICAL BACKGROUND OF TURKISH COMPETITION LAW

Turkish Competition Act was accepted and took effect on 07.12.1994. This act was established at the end of a study that took a long time. At the core of these studies rested in Article 167 of Constitution[40]. Article 167 of the Constitution is arranged in Chapter II under the title of "Financial and Economical Sentences". According to Article 167;

""the state takes the necessary precautions that maintains the healthy and regular operations of money, credit, capital, goods and services markets and develops them, and prevents the monopolization and cartels in the markets that can come about in act or as a result of agreements.

The Administration can be authorized with an act concerning the making and abolishing of extra financial charges on import, export and other procedures of foreign trade

[39] Güven, p.27
[40] The Constitution of the Republic of Turkey Law No: 2709, RG Date: 9 November 1982 RG No: 17863

except taxes and similar charges in order to regulate foreign trade for the sake of the country's economy."""

In instances concerning the restrictions on competition that happened before Turkish Competition Act was accepted, Articles 167 and 172 of the Constitution were utilized. According to Article 172 of the Constitution under the title of "the Protection of Consumers";

""The state takes the necessary precautions to protect and to enlighten the consumers, encourages the consumers' self-protective initiatives."""

The relations between the European Union and Turkey and in this respect the Decision of the Association Council No. 1/95 Establishing Customs Union between the European Union and Turkey[41] concerning the realization of Customs Union have an important effect in the preparatory step of the acceptance of the Competition Law in 1994.

Customs Union, which took effect on 31.12.1995, and was anticipated in Article 10 of Ankara Agreement on 01.01.1996 with the Decision of the Association Council No. 1/95 Establishing Customs Union between the European Union and Turkey dated 6th of March 1995, has been running in act. In Article 16 of Ankara Agreement under the title of "other Decisions of Economical Quality", it is emphasized that;

"""Active sides accept that the principles emphasized in the determinations concerning Competition, taxation and harmonization of legislation in the 1st part of the 3rd large chapter of the Agreement that has established the Union, should be enforced in partnership relations"""

Under the title of "the Harmonization of Economical Policies" of Additional Protocol[42] which is in the appendixes of Ankara Agreement, the first Chapter of Section III is arranged under the title of "Competition, taxation and harmonization of legislation", and

[41] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (Official Journal L 035, 13/02/1996 P. 0001 – 0047)
[42] Additional Protocol to the Association Agreement concluded between the EEC and Turkey dated 23 November 1970

Article 43 of the chapter refers to the determinations concerning competition in Rome Agreement. The 1st clause of Article 43 says;

""The Partnership Council determines the conditions of enforcement and procedures of principles in Articles 85,86,90 and 92 of the Agreement that has Established the Union in the duration of 6 years after this protocol has taken effect.""

Thus, Articles 30-36 of the Decision of the Association Council No. 1/95, which has made the Customs Union, under the title of "The Competition Laws of Customs Union", and Articles 37-41 under the title of "The Harmonization of Legislation" also contain decisions concerning legislation about competition. The Articles between 30 and 36 contain the agreements between undertakings that prevent, restrict and remove competition, the decisions of mergers of undertakings, harmonious actions, and the conditions of exemption, the misuse of the dominant position, state aids, and other regulations concerning this subject. While it is written that practices that are against these decisions will be evaluated according to the criteria that arise from the enforcement of the rules which are in Articles 81, 82 and 97 of EEC Treaty[43] and in secondary legislation, the legislation was also referred to. And between Articles 37 and 41, it is determined that Turkey will ensure that its legislation concerning competition rules will be in harmony with EU legislation for the sake of reaching the economical unity aimed at with customs union, and will be applied effectively. [44]

[43] Treaty Establishing the European Economic Community (EEC Treaty) Date of Signature 25.03.1957 Entry in Force 01.01.1958
[44] Güven, p. 31

CHAPTER II
MERGERS & ACQUISTIONS

A. THE CONCEPT OF MERGERS AND ACQUISITIONS AND CONCENTRATION ACCORDING TO EU AND TURKISH LEGISLATION

1. The Effect of the Provisions Regarding the Control of Mergers and Acquisitions in EU Competition Legislation to Turkish Competition Law

Since the Turkish Competition Act is prepared taking the relevant sentences in EU Competition Law as examples, its sentences concerning the control of mergers and acquisitions are very similar to EU legislation.

Since the application of Competition Law is only possible with the establishment of the Competition Board, the practice has been quite new. Now that the practice is so new, it is obvious that this law is to develop as case law and it will develop in accordance with the principles set by decisions of the Competition Board as a result of the events that are to take place in the Turkish Law, as it is in the EU Law, too. That is why the experiences concerning the Competition Law carried on in the EU will shed light to Turkish Law.

2. The Basic Principles of EU and Turkish Competition Legislation

2.1 The Effects Doctrine according to US and EU law

Basically, the "Effects Doctrine" is originated from US Law. In the Alcoa case[45] the US Supreme Court established a two-part test to establish the effects doctrine: (1) the performance of the foreign agreement must be "show[n] to have some effect" in the US; and, (2) this must have been intended. A third element to the application of the effects doctrine was added in the Timberlane Lumber Co. v Bank of America case[46]: a balancing test. This element

[45] U.S. Supreme Court Decision ALCOA S.S. CO., INC. V. United States. No. 271. Argued Nov. 15, 1949. Decided Dec. 19, 1949

[46] *Timberlane Lumber Co.* v. *Bank of America*, 549 F. 2d 597, 613 (CA9 1976)

determined whether the interest of the US was strong enough to justify extraterritorial jurisdiction.[47]

The ECJ has not adopted the "effects doctrine". Despite the ECJ's unwillingness to adopt the doctrine, the Commission does refer to the effects doctrine for purpose of review. In its Eleventh Report on Competition Policy the Commission states,

"""" the Commission was one of the first antitrust authorities to have applied the internal effect theory…to assert the contrary would be tantamount to preventing public or judicial authorities from effectively dealing with competition cases falling within their jurisdiction"""""

Also, Advocate General Mayras in Dyestuff[48] supported the effects doctrine stating that before applying the effects principle an agreement or concerted practice must have a "direct and immediate" impact on competition, be "reasonably foreseeable" and "substantial"

In Woodpulp case[49], The Commission stated that all the addressees to the concerted practice were "exporting directly to or doing business within the Community [and] the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the [Community] was therefore not only substantial but intended, and was the primary result of the agreements and practices."[50]

Despite the Commissions several decisions, the ECMR[51] does not mention effect doctrine in its text. Therefore, the ECMR does not impose any jurisdictional limitations on the Commission.

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[47] David, J. Feeney. ***The European Commission and Extraterritorial Jurisdiction Over Mergers*** (2000), http://www.nebar.com/pdfs/nelawyer/2000/040002.pdf (last accessed 17.02.1997)
[48] Antonia Acevedo, **The EEC Dyestuffs Case: Territorial Jurisdiction,** *The Modern Law Review*, Vol. 36, No. 3 (1973), p. 317-320 (ICI- Imperial Chemical International- v Commission Case 48/69(1972) ECR 619
[49] Cases 89/85, 114/85, 116-117/85, 125-129/85, ***A. Ahlström Osakeyhtiö v. Commission (Wood Pulp) Decision*** of 27 September 1988, ***The Wood Pulp Case***, [1988] ECR 5193
[50] http://www.nebar.com/pdfs/nelawyer/2000/040002.pdf (last accessed 17.02.1997)
[51] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJL 24, 29.01.2004, pages 1-22

For example, the merger between the United State's aerospace giants, Boeing Company (Boeing) and McDonnell Douglas Corporation (MDC)[52] was the case that carried the most interest and contention in regard to the European Commission's extraterritorial jurisdiction. The merger between Boeing and MDC was quickly approved by US Federal Trade Commission because from the US perspective the merger was an opportunity to advance competition within the US aerospace field with its associated effects on the country's economic and employment policies, as well as the United State's interest in an effective and efficient defense industry. But the European Commission was very hesitant to provide approval of the merger among the world's number one and number three aircraft manufacturers. Prior to the merger there were three competitors in the relevant market: Boeing, MDC and Airbus Industry (Airbus). At the time of the merger, Boeing held a 64% share of the world-wide market of commercial aircraft with Airbus occupying 30% and MDC 6%. Regarding these figures, Boeing occupied a strong position in the market. Regarding the analysis of the market, the Commission found out that the new competitors were unlikely to enter. The obstacles to entry were quite extreme and after the merger the Commission believed that Boeing would strengthen his already dominant position by capitalizing on MDC's competitive potential. As a result of this analysis, the Commission determined that the merger, as originally proposed, between these two American corporations, Boeing and MDC, was incompatible with the European common market interests. However, the Commission did permit Boeing the opportunity to alter the transaction to allay the Commission's concerns. [53]

As a conclusion, the practice concerning the effect doctrine, EU enforcement emerge as the exercise of competition rules also on the principle participation located outside the community when an undertaking that is not located in the region of EU violates the competition rules of the community through its young participation in the region.

[52]Boeing/McDonnell Douglas (Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement – Case No: IV/M 877) Bulletin EU 7/8-1997 Competition (13/65)

[53] http://www.nebar.com/pdfs/nelawyer/2000/040002.pdf (last accessed 17.02.2007)

2.2 The Effects Doctrine according to Turkish Competition Act

The following statement in Article 2 of Turkish Competition Act shows that the law accepts the effect doctrine:

""That operates within goods and services markets in the boundaries of the Republic of Turkey, or that affects these markets..."""

Nonetheless, the reason of the Article of the Competition Law also adopts this theory which is named as "the effect doctrine" in Competition Law literature and it openly contains that undertakings that are active in Turkey although they have their centers outside the boundaries of Turkish Republic are in the extent of the law concerning the effect doctrine.[54]

According to this doctrine, the undertaking situated either in the country or abroad, and that is active in goods or services market, and also foreign undertakings which are not centrally situated in Turkey or that are not directly active in Turkey are in the extent of the law if they violate competition directly or indirectly as a result of their various practices in the goods and services market in Turkey. For example, if they violated competition through their participations or related undertakings in Turkey, they would be in the extent of the law. Another example to this subject would be an undertaking which is centrally located abroad, but operates in Turkey through its distributors and thus violates competition. Similarly, even though an undertaking or undertakings do not have a participation or a related institution in Turkey, violation of competition might occur as a result of buying of the relevant product from participations or distributors abroad by buyers in Turkey and the product enters Turkey and thus the markets in Turkey are affected by this. [55]

The effect theory is not only a principle concerning the agreements between undertakings, harmonious actions, the decision of undertaking mergers, or the misuse of the dominant position, but also one that is exercised in the conditions of mergers and acquisitions. For example, if an undertaking that does not operate in Turkey, but those exports to Turkey, impairs the competition order in the market by its exportation, then it will fall within the

[54] Güven, p.51
[55] Güven, p.52

extent of the law, and therefore the mergers and acquisitions that this undertaking or these undertakings make will be subject to control.[56]

2.3 The Systems for the Protection of the Competition

Regulations made in various countries concerning the protection of competition are based on three basic systems. According to the first system, which is the system of prohibition, all cartels and restrictive practices are prohibited. For example, both the agreements between undertakings that restrict competition, undertaking mergers and harmonious actions, and mergers and acquisitions of a certain magnitude are prohibited as a rule without any further evaluation, and restrictions on competition are permitted only in the existence of certain conditions. The second system on which regulations concerning the protection of competition are based is called the system of "prohibition of misuse"[57]. In this system, the practices that violate competition; e.g., agreements between undertakings, the dominant position, are not prohibited as a rule. But the misuse of these positions is prohibited. This system is adopted in the United Kingdom. The third is the system defined as "the Conciliatory System" or "the Mixed System". In the mixed system adopted by the EU, while practices that violate competition are directly prohibited in some instances (like the prohibition of Parallel Import), in some instances a criterion for misuse is sought. In the doctrine per se, any agreement with a purpose of restricting competition is prohibited without any further reasons, and just because of this one quality. For example, agreements restricting competition are per se[58] prohibited concerning the adjustment of price between undertakings, the sharing of Market and client, the prevention of parallel import, and the prevention of passive sale. The purpose of an agreement may not contradict competition; but, even though the purpose of the agreement is not against competition, the agreement might contain some sentences that violate competition. For example, although the purpose of distribution agreements or franchising agreements are not against competition, or to put it another way, although they are not made for the purpose of violating competition in the market of the

[56] Tekinalp/ Tekinalp, ***Avrupa Birliği Hukuku***, Beta Basım Yayım Dağıtım A.Ş., p.383-384
[57] İ. Yılmaz Aslan, ***Rekabet Hukuku ve Rekabetin Korunması Hakkında Kanun***, p.12.
[58] For further information see Şahin Yavuz***, Amerikan Antitröst Hukukunda Yeniden Satış Fiyatının Belirlenmesi Sorunu: "Per Se" veya "Rule of Reason***", Rekabet Kurumu 1. Dönem Rekabet Uzmanları Tezleri Yayın No: 95, 2003

relevant product, they are agreements that contain sentences that have a quality that restricts competition because of their characteristics. According to the doctrine of "rule of reason", if the purpose of an agreement is not against competition, but some sentences of it violate competition due to the quality of the agreement, then the impacts of the agreement on competition are analyzed. If there are any positive impacts on competition, or to put it in other words, if there are just reasons for the establishment of sentences that violate competition, then this agreement is not evaluated in the extent of the prohibition. Rule of reason is accepted by the Court of European Communities in "conditions in which the restrictions are necessary objectively or when it is not possible to take any other risks of trade."[59]

The doctrine of legitimate interest shows its effect in the Nungesser Decision of the Council. In this case, INRA which is an expert enterprise on plant seed, subscribed that he would not sell the seeds to any other enterprise in Germany and also would provide any other foreign dealers against selling this seeds in Germany by the license agreements with Eisele and Nungesser enterprises. Committee's opinion was the agreement fall within the context of EEC 81(1). On the other hand the firm in his defense declared that INRA's product was a brand new one and it could only edge into the market by competing with other firms and unless they didn't make exclusive agency contract, not even one firm would take the risk of selling such a product.[60] If the purpose of the agreement is not to prevent, impair or restrict, and in short, to violate competition, but there exist sentences that restrict competition because of the quality of the agreement even though its purpose is not that, such as central distribution agreements, then even though there are sentences that violate competition, the agreement does not constitute a contradiction to competition. The system which is named as "mixed system" and exercised in the EU is based on the doctrine of rule of reason. However, in addition to this, some conditions that violate competition are prohibited per se in the practice of the Community; e.g., price adjustment, sharing of the market.[61]

[59] Tekinalp/Tekinalp, ***Avrupa Birliği Hukuku***, p. 404- 406
[60] Turgay Sarıakçalı, ***AB Rekabet Hukukunda Lisans Sözleşmeleri***, ESC Consulting Rekabet Bülteni, Sayı 13, 2005, http://www.escrc.com/www2/bulten2bb.asp?bulsayID=128&altbas=altbas3&konu=konu3&k=3 (last accessed 17.02.2007)
[61] Aslan, p.119-121

The Turkish Competition Act and the relevant regulations are prepared by taking the EU Competition Law system as a model. It is also seen that in The Competition Law the relevant regulations the mixed system is based on. While some instances are prohibited per se, some instances in which there is not the purpose of violating the law, but this impact is created are evaluated by the analysis of rule of reason. For example, in US applications, it is accepted that exclusive purchase agreements prevents the potential competitors from entry to the market by restraining the consumers' purchase options whilst they have respects raising the competition. So by the implementation of rule of reason, in Standard Oil[62] case the Supreme Court has specified the exclusive purchase agreement's respects that raise the competition like this way:

"""*From buyer side; they ensure supply guarantee, protection from price increases, enable long live planning, reduce storage costs and in the same time, from seller side; ensures predictable market structure*."""""[63]

An example to conditions which are prohibited per se by the Competition Law is the situation of the sharing of goods or services markets, and thus the sharing or the control of all the market resources and elements, which is located in Article 4(b) of the Law. Similarly, parallel import is prohibited per se in the Turkish Competition Act as well as in the EU legislation.[64] In Turkish legislation, The Board of Competition, in his *Akçansa/ Batıçim/ Batısöke/ Çimentaş/ Denizli Çimento* decision dated 17.6.1999.

"""Those Agreements price fixing and market sharing centered are deemed between the serious contradictions to competition and explicitly prohibited.

Incase the restriction of the competition aim is visible in an agreement, the agreement itself on at least its anticompetitive provisions compose a per se antitrust violation. In this case, there is no need for the determination of the agreement's effects on the competition. Agreements which aims the violation of competition create a frame which the parties sacrifice common interests for the sake of their own competitive activities. For this reason, only being

[62] United States Court Decision Standard Oil Co. v. United States, 337 U.S. 293 (1949).
[63] Alper Karakurt, ***Ekonomik ve Hukuki Açıdan Piyasa Kapama Etkisi*** , Rekabet Kurumu 4. Dönem Rekabet Uzmanları Tezi, 2005, p.53.
[64] Güven, 69

a party to an agreement that is contrary to competition is also forbidden, even the agreement did not realize its effects."""[65]

2.1. One- Stop Shop Theory

For the control of large-scale mergers, the Member States considered it necessary to create a one-stop shop for all the European Union. The system for monitoring merger transactions has been governed by the ECMR[66]. ECMR removes the need for companies to seek clearance for certain large-scale mergers in a myriad of different national regulatory regimes and ensures that all such mergers receive equal treatment. ECMR gives the European Commission the exclusive power to investigate mergers with a "Community dimension". As a result of this investigation, the Commission may prohibit mergers which create or strengthen a dominant position in the Common Market. If a concentration in the extent of the Community were to be both subject to an investigation under Community Competition Law, and to be investigated by Member States could result in the outcome of different decisions. For this reason, in the negotiations carried on in the scope of ECMR, it was emphasized that there should be clarity between Community Law and the law of member states, and therefore in concentrations in the scope of the Community, the Commission should be authorized exclusively.

According to this, while the Commission is authorized exclusively in concentrations in scope of the Community, the authorization stays with Member States in other concentrations. Therefore, concentrations which are not in the scope of the Community will be controlled only according to the legislations of Member States. Now that more that one report respectively in Member States would result in a burden of both time and money, it is provided by the principle of One-Stop Shop that there should be less costs with the lessening of the responsibilities of reporting sides, and that the application is completed in a shorter period of time preventing the taking of different decisions. [67]

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[65] The Board of Competition Decision Akçansa/ Batıçim/ Batısöke/ Çimentaş/ Denizli Çimento dated 17.6.1999
[66] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation) *Official Journal L 24, 29.01.2004.*
[67] Tekinalp/Tekinalp. ***Avrupa Birliği Hukuku***. p.465.

The principles that are beneficial for both the Community and the Member States may not be applicable for some conditions i.e., which sentences are to be applied in the absence of a legal regulation of the Member State. That is why there are some exceptions to the principle. The first of these is the exception of German Clause[68] in Article 9 of the ECMR. The second is the exception of Dutch Clause[69] in Article 22(3) of the ECMR. The third exception is the Legitimate Interest in Article 21(3) of the ECMR.

According to the German Clause, a concentration that is not harmful for the community may be harmful nationally. Therefore, the Commission may send a reported concentration to the authorized institutions of the Member State because of the sentence of "*Sending to the Authorized Institutions of Member States*" which is in Article 9 of the ECMR.[70]

According to the Dutch Clause, if the Commission determined that a concentration was not in the in the scope of the Community, but it constituted a dominant position that would prevent active competition in a significant way in the lands of Member States which had a common demand, or if this concentration prevented trade among these Member States as well, then it takes the necessary decisions in the scope of its authorization of making decisions after the common demand of one or more than one of the Member States in the way it is described in Article 3 of the ECMR. With this Clause, it is aimed that control of mergers and acquisitions should be maintained for Member States that do not have its own legislation for the control of mergers and acquisitions.[71] Because the Netherlands lacked a merger law of its own at the time, the European Commission was asked in 1997 to investigate Blokker's proposed take-over of the Dutch branches of Toys 'R Us. The request was authorized by the ECMR's so-called "Dutch Clause," letting the Commission take action, on request, against a merger within one Member State's territory. The Commission declared the acquisition incompatible with the common European market and ordered Blokker to sell the Toys 'R Us branches to an independent third party.[72]

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[68] Richard Whish, ***Competition Law***, Edinburg, 1993, p. 758
[69] Whish, p. 762
[70] Craig, Burca, p. 999.
[71] Güven, p.98
[72] Michael Wise, ***Background Report on the Role of Competition Policy in Regulatory Reform*** http://www.oecd.org/dataoecd/3/42/2497317.pdf, (last accessed 17.02.2007)

Observing the application of the Principle of One-Stop Shop in Turkish Law, according to Article 16 of Ankara Agreement[73], the sides of Ankara Agreement have accepted that the sentences concerning Competition Law regulated in EEC Treaty and principles in the relevant sentences concerning the harmonization of legislation are to be applied in Partnership relations, in the directions of Ankara Agreement signed between the Community and Turkey, Additional Protocol, and sentences of the Decision no: 1/95. In the Decision no: 1/95, Competition Laws of Customs Union and the harmonization of legislation in this subject are among Articles 30-41. These Articles are prepared taking the Articles 81, 82 and 87 of EEC Treaty as examples. The practices that are against these sentences are to be evaluated according to the measures that arise from the application of Articles 81, 82 and 87 of EEC Treaty and the rules that its secondary legislation contains. Now that in the date in which Ankara Agreement and Additional Protocol was signed with the Community there was no separate regulation concerning the control of mergers and acquisitions in the Community, there was no sentence in these agreements concerning the relations between Turkey and the European Union in this subject. However, since ECMR was prepared in the year 1989 concerning the control of mergers and acquisitions in EU and this regulation is secondary legislation, and since the rules of the Competition Law are as one, the legislation concerning the control of mergers and acquisitions is considered as secondary legislation and the principle of one-stop shop is not only valid for Member States, but it should also be valid for the countries with which competition rules will be put into practice between the related country and the Union.[74]

In this respect, if the principle of one-stop shop was to be analyzed from Turkey's angle, according to the German Clause, if a merger or acquisition in the dimensions of the Community is reported to the Commission, and in conditions this merger and acquisition is not harmful for the Community, but harmful in a national degree, i.e., harmful for Turkey, the Commission should report this position to the Competition Board according to Article 9 of ECMR. But today, many of the Member States have their own legal regulations concerning

[73] Agreement Establishing an Association between the European Economic Community and Turkey (dated 12 September 1963)
[74] Tekinalp/Tekinalp. ***Avrupa Birliği Hukuku,*** p.69.

mergers and acquisitions, and of course now that Turkey has competition legislation the Dutch Clause has no importance.[75]

The Clause of Legitimate Interest is the 3rd exception in the content of the Regulation. According to Article 21 of the ECMR, none of the Member States may enforce its own national law for a concentration in the dimensions of the Community. The principle of Legitimate Interest is important for national interests. In conditions when the Commission is exclusively authorized i.e., when there is a merger and acquisition in the scale of the Community, and the report should be made to the Commission, the Member States will hold authorization to take the necessary precautions to protect and to reconstruct active competition in the relevant market in its own lands. Turkey, as well, in order to protect its legitimate interests, may take the necessary precautions that are requisite to establish and to protect active competition in the relevant market, and that are in a quality that are in accordance with the general principles and other sentences of the Community's law; such as public security and moral rules. According to this, before the necessary precautions are taken, it should be reported to the Commission and the procedure to which other Member States are subject should be applied.[76]

2.4 The Importance of the Control of Mergers and Acquisitions according to Competition Law

In Doctrine, the word "Merger" is used and all the processes that result in the acquisition of the control of an undertaking by another undertaking are pronounced as "Merger" whether it should be a merger, acquisition or a joint venture. But in both Council and Commission Regulations and in relevant regulations, generally the word "Concentration" is rather used than "Merger"[77]. The name ECMR concerning the mergers and acquisitions is "The Regulation on the Control of Concentrations between Undertakings". In other relevant regulations, also the word "Concentration" is used. In Turkish Law, while the word "Concentration" is translated into Turkish as "Konsantrasyon" in the studies on EU

[75] Güven, p. 98
[76] Güven, p.101
[77] Güven, p.60

Competition Law, the Turkish equivalent of the word is also used as “Yoğunlaşma”. And in the Turkish Competition Act, the words “Mergers and Acquisitions” are used.

The technical expression for the word 'Concentration' is generally refers to the concentration of economical power of taking decision, on some specific focuses by changing hands among enterprises. This situation causes some structural changes on related market by reducing competition period. In other words, it is possible to talk about a concentration that

Article 7 of Turkish Competition Act mentions, in case the togetherness of enterprises shows the quality of continuance, independence and institutional and this causes current and potential competition reduction in markets. In opposition to the Turkish Competition Act and related declaration, in the policy guidelines of European Community Law about concentration audit, there has been the definition of concentration and then this definition was used as a basis for the next commission announcements. According to this definition in which the term of “control" is a determining factor, the operations which causes permanent and constant changes on enterprise's structures are accepted as concentration without considering its’ conformation. While determining a relation that causes concentration in markets, the comparisons of the attitudes and operations which have the purpose of the coordination of competition between enterprises are especially considered by the meaning of Article 85 of EEC Treaty.[78]

Concentrations can exist in various ways. Mergers and Acquisitions are only two examples of concentration forms. Since the word “Concentration” is used in the regulation on EU’s Competition Law, it is preferred to use the word “Concentration” in the analysis of the subject when it comes to the direct mentioning of the ECMR.

Nowadays, national markets are replaced by regional markets, and even by a world market. Globalization is widespread especially in the trade sector and companies are inclined to bring together their forces for the purpose of competition. The emergence of the freedom of trade is increasing with transnational trade becoming widespread as a result of the emergence

[78] Sanlı, p. 317

of the abolition of borders, the concept of globalization, the increase in the number of transnational companies and technological development. As a result of the geographical market becoming a world market, the mergers and acquisitions of companies have an increasing importance in order to compete in the world market. The various factors like big capital, human resources, marketing, distribution web, access to local markets necessary for acting in the international scale has brought up the subjects of mergers and acquisitions.[79]

Among the reasons of mergers and acquisitions are to possess the capital power necessary for competition in international scale, the strengthening of financial structure, the advantageous position of buying an undertaking compared to the establishment of an undertaking, to resist the effects created by technological development, to overcome the restrictions of the pressures of capital markets, the strategically decisions of the managers of undertakings, the advantage of taxation, the conditions of crisis and legal regulations, to increase the efficiency, specialization, to supply the facility to enter into local markets, to make R&G workings easier.[80] Among other reasons, the major reason for mergers and acquisitions in Turkey is claimed as Turkey was affected by the financial crisis that had begun in Asia and the companies which had lost power in the face of the aforesaid crisis came together and lessened the effects of the conditions of the crisis.

Along with the mergers of companies, various targets are anticipated such as specialization, clarity, taking quick decisions, the maintenance of the increase in efficiency, cheap production, new technology, widespread distribution web, access to local markets, having a strong financial structure. It is an important merger and acquisition that was also given place in the media when the companies within the group structure of KOÇ Holding Company; ARÇELİK, Türk Elektrik Endüstrisi (Turkish Electric Industry), BEKO Trading Company, Atılım Marketing Company and Gelişim Marketing Company were united under the administrative roof of a central administration called ARÇELİK – BEKO.[81] And recently another important merger between Ayceel and Aria in communication sector was realized in Turkey.[82] Also in June / 2006 the merger between Shell and Turkas, in oil field, was

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[79] Arif Esin, ***Avrupa Rekabet Hukukunda Son Gelişmeler ve Türkiye'ye Etkileri***, Rekabet Bülteni, Sayı 1, ESC Consulting, 1999, p. 18-19

[80] Karacan, p. 9-13,

[81] Milliyet Gazetesi, ***KOÇ Şirketleri global rekabete karşı birleşti***. 03.11.1999.

[82] Zaman Gazetesi dated 24.06.2004, ***Aycell – Aria Birleşti Yeni İsim AVEA***.

realized.[83] Lastly, on April /2006 Turkey's four biggest defenses companies TAİ/TUSAŞ, Aselsan, Havelsan ve Roketsan, has merged under the name of Savunma Teknolojileri Holding. By this merger the Holding Company would be able to control 70% of Turkish defense industry.[84]

The mergers and acquisitions that arise between companies as a result of various reasons may have negative impacts on competition even though they are done with the assumption that they will be beneficial. There are two different thoughts; one positive and one negative[85] concerning merger and acquisitions. The most important reference of the ones in favor of mergers and acquisitions i.e., the ones that regard mergers and acquisitions as structures that do not impair the competition order, and that do not violate competition is the increase of economical efficiency. And they argue that interferences to prevent mergers and acquisitions will hinder the operation of free market. Thus, only when it has a serious harm on the competition structure, mergers and acquisitions should be interfered. According to the ones with the contrary idea, a more susceptive approach should be taken concerning the operation of the free market. Evaluating the mergers and acquisitions socially and politically as well, such as the effects on unemployment and regional politics, a more interfering stand should be taken.[86]

Mergers and acquisitions also have economical and social benefits such as the more economical position of buying an undertaking that already making the relevant production instead of the establishment of an undertaking, the more economical position of undertaking an existing distributor instead of establishing its own distribution web, making an undertaking's access to raw material resources easier, the maintenance of more credit and capital stock, technological development, the maintenance of having the patent and the technology of know-how, encouraging the managers to work more efficiently, the saving of the undertaking in hardship, and the prevention of unemployment[87]. Among the benefits, there are increasing their investment, entering into new geographical markets, developing new products, creating a variety of products, maintaining an increase in supply, the transfer in

[83] Vatan Gazetesi dated 29.05.2005, ***Shell ve Turcas Birleşti 500 Milyon$'lık Şirket oldu.***
[84] http://www.ntvmsnbc.com/news/368343.asp, (last accessed 11.02.2007)
[85] For the negative approach see Derya Telan, ***Erken Uyarı! Alınmamış Tedbir?***, http://ilef.ankara.edu.tr/id/yazi.php?yad=2429 (last accessed 11.02.2007)
[86] Whish, p. 664-665.
[87] Whish, p.666-671. Craig, de Burca, p.980-981

technology, the development of R&G activities, the decrease of costs, the realization of the restructure and modernization of undertakings, and the maintenance of the increase in the market force. [88] The Companies by the way of mergers find solutions for the search of efficiency which the globalization and the raising competition in the world oblige. By developing more efficient economies the service of total welfare in the world is aimed. In order to catch the cost advantages in raising competition environment, enable the evolvement of new technologies and ensure that transfer of know-how mergers, acquisitions and purchases are supported. Otherwise, it would be hard for the companies to survive. Besides these, it is aimed to induce the factors such as to be open out for new markets, increase the good capacity, and evolve new brands. For these purposes, countries enable their substructures in order to simplify mergers, acquisitions and purchases.[89]

Mergers and acquisitions have negative impacts, as well as their positive impacts. These are the negative impacts on the competition order in the free market, the loss of efficiency, the centralization of power, the central concentration, and the centralization of control in the hands of certain groups, unemployment and the impacts on regional politics. The negative impact of Mergers and acquisitions on competition may arise as the decrease in competition in the market. Especially in horizontal mergers and the mergers in oligopoly[90] markets, competition is negatively affected. The Mergers and acquisitions result in the centralization of the capital, and concerning unemployment and regional politics, they may result in the closing down of factories and serious unemployment problems. Similarly, mergers and acquisitions in certain sectors of the economy such as the media have a special importance. For example, Board of Competition, in his decision dated 17.07.2000[91] determined that the companies who are in a dominant position in news paper, periodical distribution market have forced the last sellers whom they supplied goods continuously, inorder to make a choice between their goods and competitor companies' goods and canceled

[88] Güven, p. 61
[89] http://www.referansgazetesi.com/haber.aspx?HBR_KOD=57036&ForArsiv=1 (last accessed 11.02.2007)
[90] The structure of industrial branches are oligopolistic when the production of the relevant product is few and in the control of firms of similar power, and the tactic of pricing of any of these affect the others' Market share drastically. For further information see Aydın Çelen, ***Oligopolistik Pazarlarda Gözlenen Paralel Davranışların Rekabet Hukuku Açısından Değerlendirilmesi: Uyumlu Eylem Ve Birlikte Hakim Durum***, Rekabet Kurumu 1. Dönem Rekabet Uzmanlığı Tezleri, Yayın No 92, 2003.
[91] The Board of Competition Decision, ***BDD-BİRYAY - YAYSAT Kararı***, File No : D2/2/B.E.-99/1, Decision No : 00-26/292-162, Decision Date : 17.07.2000

the dealership agreements of the dealers who display and sell the competitor companies' goods, stopped the supply of the goods to these points or impended them for these reason or were in activities like those; and the board decided that by acting like these, those companies have prevented the goods of a new distributor company enter into the market; by using their financial, technological and commercial advantages in newspaper and periodical market which grow out of their dominant position, and they have abused their dominant position for their activities aiming to ruin the competition.

Among the damages of mergers and acquisitions on competition is the empowerment of oligopolistic market structures, increasing the obstacles of access to the market, causing segmentation and sharing of the market, causing the market share to increase that could result in the misuse of the dominant position against rivals, suppliers and clients[92]. The most important reference of those that claim that mergers and acquisitions should be controlled is the obvious negative impact on competition that exists as a result of Mergers and Acquisitions. In the mergers and acquisitions that take place between rival undertakings, the negative impact that exists on competition is even more. The reaching of a dominant position of an undertaking or the strengthening of its dominant position as a result of a merger and acquisition, and in this respect decreasing active competition creates a potential threat concerning competition and that is why it is required that it should be controlled. [93]

The negative impacts created by mergers and acquisitions is analyzed in "Notice on Horizontal Mergers"[94] which was prepared by the Commission in EU in the light of previous experience, under the titles of reaching significant market force with merger, unilateral impacts and impacts that create cooperation.

As much as it is harmful on the maintenance and protection of competition order in the free market that a regulation not to permit mergers and acquisitions directly only taking into consideration its negative impact on the competition order, and without any concern, any evaluation of the positive effects of mergers and acquisitions, similarly, it is also harmful on

[92] Whish, p.724-727. Craig, de Burca, p.670-671
[93] Tekinalp/Tekinalp, ***Avrupa Birliği Hukuku***, p. 464
[94] Commission Notice on the Appraisal of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, Brussels, dated 11.12.2002.

the competition order that any regulation should be made to permit mergers and acquisitions directly without taking into consideration its negative impacts on competition. [95]

B. THE CONCEPT OF MERGERS AND ACQUISITIONS AND CONCENTRATION IN EU LAW

1. THE CONTROL OF MERGERS AND ACQUISITIONS ACCORDING TO THE ARTICLE 82

The European Court of Justice (ECJ), has made its first decision in the case of "Continental Can"[96] in the direction that Article 82 is applicable to mergers and acquisitions. In the year 1973, in the court of "Continental Can", EJC has evaluated the acquisition of the majority of lots by an undertaking of dominant position in the extent of Article 82. In the event that was the subject of the decision, the US firm called Continental Can had entered into the market by buying the 85% of the lots of a firm that functioned in the metal package sector in Germany called SLW, and then established another company in Belgium called Europemballage Corporation, and through this company bought the 11% of the lots of a Dutch company called TDV which functioned in the same sector with SLW. The Commission has regarded Continental Can's acquisition of the lots of SLW firm firstly, and then its acquisition of TDV through Europemballage as the misuse of the dominant position in the extent of Article 82 of TEU. However ECJ, has cancelled the decision of the Commission now that there did not exist enough evidence showing that Continental Can was in a dominant position; but also made its first decision that this issue is to be applied to the control of Mergers and Acquisitions, as well. In this decision, the EC verified that the conditions of misuse in Article 8 are set as examples, and the inventory is not limited to what is given place in the issue. Thus, ECJ has come to the decision that undertakings which strengthen their current dominant position as a result of mergers and acquisitions, and that decrease active competition, will be evaluated in the extent of Article 82. Concerning that Article 82 will be

[95] Güven, p. 66
[96] Case6/72 (1973) ECR 215, (1973) CMLR 199

applied in the control of mergers and acquisitions about the misuse of the dominant position; the Commission has made various decisions after the court of Continental Can. [97]

2. THE CONTROL OF MERGERS AND ACQUISITIONS ACCORDING TO ARTICLE 81

The first decision of ECJ noting that Article 81 is applicable to mergers and acquisitions is BAT& Reynolds / Commission decision[98]. In this event, ECJ has decided that Article 81 of TEU is to be applied to the controlling of mergers and acquisitions. [99] In the event, the firm Philip Morris functioning in tobacco sector had bought 30% of the lots of the firm Rothmans which is another firm functioning in the same sector, and had reached the voting ratio of 24.9% in addition to some additional rights. However, although it had the right to vote, it neither had the right to be represented in the executive board of neither Rothmans nor it had any influence. This agreement between the sides was subject to exemption by the Commission in reference to the conditions of exemption in Article 81/3. But as a result of application of rival firms operating in the same sector even though there was the decision of the Commission, EJC has approved of the decision of the Commission for exemption and decided that Article 81 is applicable to mergers and acquisitions. According to ECJ, agreements make an undertaking gain legal or in act control over another firm, or that result in a close commercial cooperation between sides, and thus impairs the competition order in the market are in the extent of Article 81. [100]

3. THE CONTROL OF MERGERS AND ACQUISITIONS ACCORDING TO THE COUNCIL REGULATION NO: 4064/89 OF 21 DECEMBER 1989

After the case of Continental Can, the Commission has made a proposal to the Council that necessary regulations should be made concerning the control of big concentrations other

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[97] Whish p.737, Güven, p.82.
[98] Case 142/84 and 156/84 (1987) ECR 4487, (1988) 4 CMLR 24
[99] Tekinalp/Tekinalp, ***Avrupa Birliği Hukuku***. p. 462, Whish, ***Competition Law***., p.736., Craig, de Burca, p.979.
[100] Valentine Korah, ***An Introductory Guide to EEC Competition Law and Practice***, ESC Publishing Limited 1990, p. 212.

than those in coal and steel sectors, relying on the authorization given by Articles 83 and 308 of EEC Treaty. The Commission proposed, in 1973, that a specific regulation be adopted to deal with concentrations.[101] The issue was controversial, as opinions differed substantially between Member States to the extend that which concentrations should be controlled at the Community level, as opposed to domestically.[102] After long work and a long duration of time, the subject became up to date while working on the purpose of creating a single Market, and in accordance with the proposal of the Commission dated 21st December 1989, Regulation No: 4064 / 89 was accepted by the Council. The Regulation called ECMR took effect on the 21st of September 1990.[103]

And the Commission Regulation No: 3384/94 of 21 December 1994 accepted concerning declarations, durations and the stage of verbal defense about the application of the Regulation No: 4064/89 was abrogated by the Commission Regulation no: 447/98 of 1 March 1998. The Commission Regulation No: 447/89 is still in effect. The Council Regulation no: 4064/89 is applied in the control of important Mergers and Acquisitions which are beyond the national borders of a single Member State and which affects the Common Market. That is why the application field of the Regulation is restricted to a numeral threshold. It is possible that this threshold may be redetermined at the end of experiences gained in the aftermath. The purpose of the Regulation is to control important Mergers and Acquisitions in an effective way. The Member States cannot enforce their national law in the control of Mergers and Acquisitions which are in the extent of the Community. [104]

The ECMR contains the evaluation, definition, declaration of Mergers and Acquisitions, the calculation of endorsement, the analysis of declaration and the beginning of the enquiry, the Commission's authority of decision, sending to the authorized organizations of Member States, durations for starting the enquiry and taking decisions, asking for information, the making of enquiry by the organizations of the Member State, the authority to investigate on the spot, executive fines, the control of ECJ, trade secrets, the hearing of sides

[101] Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentrations between Undertakings. OJ (1973) C 92/1
[102] Whish, p. 738
[103] Council Regulation (EC) No: 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, P.1: Corrected version, OJ l 257, 21.9.1990, p.13), Merger Control Law in the European Union, Situation in March 1998, European Commission, Brussels, Luxembourg, 1998, p.41.
[104] Güven, p.76

and third persons, relations with the organizations of Member States, the publishing of the decisions, the Authorization, relations with Non-Member States, and sentences concerning the effect. The Regulation no: 4064/89 cannot be enforced to Mergers and Acquisitions which were before the taking effect of the ECMR and on which investigation was carried before the date of the ECMR's taking effect by a competition authority of a member state (Article 25 of ECMR). The ECMR is totally obligatory and directly applicable for all the states that are members of the European Union. The only authorized organization in the control in the extent of the Community is the Commission. All the Mergers and Acquisitions in the scope of the ECMR are to be reported to the Commission before it takes effect. Concentrations with a Community dimension must be notified to the Commission[105]. On notification, the Commission is obliged to assess, within a period of one month, whether or not that concentration falls within the scope of ECMR and, if so, whether it raises serious doubts about its compatibility with the common market.[106]

The other relevant regulation of the European Union concerning the control of Mergers and Acquisitions consists of "The Complementary Regulation"[107] and "Commission Announcements"[108].[109]

4. THE CONCEPT OF CONTROL

In Competition Law the transactions which do not cause change of control does not accepted as concentration. Accordingly first of all, the examinations of the structural changes regarding the control of entities gain importance for the evaluation of the concentrations.[110] The concept of "*Control*" has an outstanding significance for Competition Law. However, in

[105] Mehtap Civir, ***Mergers And Acquistions in EU and Turkey,***, Marmara Üniversitesi Avrupa Topluluğu Enstitüsü Yüksek Lisans Tezi, 2002, p. 20.
[106] Merger Reg. Art. 6(1)(a)-(c) Broadly this means that the Commission must determine (a)whether the concentration creates or strengths a dominant position, (b) as a result of which effective competition in the common market (or a substantial part of it) would be significantly impeded, Art. 2(2) and 2(3).
[107] Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064 / 89 on the control of concentrations between undertakings, OJ L 61, 2.3.1998.
[108] Merger Control Law in the European Union, Situation in March 1998, European Commission, Brussels, Luxembourg, 1998, p.4-6
[109] For Further information see Güven, p. 87- 90
[110] Abdulgani Güngördü, ***AT ve Türk Rekabet Hukukunda Yoğunlaşmalarda Kontrol Unsuru,*** Rekabet Kurumu 2. Dönem Rekabet Uzmanları Tezi, Yayın No: 131, 2003, p.1.

the Competition Law the concept of control is not mentioned. Yet, in the 2nd Article of the Communiqué Numbered 1997/1[111], the scope of the concept of control and under which circumstances control can be gained is clarified. According to this "*control*",

"""*can be achieved separately or together, in act or in law, with rights, contracts or other means that have the means of maintaining significant impact over an undertaking, and especially with the right of property or possessor rights that permit functioning over the whole or a part of the property ownership of an undertaking or with rights or contracts that maintain a significant effect on the establishment or decisions of the agencies of an undertaking.""""*

According to this regulation, "*control*" over an independent undertaking can be achieved both by a single undertaking and by more than one undertakings jointly.[112] The control can be obtained legally, as in the example for the take over of the assets or de facto, as in the example of long live supply or debt agreements.[113] All means are to be used in law or in act for the achievement of control. The important point is that these means are in a level to make them have the facility of a "decisive influence"[114] on this target undertaking. For the credibility of economical control, the decisive influence should be neither temporary nor of a short duration. As shown, "*control*" is rather an economical term than legal concerning the Communiqué.

The Communiqué has anticipated various means concerning by which means control will be achieved, such as property over the value of property ownership, possessor rights permit functioning, or rights that permit having impact on the establishment or decisions of agencies, and has not restricted these means in any way. For example, any means such as executive contract, drawings lease contract, profit contract, the acquisition of stocks that operate in the exchange market, and the acquisition of property ownership or partnership shares can be treated as sufficient for acquisition. The important factor in the determination of control is the readiness of the means that permit a decisive influence for use whenever

[111] Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ, No: 1997/1, RG No:23078, RG Date: 12.08.1997.
[112] Sanlı, p. 326
[113] Korah, p. 303
[114] Sanlı, p. 327

wanted. Thus, this is also clearly stated in the statement of *"the means that enable the application of a* decisive influence*"* both in the Communiqué (Art. 2/2), and in the ECMR (Art. 3/5). The key solution for the determination if the rights that are gained by one entity on the other are enough or not is the procurement of the opportunity of decisive influence. At the time of reaching this point the concentration occurs.[115]

In the European Union Law, there is also a similar provision in ECMR[116]. According to this, in the determination of control, the criterion for "significant effect" has been taken as a basis like it is in the Communiqué, and it is assumed that when an undertaking has the advantage to direct the establishment of the commercial policies of another undertaking for its own benefit, then the "decisive influence" and as a result "control" is achieved. Regarding the ECMR and Communiqué, the control comes true by means of a right or an agreement that gives the opportunity of decisive influence or other instruments.[117] In all these explanations, various means to achieve control have been shown both in the Regulation and in examples. However, it is to be evaluated whether control is achieved or not according to the characteristics of the existing situation. In practice, in the conditions of the acquisition of the whole or more than the half of the property ownership (or partnership shares) of an undertaking or the maintenance of the ratio of votes that would determine the taking of decisions in the authorized agencies of an undertaking, it would be proper to claim that "control" is achieved. To emphasize it once more, the basis is the achievement of economical control, and not the legal control from the aspect of Competition Law.

In the European Union Law, certain methods and presumptions are used in the determination of whether control is achieved or not. For example, an analysis should be made starting from the seizure of the minority interests of an independent undertaking, especially the determination of whether the rest of the interests of this belongs to a widespread and scattered group of shareholders, the determination of whether the general assembly gathers or not i.e., whether there is a power gap in the undertaking or not, the conditions in which whether the minority interests are endowed with privileged rights or not. And in the determination of such circumstances, they are accepted as sufficient for the maintenance of

[115] Güngördü, p.11
[116] Council Regulation (EC) No: 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings.
[117] Güngördü, p.11

"single", and more likely of "cooperate control". In addition to this, if one of the undertakings that are dominant in the control of an undertaking which was previously under "cooperate controls" withdraws from partnership in favor of another or others, then acquisition those results in concentration takes place.[118] For example, In *McCormick/CPC/Radobank/Ostman Case,* the Commission has decided that in a new joint venture, the voting process of all three part owner's acceptance necessity gives the chance of decisive influence to each side about the trading policy and management decisions of the enterprise. Radobank explained that they wouldn't partake of the trading policy but the commission interpreted that the treaty about Radobank's low financial interest and constant achievement wouldn't destroy their right to use decisive influence. [119]

In the European Union Law, if the procedures of two or more acquisitions are made in relation to one another in an economical or legal way, it generally assumed that this results in one single concentration. For example, the control of an undertaking for the purpose of the acquisition of one single undertaking, or the acquisition of the interests or the values of property ownership of the target undertaking in the short run are evaluated in the scope of one single concentration, and both endorsement calculations and the conditions of the dominant position are determined in relation to the whole taking into consideration what happens before and after these operations.[120]

As opposed to this, the operations that are of a divergent quality concerning its outcomes although they are in relation to one another are assumed to result in not a single, but in more than one concentration, and the evaluation is also made separately concerning these operations. For example, in this respect, the exchange of two undertakings of some of interests or the values of property ownership by various contracts, or consortium proposals with the purpose of sharing the property rights of the target undertaking just after the acquisition, or again in a similar way, the sharing of the property rights of an undertaking over which there used to be consortium control among the partners, or the operations which have the purpose of the re-transportation of a part of the property rights of the target undertaking of

[118] Sanlı, p. 330.
[119] Case No. IV/M.330 - OJ 256, 21.09.1993 Mc Cormick/CPC/Rabobank/Ostmann
[120] Güngördü, p.13

acquisition to third persons are generally accepted as resulting in more than one concentrations.[121]

4.1. Types of Control

4.1.1. Direct – Indirect Control

In general, it constitutes the basis that the undertaking that did the acquisition and the controlling undertaking should be the same thus, in principle, whoever does the acquisition also have the right to control it. However, this situation has lost effect against the relations of operation that have become ordinary in commercial life. It is becoming more and vaguer who has the control in the face of complicated structures such as holding companies and transnational companies that have become widespread in our day, and the dependent economical relations in these structures. That is why the undertaking that does the acquisition in appearance, and the undertaking that is supposed to control the other undertaking that is subject to acquisition can differentiate as a result of this and in relations like this.

Thus, directly in Article 3/1.b of the ECMR, and indirectly in the Communiqué, *"indirect control"* is mentioned in addition to direct control. According to Article 2 of the ECMR[122],

"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 involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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

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

[121] Sanlı, p.329.
[122] Council Regulation (EC) No: 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings.

And according to Article 3 of the ECMR[123],

"Control is acquired by persons or undertakings which:

a) are holders of the rights or entitled to rights under the contracts concerned; or
b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving there from."

Where one undertaking acquires more than %50 of the voting capital of another this would normally give rise to sole control, unless for example, a shareholders' agreement gave the minority shareholder(s) joint control with the majority shareholder, for example through rights of veto. Control can be found to exist even where there is a shareholding of less than 25%; for example in CCIE/GTE[124], CCIE acquired 19% of the voting rights in EDIL and was found to have acquired control, the remaining shares being held by an independent investment bank whose approval was not needed for important decisions. It is possible that an undertaking that acquires shares in another, but which does not acquire control in the sense of Article 3(3) of the ECMR, may nevertheless be party to an agreement that is restrictive of competition under Article 81.[125]

4.1.2. Single – Joint Control

If an undertaking has the power to exercise a significant effect over another undertaking, then the undertaking mentioned is assumed to have achieved single control. Under normal circumstances, "decisive influence" can be maintained by a single undertaking on its own by the achievement of the majority of property ownership, or interests, or agencies of decision. In this respect, every factor in act and/or in law is taken into consideration, and it

[123] Council Regulation (EC) No: 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.
[124] Case No: IV/ M.258 CCIE/GTE
[125] Whish, p. 746-747

is determined whether or not one undertaking on its own achieves control in the characteristics of the existing event.[126]

From the aspect of the Turkish Competition Act, it is accepted that not only the achievement of control on its own, but also "joint control" achieves by more than one undertaking result in concentration. According to this, if the effect that an undertaking exercise on another does not permit control on its own, and the significant effect can be exercised only in common action with other undertakings, then there is *"joint control"*. To put it in another way, concerning the basic commercial policies of the relevant undertaking, if the economical interests of undertakings require making joint decisions, and this process of joint behavior does not have a temporary quality, then it should be accepted that joint control is achieved over that undertaking. The Competition Board in the decision of LPG about giving permission to the "joint venture" which is planning on to acquire liquefied petroleum gas (LPG), the conditions of mutual control are in the following terms:

"""Fundamentally it is not necessary for all part owners to have equal financial interest or vote right to achieve mutual control. But in such treaties the important point to underline is to give minor interest a qualification to vote that's strengthened by strategic decisions or to give right to veto or regularize the power to take decision qualified enough to achieve mutual control."""[127]

Although *"joint control"* generally comes into existence especially as joint ventures, it can also be observed in joint mergers, partial mergers that do not permit control on its own, company rescues, the buying of interests reciprocally, and even in mergers. Decisive influence from the aspect of *"joint control"* is possible in conditions when one of the undertakings can block the practices of and behaviors concerning the basic commercial policies of the target undertaking whenever it is necessary.[128] Paragraph 18 of the Commission's Notice on the Concept of a concentration states that there will be joint control where "*the shareholders … must reach agreement on major decisions concerning the controlled undertaking*" in a case of sole control, one undertaking is able to determine the

[126] Sanlı, p. 330
[127] RG Date: 01.07.2000 RG Number: 24096
[128] Güngördü, p.30

strategic decisions of another; a case of joint control will exist where two or more undertakings must reach agreement in determining the commercial policy of the entity in question. A large percentage of cases involve the acquisition of joint control. A change from joint control by three firms to two would also qualify as a concentration.[129]

To think in general, the first possibility in which "joint control" can exist is the equality or the right of equal vote in the composition of the decisive agencies of the mentioned undertaking. In such a situation, the sides will have to act together as a result of their positions in the undertaking, and even though there is no agreement between them, "joint control" will come about in act. In the decisive agencies of an undertaking, equality is dependent either on share (capital), or on contract or other advantageous situations. In this respect, the representation conditions in the decisive agencies do not have the obligation to be in proportion with share holders of the same level or with the values of property ownership. In the decision of *Borusan Mannesmann Endüstri ve Yatırım A.Ş.* , a joint venture called Borusan Mannesmann Endüstri ve Yatırım A.Ş is incorporated by Borusan Birleşik Boru Fabrikaları A.Ş, Kartal Boru A.Ş, Mannesmann Sümerbank Boru Endüstrisi T.A.Ş. with the capital ratio of %77 Borusan Group, % 23 Mannesmann AG. In this decision although the owner interests are not equal; there has been no mutual control contest. Because the process in question is taken as joint venture, it is understood that the existence of mutual control is acquiesced. [130]

Another circumstance that can be of presumption to the existence of "*joint control*" is the recognition of the "*veto*" right for one or some of the sides in the process of decision making. In this way, common behavior and consensus will be obligatory in the determination of the undertaking's commercial policies. The recognition of the veto right is important in situations when the proportion of shares or representation are not equivalent and one of them is a minority in the sense of the Turkish Competition Act. In this respect, all sides will have to exhibit common behavior concerning the continuance of the functioning of the undertaking because of the pressure created by the veto right.[131] Also the LPG Decision is a good example for Turkish Competition application. In LPG case which is the subject of the decision it is

[129] Whish p. 747
[130] Güngördü, p. 34
[131] Sanlı, p.

asked from the Board of Competition to give permission for the joint venture between 39 companies that act in the distribution market of LPG in order to act in supply market of the same good, under the title of "LPG Temin Dağıtım ve Sanayi ve Ticaret A.Ş.". In this decision, at least eight affirmative votes from the members of the board of directors which consist of eleven members are needed for strategic decisions of this joint venture. During the consideration of the board of directors membership numbers of the parties, it is determined that there is no authorization for any party to take decisions solitarily, but regarding the important decisions for which 8/11 vote quorum is needed, incase the group of Aygaz votes against, any decision can be taken. So that it is determined that Aygaz Group has an important role in decision machinery and he has the veto power by himself. Besides, the dominant position of Aygaz, Primagaz and Demirören Groups' financial structure is discussed. Incase this three groups votes in the same way said quorum can be achieved where the rest of 29 company has been represented just by 2 board of directors. In such strategic decisions almost there were no right of these small companies. For the absence of the voices of the minority shares for these strategic decisions and lack of any provision in the partnership agreement that gives veto right to those companies, it is decided by the Board of Competition that there is no joint control in that joint venture.[132]

Except these special circumstances mentioned, "*joint control*" can also be achieved in the conditions of two or more undertakings that have the minority share in the target undertaking cooperate through agreement or in act and reach the majority level in the process of decision making of the undertaking. It is not easy for undertakings that do not have an agreement between them which is legally binding, and that act together only because of their common commercial interests, to reconciliate in the long run concerning the commercial policies of the target undertaking. That is why it is observed that undertakings come together in the scope of a contract relationship and they achieve control by securing the common decisions and behaviors legally. The concept of control has a central importance for the determination of concentrations. For the evaluation of a transaction as a concentration, there

[132] The Board of Competition Decision, File No: D4/1/Ö.P.-98/2, (D1/2/Ö.P.-98/2), Decision No : 99-26/230-138, Decision Date : 27.05.1999

has to be structural changes in the control of the enterprises. These changes are resembles continuous and permanent power shifts.[133]

C. THE CONCEPT OF MERGERS AND ACQUISITIONS AND CONCENTRATION ACCORDING TO TURKISH LAW

1. MERGERS AND ACQUISITIONS IN THE EXTENT OF TURKISH COMMERCIAL CODE

The basic law concerning Mergers and Acquisitions of undertakings in Turkish Law is Turkish Commercial Code (TCC), and between Articles 146 and 151 of this law, mergers of undertakings in general are regulated. According to Article 146 of TCC;

“““*Merger is the union of two or more trading companies to establish a new trading company, or the adherence of one or more than one trading company of another existing company*.””

Therefore, it is mentioned in Turkish Commercial Code that company mergers can be in two ways. The first of these is merger through a new establishment, and the second is merger through acquisition. In merger through a new establishment, at least two companies establish a new company by making the decision of merger, and they become a part of this new company with all the assets and liabilities. In the merger through acquisition there are again two companies in the least, and one of these companies takes over, while the other is the one taken over; in other words there is a partnership included. While the partnership which has taken over remains, the one taken-over delivers its partnership of property ownership to the company that takes-over as a whole. With the completion of procedure, in the case of merger through new establishment, the companies of the merger; and in the case of merger through acquisition, the companies that are taken-over dissolve. [134]

[133] Güngördü, p.58
[134] Tekinalp, Ünal. (Poroy/Çamoğlu), ***Ortaklıklar ve Kooperatif Hukuku***. Beta Basım Yayım Dağıtım A.Ş, 2000, p.112

With Article 147 of Turkish Commercial Code, it is obligatory that the companies of merger should be of the same kind; therefore, incorporated companies can unite with incorporated companies and partnerships in commendams in which the capital is divided to shares, and limited partnerships unite with limited partnerships, and ordinary partnerships merger with ordinary partnerships and with partnerships in commendams. In the case of a merger or acquisition, the property ownership of trade partnerships is delivered to the partnership newly established or to the partnership in which the acquisition takes place by universal subrogation and without dissolution. Mergers in which the merger of property ownership does not take-place are not evaluated in the scope of Article 146 of TCC.[135]

According to TCC sentences, it should be noted that any merger and acquisition that takes place is not directly and automatically subjected to control in the extent of Turkish Competition Act. According to Turkish Competition Act and Communiqué, the mergers between independent undertakings are important. What is meant by independence in Turkish Competition Act is not legal independence, but economical independence. In mergers that take place between undertakings which are not independent, since the merger will take place between partnerships which are a part of the same group, no matter how different it may seem there is a difference in control, the partnership to which the companies are a part of continue to have the control after the merger takes place, and there is no change concerning the control. In this respect, the control is not delivered and the condition of Article 2 of the Communiqué which is "the condition of the merger of two or more independent undertakings" does not exist.

In the extent of TCC, there is a different procedure concerning the merger of incorporate partnerships. According to this, in incorporate partnerships, by the establishment of a new company, the properties of the partnership are delivered to the new company without dissolution in the process of merger. Sentences concerning the establishment of an incorporate company and the acquisition of an incorporate company by another incorporate company are applied concerning this merger. In the merger of two incorporate companies, an incorporate company undergoes dissolution by being taken-over by another incorporate company with all

[135] Güven, p.105

the assets and liabilities. The properties of the company which has dissolved are maintained by the company of acquisition separately until its debts are paid or supplied. [136]

In Article 3 of ECMR, which mergers are in the extent of the ECMR are defined, and thus a similar regulation with Turkish Commercial Code is made. According to this, the delivery of all the properties and debts (both assets and liabilities) of one or more companies to a company whish has been established beforehand i.e., that already exists (in this case, the shares are divided among the share holders of the company of acquisition), the transfer of a couple of companies to another company that they have established themselves with all the assets and liabilities, or the transfer of one or more that one subsidiary companies to a principle company with all the assets and liabilities are mergers in the extent of the ECMR.[137]

Moreover, mergers which fall outside the extent of the ECMR are mentioned in it. According to this, operations in which neither the acquisition of assets and liabilities nor company dissolution takes place are not to be in the extent of the ECMR, e.g., only the selling of the property or delivery of the lots of the company, or the reestablishment of a single company (change of type), the transfer of a company to a newly established company with all the assets and liabilities. [138]

1.1. Company Mergers in Practice

1.1.1. Pre-interview between the Parties of the Merger

It is the step in which the sides come together before the merger takes place in order to get to know one another and to determine the type of the new company of merger that is to be established. In this step, the sides sign a letter of intent generally. [139]

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[136] Güven, p. 108
[137] Esra Tanrıkulu, ***Şirket Birleşmelerinin Rekabet Hukuku Alanındaki Etkileri,*** İstanbul Bilgi Üniversitesi Sosyal Bilimler Enstitüsü Ekonomi Hukuku Yüksek Lisans Tezi, 2005, p.5
[138] Tanrıkulu, p. 5
[139] İsmail G. Esin, - Tunç Lokmanhekim, ***Uygulamada Birleşme ve Devralmalar.*** Yetkin Yayınları (2003). p. 9

a. Due Diligence

In this step, the sides generally make investigations in three fields (in legal, financial and operational fields) in order to determine the economical powers, work fields and legal relations of one another. In the extent of the legal investigation, there are papers concerning the establishing, operating, and partnership structures of the sides (the principle agreement, trade register records, executive board decisions, books of share holders), loan contracts, factoring, leasing contracts, guarantees, letters of credit, agreements in which the firm is a side, records of the personnel, insurances, files of pending and possible courts, data and documents about properties and literary properties etc. In the extent of the financial investigation, there are profit and loss statements and balance sheets about the firm in general prepared by independent control institutions. In the extent of the operational investigation, there are marketing, human resources, technical subjects of the firm and technical elements such as production and storage. [140]

b. Preparation of the Merger Agreement

Regarding the Merger of Joint Stock partnerships, the merger agreements are suggested implicitly in Article 148 of TCC are arranged between the new partnerships and joining partners.[141] With this agreement, the sides determine the purpose and modus of the merger according to the Turkish Law of Obligations. In mergers through the establishment of a new partnership, a contract for partnerships in the merger is made and for a new partnership, and in acquisitions a merger contract is made between the merger side(s) and the partnership of acquisition. The contract contains the ratio of share exchange, the cost of the authorized capital, corporate names, the cost of the increase of authorized capital and the subject of dealing, the conditions of merger, and the responsibilities of the sides for each other. The contract is to be acknowledged by the public notary.[142] The Merger Agreement is an agreement of indebtment, saving and organization inclusive of the structure, net worth transfer and exchanging of the shares of newly established or accessing partnership where the

[140] Esin/ Lokmanhekim, p.19-20
[141] Civir, p. 80
[142] Tekinalp, Poray/ Çamoğlu, ***Ortaklıklar ve Kooperatif Hukuku***, p.115

merger will take place. It constitutes the legal base concerning the transmission of net worth by total subrogation.[143]

After these preparatory steps, in acquisitions, equity capital calculations of the merger companies are made with the investigation of the court.[144] After the merger contract is signed, in the partnership of acquisition, the operations for the increase of capital and the preparation of the shares that are to be given to the share holders of the partnership that is to join are made, and the merger contract is acknowledged by the general assembly of the partnerships of merger. After the partnerships of merger register and announce the decision of merger, it is registered and announced that the partnership that joins has dissolved. In the mergers through new establishment, after the preparatory and juridical steps, the establishing processes of the new partnership that is to be established are made, the new partnership is established by the acknowledgement of the merger contract, and the dissolution of the partnerships to unite are registered and announced.

2. THE LEGISLATION CONCERNING THE CONTROL OF MERGERS AND ACQUISITIONS IN TURKISH COMPETITION ACT

2.1 The Act on the Protection of Competition numbered 4054 (Turkish Competition Act)

The Act on the Protection of Competition Numbered 4054 (Turkish Competition Act) makes up the basis of the relevant regulations concerning the control of mergers and acquisitions. After the acceptance of the Turkish Competition Act on December 1994 by the acceptance of the Parliament, it came into effect. During the preparatory stage of the Act, benefited from the experiences in US, EU, Germany and France. The Competition Board which has an independent structure has been able to start its actions on 1997. The articles 4, 5 and 6 are parallel with the Article 85 and 86 of EEC Treaty but more detailed. Because,

[143] Civir, p.81
[144] For further information on capital calculations see Halil Soyler, ***Özvarlık Tespit Davaları***, http://www.alomaliye.com/halil_soyler_ozvarlik.htm (last accessed 11.02.2007)

contrary to EU's supranational competition policy, Turkish Competition Act has a national characteristic.[145]

2.2. The Relevant Regulations

The Competition Board has the authority to enforce regulations concerning the subjects in Turkish Competition Act (Article 62). Except what is mentioned in the Law, sentences concerning the use of the Institution of its authority, management and working basis, the collection of the Institution's income, the making of the expenses and the procedure and basis that are to be used in the control of these processes, the basis of the changes that are to be made in the monthly wages, the basis for the employment of foreign specialists, sentences for the purchase and the procedure of bids of movable and immovable that are to be purchased by the Institution are determined by a Regulation.[146]

2.3. The Communiqués of the Competition Board

The Competition Board is established to provide that goods and services markets exist and develop in a free and healthy competition environment, to control the application of Turkish Competition Act, and to carry out the duties given by Article 20 of Turkish Competition Act). It is an institution with public legal entity and financial autonomy. One of the duties of the Board is to publish communiqués concerning the application of the Law and to make the necessary arrangements. The Competition Board has published various communiqués in accordance with these duties and authorizations. The Competition Board has accepted the Communiqué No: 1997/1 on the Control of Mergers and Acquisitions. [147] Some changes were made on this Communiqué with Communiqués numbered 1998/2, 1998/6, and 2002/2.[148]

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[145] Esra LaGro, ***Avrupa Birliği ve Türkiye Rekabet Politikası Açısından Bankacılık Sektörüne Genel Bir Bakış,*** Bankacılar Dergisi, No: 26, 2001, http://www.tbb.org.tr/turkce/dergi/dergi36/Esra%20lagro%20(s.50).doc (last accessed 17.02.2007)

[146] Güven, p. 92

[147] Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ, No: 1997/1, RG No: 23078, RG Date: 12.08.1997.

[148] For further information see Güven, p. 93-95

2.4. The Decisions of the Competition Board

The principles that are given place in the decisions of the Competition Board set out the examples for the application of Turkish Competition Act. The decisions of the Competition Board are very important in act because they exhibit how the Law and relevant regulations are to be applied. While the authorized board in the application of Turkish Competition Act is the Competition Board, in the application of the Competition Law of the European Union, the Commission is the authorized institution. The decisions of the Commission and the Court of the First Instance which is the means for application against these decisions and especially the ECJ decisions are significant in act. And in Turkish Competition Act, regarding the Article 55, appeal may be made to the Council of State within due period against the final decisions, measure decisions, fines and periodic fines of the Board, as of communicating the decision to the parties. Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines. The Council of State, which is the court of the upper degree, is to be applied to against the decisions of the Competition Board. However, up to now, the Council of State has made a detailed analysis concerning the procedure; but it has not made a detailed analysis concerning the basis in the decisions it has made.[149]

3. MERGERS AND ACQUISITIONS ACCORDING TO COMPETITION LAW

3.1. General

Acquisition, which is described as one or more than one undertakings' taking over another undertaking that is economically independent into its structure, and as a result the undertakings' losing its independency, and joint ventures[150] which do not have an impact and purpose of restricting the competition are not *"per se"* prohibited as a result of the benefits aforesaid; yet accepting that they may have some harmful impacts for competition under certain circumstances, they are controlled by flexible regulations.[151]

[149] Güven, p.96
[150] For further information see Kayıhan, Lerzan.
[151] Sanlı, p. 315

For this purpose, the sentence predicted in the Turkish Competition Act, is contained in Article 7 under the title of "Mergers and Acquisitions". According to this sentence;

"""The merger of one or more than one undertaking in a way that would create a dominant position or that would enforce its dominant position, and that would result in the decrease of competition in a significant way in any of the goods or services markets in the whole or a part of the country, or the any undertaking or person's acquisition of the property ownership or all or part of the partnership shares of another undertaking or the means that give the authority to have rights in the management except the case of inheriting through legacy"""

are accepted as against the law and prohibited. And in the second item of the sentence, it is described in that;

""""Which kind of Mergers and Acquisitions will have to be reported to the Board for authorization in order to have legal validity will be announced by the Communiqués that will be published by the Board"""

and it is anticipated that the Competition Board is exclusively authorized in the control of mergers and acquisitions. Based on this sentence, the Competition Board published "Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board" on 12.07.1997[152], and determined the mergers and acquisitions which are to be reported to and asked for authorization of the Competition Board to gain legal validity.

The centralization of the power to make economical decisions by Mergers and Acquisitions of this kind or by joint adventure, in other words, the centralization of the control in certain centers as a result of changing hands between undertakings, and resulting in structural changes so as to decrease the number of players in the relevant market is called "concentration"[153].

[152] Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ, No: 1997/1, RG No: 23078, RG Date: 12.08.1997.
[153] Güngördü, p.13.

In the Article 2 of Communiqué, the extent of the concept of control and in what conditions it may be achieved is explained. According to this, control;

""...it may be established with rights, contracts or other means that enable the possibility to affect significantly an undertaking in act or legally separately or together, and especially with the right of property over the whole or a part of the property ownership of an undertaking and the right of utility that is open to operation, or with rights and contracts which are significantly effective on the decisions.""

Even though it is not openly stated in the Turkish Competition Act and the relevant Communiqué, it will be seen that the most striking concept in application of Article 7 which is under the title "prohibited actions" of the 2nd part of the Law no: 4054 is *"concentration"*.

For the application of Article 7; first of all a merger between undertakings should have a quality of a concentration.

In general, the concentration of the power to make economical decisions, in other words of economical control in certain centers by changing hands among undertakings, and the resulting of this position in structural changes in a way to decrease the number of competition subjects in the relevant market is called *"concentration"*. In other words, on the condition that mergers between undertakings carry a quality that is continuing, independent and institutional and this resulting in the decrease of competition in the market, it is then possible to mention the concept of concentration in the sense of Article 7.[154]

In the European Union Law, in the ECMR for the control of concentrations, the definition of concentration was given, and in the later Commission announcements this definition was taken as a basis. According to this definition, operations that result in perpetual and continuous changes in the structures of the relevant undertakings are treated as concentrations no matter what type it is, and in the determination of a relationship that results in concentration in the market, the comparison is taken into account that of operations and

[154] Sanlı, p. 317.

behaviors with the purpose of the coordination of competition among undertakings in the extent of Article 85.[155]

From the perspective of ECMR Article 3 of the ECMR defines the term of "Concentration", and also there has been some case law regarding this concept, but also the Commissions Notice on the Concept of a Concentration is an important source of guidance on its practical application.[156]

Article 3(1) of ECMR provides that *a concentration shall be deemed to arise where;*

a) two or more previously independent undertakings merge, or
b) one or more persons already controlling at least one undertaking, or
c) one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole parts of one or more other undertakings.

Having determined whether an operation amounts to a concentration in the sense of Article 3, it is necessary to consider whether that concentration has a Community dimension according to the provisions in Article 1.[157]

Article 1 (2) provides that a concentration has a Community dimension where,
a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[158]

Article 1(3) provides that; a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

[155] Güngördü, p.13
[156] Whish p, 744
[157] Whish, p. 751
[158] Whish, p.752

a) the combined aggregate worldwide turnover of all undertakings concerned is more than EUR 2 500 million;

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

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

d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3.2. Situations which do not count as Concentrations in the Extent of the Communiqué Numbered 1997/1 about Mergers and Acquisitions

Situations that count as concentrations include a wide scope in economical life. That is why, even though any situation in which control changes hands can be qualified as concentrations at first sight in the extent of Competition Law, the control of all situations in which situations change hands by competition rules is not a solution that is appropriate to the purpose. Since the control of concentrations of all scales is not practically possible, control does not agree with the purpose of the Competition Law in some circumstances. In this respect, institutional corporations that do not have a significant effect on competition or that can contribute to competition in a positive way are left outside the extent of the concept of concentration, and this concept is restricted so as to make it applicable in a way to suit the purpose of competition rules.[159]

In case a transaction does not concludes a change in the control than it shall not be a concentration in the frame of Article 3(3) of ECMR.

ECMR states that;

a) The seize of less shares needed for the use of the right of control, or

[159] Sanlı, p. 338

b) The position of a company's shares that are temporarily belong to a lending society or an other financial entity or an other insurance company

does not constitute concentration.[160]

In Turkish legislation, in order to specify the concentrations that do not fall in the scope of the concentration, the Communiqué based on Article 7 of the Turkish Competition Act has restriction in two ways. One of these restrictions is quantitative, while the other is qualitative.[161]

3.2.1 From the Point of View of Qualitative

In concentrations of quality, there is a change in the control of undertakings in appearance, but especially if this control is temporary and because of this temporary quality, and if its purpose and outcome is not to decrease competition, such operations count as concentrations under normal circumstances; but they are not in the extent of the control of the Turkish Competition Act because of the quality of the operations and relations.

In Article 7 of the Act, only the situation of "*inheritance*" is mentioned on this subject. And in the Communiqué, this scope was broadened and two other situations were mentioned in Article 3.

In Article 3 and item "*a*" of the Communiqué, it was mentioned that,

"""That undertakings whose ordinary activities are to transact with securities for their own account or for the account of others, temporarily hold the securities acquired with a view to reselling them, provided that the voting rights arising from such securities are not exercised by them in such a way that the competition policies of the undertaking issuing the securities are affected.""",

[160] Güngördü, p. 39
[161] Sanlı, p. 338

are not in the extent of the Act, and thus the permission of the Board is not sought for such Mergers and Acquisitions. Therefore, with this sentence of the Communiqué, operations which are to be qualitatively exempt are mentioned.

In item '*b*' of the Communiqué that regulates the other situation, it is mentioned that

"""*That acquisition is carried out by a public institution and an organization with the aim or reason of liquidation, winding up, insolvency, cessation of payments, composition, privatization or by a similar reason, and as required by law.*"""

are not in the extent of the Act, and it is mentioned that the permission of the Board is not to be sought for such Mergers and Acquisitions, as well. According to the Article in question, for being in the extent of this item of a merger or acquisition, the means of control must have changed hands in accordance with the law, and the one that does the acquisition should be qualified as a public establishment or institution. The Article anticipates various circumstances concerning the reason of the merger or acquisition; however, such circumstances are not mentioned in numbers, but are set as examples.[162] In Turkish Commercial Act, Article 434 and ongoing articles under the title of "Liquidation of Joint Stock Company" the procedure for the liquidation of joint stock companies is regulated. Regarding this, the liquidation transactions have to be done by the liquidators who shall be authorized by the articles of association or by general assembly of the company. By the liquidation process the control of the company be belong to those liquidators. But in this situation, the change of the control of the company is as required by law, it is deemed in the exemption of Article 3(b) of the Communiqué Numbered.[163] Another example for the exemption is the acquisition of the minority shares of the company by the majority owner. In this case as the control does not change there is no merger in the frame of Article 7 or Communiqué. However, the Board of Competition may deem the transaction as merger and give permission as it is in *Autoliv Cankor Otomotiv Emniyet Sistemleri Sanayi ve Ticaret A.Ş.*[164] case.

[162] Güven, p. 256, Sanlı, p. 328.
[163] Tekinalp (Poroy / Çamoğlu), p. 796 - 811
[164] The Board of Competition Decision, Decision No: 54/394-46, Decision Date: 26.2.1998

3.2.2. From the Point of View of Quantitatively

In the Turkish Competition Act, some operations that count as concentrations qualitatively can be exempt from the control of competition authorities because of the greatness of the undertakings which are included in this operation in economy. The anticipation of such an exemption provides the restriction of the number applications for the sake of a healthier analysis and evaluation of competition authorities, practically. The economical benefit of such an exemption is instead of preventing the whole of the Mergers and Acquisitions that are the ordinary and at the same time inevitable practices of commercial life, but to control concentrations that are of a magnitude that can result in the outcome of decrease of competition significantly, and moreover the encouragement of the merger of small and medium scale undertakings that are taken to be beneficial for competition.[165]

Quantitatively, it is possible to try different methods. For example, in the determination of the economical power of undertakings, it is possible to take only the endorsement or the criterion for market share as a basis, and to take both of them as a basis, as well. It is also possible to give the discretionary power to competition authorities to determine which criterion will be applied. The Turkish Competition Act has adopted the second path concerning this subject, and it has anticipated which kind of mergers and acquisitions are to take the permission of the Board will be determined by Communiqués which are to be published by the Board. The Communiqué of the Competition Board was based on the criteria of *"market share"* and *"endorsement"* in the determination of the concentrations that were to be outside the scope quantitatively.

In the sentence of Article 4/1 of the Communiqué, it was mentioned that;

""Where, as a result of a merger or an acquisition mentioned in article 2 of this Communiqué, total market share of the undertakings that carry out the merger or acquisition exceeds 25 % of the market in the relevant product market within the whole or a part of the territory, or even though it does not exceed this rate, their total turnover exceeds TL twenty-five trillion, it is compulsory for them to take the authorization of the Competition Board""""

[165] Sanlı, p. 339

Thus, the Competition Board anticipated two different thresholds that take endorsement and market share as their basis for concentrations that have to ask for permission, and as a rule it has brought forward the condition of prior declaration and permission obligation for concentrations that exceed one of these thresholds.[166]

According to what measures these thresholds which are anticipated in the Communiqué will be determined, is included in the regulations of the following items in a more or less detailed manner. To put it shortly, in calculation, the Communiqué took the total endorsement and market share of the whole of the undertakings that do the merger and acquisition as basis, and has put it into the sentence that the enterprises that are sides of this concentration not only directly, but also indirectly, and that are included in the concept of undertaking both horizontally and vertically will be taken into consideration in the calculation of the endorsement.

In the European Union Law, since the Union has a structure above nations, and the member states have the right to control over the concentrations as a result of their national legislation, a different system than the Turkish Law was anticipated. According to this, in order to be in the extent of the ECMR, a concentration is to have *"the community dimension"* firstly. And for a concentration, in order to be in the community scale, the relevant undertakings have to provide the conditions of a worldwide endorsement of more than 2.5 billion ECUs, a total endorsement in each of at least three member states more than 100 million ECUs, a total endorsement of at least two of the relevant undertakings included in the calculation of total endorsement at least in three member states more than 25 million ECUs, and moreover at least the endorsement of two of the relevant undertakings in the scale of the community to be more than 100 million ECUs each, the 2/3 of the endorsement of each of the two of the relevant undertakings in the scale of the community to be achieved not from a single member state.[167]

It is clearly shown that the ECMR has taken the endorsement as the criterion rather than the market share different from our system, and has anticipated a system of multiple thresholds that has a more complicated quality. In the calculation of the endorsement, the

[166] Sanlı, p. 340
[167] Güngördü, p.41

regulations of the ECMR and the Communiqué are in parallel in many ways, except some sentences.

3.3. Types of Mergers and Acquisitions in the Extent of Competition Law

3.3.1. Horizontal Mergers

Horizontal Mergers is the merger of undertakings that function in the same level of the chain of production and distribution e.g., the merger of two firms that produce automobiles.[168]

Horizontal Mergers is a type of concentration that creates significant changes in the structure of market, and the number of existing rivals in the market decrease as a result of the horizontal merger, and this situation creates two impacts on competition. The first of these is since the market share is higher than the market shares of each of the undertakings that are sides of the operation respectively; it may result in the undertaking's seizure of Market force and creating a dominant position in the market. Secondly, the structure of market that changes as a result of the horizontal merger might create a convenient atmosphere for undertakings to make agreements that would impair competition.[169] On the other hand, this new establishment may use its force to decrease the quality of the goods or services that it produces or to increase the prices of these. [170] Because the horizontal merger involves two firms in the same market, it produces two consequences that do not flow from vertical or conglomerate mergers:

a) after the merger the relevant market has one firm less than before,
b) the post merger firm ordinarily has a larger market share than either of the partners had before the merger.[171]

The negative impacts of horizontal mergers on competition are analyzed under two titles which are coordination impacts in general and one-sided impacts. The decrease of the

[168] Craig / De Burca, p.979
[169] Ulu, p.11.
[170] Ercüment Erdem, ***Türk ve AT Hukukunda Birleşme ve Devralmalar***, Beta Yayınları, 2003, p.37
[171] Cvir, p.11

number of firms functioning in the market as a result of mergers and whether the coordination between firms will come into existence or not is evaluated in terms of coordination impacts. In coordination impacts, while undertakings before merger do not find coordination impacts profitable, the position of the market may be convenient after the merger. On the other hand, in one-sided impacts, the possible impacts of the disposal of price pressures with the merger of firms that force competitive price pressures on each other are analyzed. The sides of merger may reach the position to increase their prices by disposing of the price pressure between them as a result of a horizontal merger. A firm that could not venture an increase of price because of the price pressure in the market before the merger may dispose of the price pressure of the rival product as a result of the horizontal merger and may venture a one-sided increase of prices.[172] The reason of one-sided impact arises from the co-ownership of two close rival products.[173]

Horizontal mergers do not always bring forth negative impacts.[174] Especially the merger of small size enterprises is supported by various practices to make them stand against big scale enterprises and to increase the competition environment in this direction. In the practice of the EU Competition Law, the thought of protecting small scale undertakings against the big ones is rather more frequent e.g., German Competition Law that stick out with these practices.

Although in Turkish Competition Act, there is no special sentence either in the Act or in the Communiqué on the protection of SMEs, we may say that small and medium scale enterprises are protected because the undertakings that do the merger and acquisition which is under control with the threshold system introduced are controlled on the basis that they are to exceed 25 million New Turkish Liras endorsement or 25% of the Market share in the market of the relevant product.[175]

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[172] Ekrem Kalkan, ***Yatay Birleşmelerin İncelenmesinde İktisadi Tekniklerin Kullanılması***, Rekabet H-Kurumu, 3. Dönem Uzmanlık Tezleri Serisi, 2004 p. 6-7.
[173] Aydın Öztunalı, **Yatay** ***Yoğunlaşmalarda Tek Teşebbüs Hakimiyeti***, ***4054 Sayılı Rekabetin Korunması Hakkında Kanun ve AB mevzuatı uygulamaları***, Rekabet Kurumu 1. Dönem Uzmanlık Serisi Tezleri, 2003 p.13.
[174] Ulu, p.12
[175] Güven, p. 117.

In practice, since especially the horizontal Mergers and Acquisitions that take place in markets of oligopoly structure prepare a suitable basis for behaviors that create an open or close cooperation, these mergers are prohibited. İGSAŞ / Toros Gübre[176] decision of the Competition Board is an important decision on this subject. Concerning determinations about the market in general and the sides, because of the strengthening of the oligopolistic structure of the fertilizer market in which obstacles of access to market are already big enough, and the existence of the difficulty to function in the market, and because it is against Article 7 of the Turkish Competition Act, the acquisition subject to announcement was not permitted.[177]

3.3.2. Vertical Mergers

Vertical Mergers are Mergers and Acquisitions between undertakings that function in the same goods or services market, but that are of different levels in the market.[178] About vertical mergers, in "Communiqué of Group Exemption on Vertical Mergers" accepted by the Competition Board,[179] vertical mergers are defined as;

""""Agreements between two or more undertakings that function in different levels of the production and distribution chain for the purpose of buying, selling, and reselling of certain services."""

The effects of vertical mergers on competition are as much as the ratio of the effectiveness of the undertaking that already has the market force on the market. The competition between distributors and retailers, which is also called in-brand competition, is in fact a competition that is looked for.[180] In this situation, consumers are positively affected by in-brand competition.

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[176] Rekabet Kurulu Kararı, Karar Tarihi: 03.11.2000, Karar Numarası: 00-43/464 - 254
[177] Serdar Dalkır, Erkan Kalkanbir, ***Yoğunlaşma İşlemi Sonucunda Ortaya Çıkması Beklenen Refah Etkilerinin Pcaıds (Proportionality-Calibrated Aıds) Modeli İle Tahmin Edilmesi: İgsaş'ın Özelleştirilmesinin Tek Taraflı Etkileri (Unilateral Effects),*** Rekabet Kurumu Rekabet Dergisi, Sayı 19, 2004, p.6,
[178] De Burca, p.979, Whish, p. 537.
[179] Block Exemption Communiqué on Vertical Agreements, Amended by the Competition Board Communiqué No. 2003/3 Communiqué No: 2002/2
[180] Whish, p.541.

Vertical merger is the merger of an undertaking that functions in a particular level of the market with another undertaking which is located above or below in the distribution chain.[181] The merger of the distributor and the producer or the merger of the distributor and the seller are examples to vertical merger.

Even though the opinion that vertical mergers are less harmful on competition other than horizontal mergers is widespread, there are also counter opinions[182].

Especially the intellectual patent rights and some restrictions in franchising contracts in vertical mergers do not aim to violate competition; they affect the competition order because of their quality. [183]

Vertical mergers take place generally between the productive controlling company, distribution companies and sales marketing cooperations in general. Positive outcomes such as the decrease of costs and the effective management of costs as a result of these mergers cannot be disregarded. One of the most important reasons of the prohibition of vertical mergers is that in the entrance to the production process of a vertical merger, the needs of capital increase significantly and thus potential rivals are excluded, or the vertical merger is used as a means of price discrimination. The most important issue in the control of mergers from the aspect of Competition Law is whether prices will increase or not after the merger, and in this respect whether competition will decrease significantly or not with the increasing of this power.

In the EU enforcement on vertical mergers, the Commission does not permit such mergers in conditions when some distributors are pushed out of the market or there is the control of supply in the market from the aspect of consumers or distributors with the possibility of the restriction of competition from the aspects of distributors, consumers or users of the facilities of supply and sale in the relevant market. [184]

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[181] Güven, p.118
[182] Akıncı, *p*.111.
[183] Güven, p.118.
[184] Esin, Arif. ***Rekabet Hukuku***. p.206.

The decision of Alcoa / Reynolds analyzed deeply by the Commission is a decision that sets an example concerning vertical mergers.[185] As a result of its investigations, the Commission determined that the merger of Alcoa, which was the producer of aluminum alloys used in spacecrafts, of Reynolds, which was the most important supplier of P0404 of high purity, could result in the exit of McCook from the sub-market, now that other suppliers would not be able to supply the demands of Aloca's rival firm McCook Metals. Since this vertical merger could make the potential rivals' access to market harder as a result, and since it was anticipated that the control of the conditions of supply in the market by the merger could increase the prices in the sub-market, the Commission asked Alcoa to put for sale the melting company that produced the P0404 raw material to a 3rd undertaking.[186]

3.3.3. Conglomerate Mergers

In Competition Law, mergers between undertakings that are by no means rivals and that function in totally different goods and services markets are called "*conglomerate mergers*".[187] For example, the acquisition of an undertaking that produces white goods by a construction firm, or the merger of an undertaking in the printing business with a hotel chain can be qualified as conglomerate concentrations. The merger of an undertaking with another undertaking that is not in the same goods market, but those functions in a close market is called "*product expansion*", and the merger with an undertaking that is a part of the same goods market, but that functions in a different geographical market is called "market expansion". Concentrations other than these and that have no relations whatsoever concerning the markets that they function in are called "*pure conglomerate mergers*".[188]

The negative impact of conglomerate mergers on competition is the least when compared to other types. It is not possible for such a merger to affect the market structure directly, and it is unlikely that it should create discriminating impacts, as well. However, it is generally mentioned that in this type of mergers, the commercial relations between

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[185] Commission Decision 2002/174/EC in Case Comp. / M.1693, Alcoa / Reynolds, OJL 58, 28.02.2000
[186] Serpil Çınaroğlu, ***Rekabet Hukukunda Dikey Birleşmeler: Etkinlik Ve Rekabet,*** Rekabet Kurulu 2. Dönem Rekabet Uzmanlığı Tezleri, Yayın No: 111, 2003, p.36.
[187] De Burca, p. 979, Whish, p. 665.
[188] Sanlı, 319.

undertakings that are sides of this merger may result in the decrease of competition by creating a discriminating impact in some circumstances. Moreover, because of the existing dominant situation of such a merger in the market, it may result in a negative impact on competition in another market. The most common charges leveled against conglomerate mergers that they may; cerate a deep pocket that enables a firm to devastate its less affiliated rivals, lower costs, raise barriers to entry, frighten smaller companies into less vigorous rivalry, create the opportunity to engage in reciprocal dealing, eliminate potential competition.[189]

4. MERGERS AND ACQUISITIONS IN TURKISH LAW OF OBLIGATIONS

In Article 180 of the Law of Obligations, it is mentioned that,

""If a company undergoes a merger with another company with the mutual acquisition of assets or liabilities, the rights of the obliges of both companies that arise from the acquisition of a property are still relevant, and they may get their claims from the new company""

This sentence of the Article regulates the future of the debts of the companies of merger to ex-obliges after the merger, rather than determining the extent of the merger in a legal way, and it is just enough for this sentence to regulate the companies of merger as the becoming of one and new company and losing their ancient quality.[190] The merger of the companies in this way constitutes a merger in the scale of Competition Law only with the conditions that real or legal personalities that run the company should function independently in an economical way before the merger, and then the company should be left to the execution of a single center permanently.

[189] Civir, p. 15.
[190] Civir, p. 91

CHAPTER III

A NEW PERSPECTIVE FOR MERGERS & ACQUISITIONS

THE EUROPEAN COMPANY STATUTE: SOCIETAS EUROPAEA

A. THE HISTORICAL BACKGROUND OF THE EUROPEAN COMPANY STATUTE (SOCIETAS EUROPAEA)

Two basic methods have been developed in the extent of EEC for the sake of maintaining the competition of European capital companies with American and Japanese Companies. The first of these is the maintenance of the right of free circulation to persons, goods, capital and services in the scope of the four basic freedoms in the European Union. The second is, by the approximation of national legislation, the reciprocal recognition of companies between member states and the maintenance of foreign and national companies in terms of being subject to the same modus. [191] The achievement of harmony in national legislations that were significantly different from one another among member states when the European Community was first established, especially the harmony in company law, institutional execution, accounting, and control was very important not only for getting over the problems created by the different measures for protecting the interests of share holders, company employees, institutions that provide credit to the company, and third persons; but also for the establishment of a common market that functions. For this reason, various legal regulations have been made in company law for the sake of the establishment of equal protection in the scope of the Community. The SE, which was believed to have an important effect on the establishment of a common market by providing the decrease of operation costs significantly through enabling the restructuring of companies, was seen as one of the symbols of the European Union.[192] The SE is modernity through out the EU, for the management of the entities by corporate companies, and to put the modern corporate governance principles in

[191] Ali Cenk Keskin, ***Şirketler Hukuku Alanında Avrupa Topluluğu Düzenlemeleri ve Avrupa Şirketi***, İstanbul: Beta Yayınları, 2004, p.1.

[192] Carla Tavares Da Costa – Alexandra de Meester Bilreiro, ***The European Company Statute,*** The European Business Law and Practice Series, Kluwer Law International, 2003, p.vii

application, and also for the participation of the workers in the management of the companies.[193]

Companies that function internationally intend to establish complicated structures in their execution agencies in establishing group companies in order to benefit from the advantages of taxation, and in benefiting from various legal methods such as intending for Mergers and Acquisitions. The absence of a single system of a corporation income tax in the European Union is also one of the reasons that companies intend for such complicated structures. In the European Union, various actors have been created in the area of company law for the sake of overcoming this complication even a little. The newest of these actors is SE.[194] The purpose of the SE is to give companies operating in more than one Member State the possibility of being established as a single company, with one set of applicable rules and a single management and reporting system. Such rationalization should reduce administrative costs and formalities.

Even though the idea of SE was brought about in 1959, its legal realization could come about only in 2004. Starting from the idea of SE which was initiated in the 57th Congress of Notaries of France in 1959, and from the project prepared by a committee under the presidency of Prof. Pieter Sanders, Dean of the Faculty of Law in Rotterdam University, the Commission of the European Union prepared its own regulation in 1970.[195] With this regulation, it was aimed to create a legal personality that would be registered in a register which would be established in the body of the European Official Gazette, and could compete with the local companies of the member states. Since the member states protested against this project, studies on this project were ended in 1982. In 1987, when the European Council called to duty Community Institutions for the purpose of establishing a company that is subject to the European Law, the studies began once more, and by making some alterations on the regulation which was given up in 1982, a new plan was made. The first chapter of this plan consisted of a regulation. The regulation composed of transnational mergers, associate

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[193] Ahmet Ulutaş, ***Avrupa Anonim Şirketi (Societas Europaea)***, Adalet Bakanlığı Yayın İşleri Dairesi Başkanlığı Adalet Dergisi, www.yayin.adalet.gov.tr/dergi/25_sayi.htm (last accessed 24.02.2007)

[194] Frits Bolkestein, ***The new European Company: Opportunity in Diversity***, 2002, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/598&format=HTML&aged=1&language=EN&guiLanguage=en (last accessed 12.02.2007)

[195] The Official Journal of European Communities C 124, 10.10.1970 – The Bulletin of European Communities, 1970, no:8

branch and holding company institutions that functioned in member states, and structural regulations that would permit the realization of the common strategies of the same group of companies. The second chapter of the plan consisted of an instruction. But this second plan was also unsuccessful and it fell off the agenda because of the opposition of Germany. The Commission has prepared "The Davignon Report" dated October 27, 1970, at the end of two years of labor that began in 1996. Because of some of the regulations introduced by the report, the Member States were divided into two groups and this divergence of opinions lasted until the 20th December 2000. On 20th December 2000, the Regulation (SE/RE) was accepted by the member states as a document of 70 Articles in Nice Agreement.[196]

The Council Regulation No: 2157 (SE/RE)[197] consists of 7 chapters and an appendix. With SE/RE, regulations on the establishment, functioning, organization and dissolution of SE were introduced. The SE/RE reaches a unity with the Council Directive (SE/DI) of the same date. No member country can benefit from the system of Societas Europaea unless they provide the municipal law regulations that are in the SE/DI.

The first chapter of SE/RE consists of the general sentences to be applied to SE. It was mentioned in the first Article that the capital of SE is divided into shares, every partner can have their shares in ratio with the capital invested, that SE has a legal entity, and that the regulations on employees will be given place in the sentences of the SE/DI. [198]

The second chapter of SE/RE consists of the establishment methods of the SE. The SE cannot be established in methods that are not one of the methods in the list.

The third chapter of SE/RE regulates how SE will be organized. The SE can be established both with a monist and a dualist structure. While in the monist structure, there is a general assembly of share holders and an executive board that runs the company, in the dualist structure there is also a controlling board in addition to these.

[196] Da Costa, Carla Tavares – Meester Bilreiro, Alexandra de, p. 1-7
[197] Council Directive 2001/86/EC of 8 October 2001, (OJ L294 OF 10.11.2001)
[198] Sandra Schwimbersky, ***Case Study Report on Plansee SE*** (2006), http://www.seeurope-network.org/homepages/seeurope/file_uploads/planseecasestudyreport2006-09-20_final2.pdf (last accessed on 12.02.2007)

While the fourth chapter regulates the accounting method of the company, the fifth chapter regulates bankruptcy, dissolution, indebtedness, and suspension of payments. While the sixth and the seventh chapters consist of temporary and additional sentences, in the appendix there is the list of company types that can set the basis for the establishment of Societas Europaea.

The SE/DI consists of three chapters. The first chapter contains in what terms the employees will be situated in SE according to establishment methods, the second chapter contains the methods of debate between the employer and the employees, and the third chapter contains various sentences.

B. THE STRUCTURE OF A EUROPEAN COMPANY STATUTE

1. THE LEGAL STRUCTURE OF EUROPEAN COMPANY STATUTE

According to Article 6 of SE/RE, every SE should be established based on a principle contract. Sentences that are to take place in this main contract called "status" are determined in the Regulation, as well. It is obligatory that in the title of the company, the abbreviations Societas Europea which is "SE" is to be located. The minimum capital quantity of SE must be at least 12.000 Euros according to Article 4 of the SE/ RE. It is permitted in the SE/RE that a member state may anticipate a higher amount of minimum capital. The capital currency of incorporated companies in countries that have not yet undergone the Economical and Pecuniary Union policy of the European Union are applicable for SE, as well.[199]

According to the Regulation, the type of SE is an incorporated partnership. The condition is enforced that the executive center and the company's center should be the same. In conflicts among partners and between the company and third persons in or after the establishment of SE, the law of the location of the company center will be applied. In addition to this, in the presence of a continuous and effective relation with one of the member states,

[199] Keskin, p. 18

the law of this country will be effective in the determination of the law that will be applied. Starting from the establishment of the company, the law to be applied will be determined by Article 9 of the SE/RE. According to this Article, the SE/RE rests in the top of the hierarchies of norms that regulate SE, and in conditions when the SE/RE openly permits it, and then the principle contract of the company will be used secondarily. In areas not regulated by the regulation, the regulations of member states on SE, and lastly the incorporate company's sentences that are in harmony with SE will be applied.[200]

2. THE ESTABLISHMENT OF EUROPEAN COMPANY STATUTE

According to the SE/RE, Societas Europaea gains a legal entity, the moment it is registered. The establishment of the company is announced after the registration both in the registry gazette of the location of the company's center, and in the Official Gazette of European Communities.[201]

In SE/RE the establishment types of SE are determined as four types. These are through merger, holding companies, establishment in the type of a subsidiary company and the changing of type of an incorporate company that is subject to national law.

2.1. Formation of an European Company Statute by Merger

Transnational mergers are encouraged by the approximation of the legislations of member states in the European Union. With Article 17 of SE , two types of merger are defined. The first is merger through acquisition; the second is merger through the establishment of a new company.

For both types of merger, firstly a merger project is needed. In the project, there has to be the titles of the companies that will do the merger, the title of the new company to be established, the company's center, interest disposal ratios, when and how the company to be established will dispose interests, preferred shares, profit and loss participation ratios, from which date onwards the company will have done the merger, issue of bill, sentences on the

[200] Da Costa, Carla Tavares – Meester Bilreiro, Alexandra de, p. 14.
[201] Keskin, p. 21

members of the executive board and controllers. At the end of the report in question, if the share holders acknowledge merger in the general assembly (of course with the condition of obeying the meeting and decision quorums determined in the direction of the rules enforced by the law to which the siding companies are subject to), the operations become valid with a certificate given by a notary, court, or another authorized entity that will be given at the end of an official control by the member state.[202]

With the fulfillment of the requirements of Articles 25 and 26 of the Regulation, the Company is announced in the Official Gazette of European Communities the way it is anticipated in the law of the relevant member state. At the end of the merger, the property ownership of the companies of merger is transferred to the newly established SE as a whole.

In merger through acquisition, the company of acquisition is abolished; the company that does the acquisition gains the title of SE. The assets and liabilities of the company of acquisition is transferred to the company that does the acquisition, and the share holders of the company of acquisition become the share holders of the company that does the acquisition.

In merger through the establishment of a new company, the whole of the assets and liabilities of the companies of merger is transferred to the newly established company. The share holders of the companies of merger become the share holders of the newly established conmpany. The companies of merger are abolished. Member states can anticipate an authorized entity to oppose merger by asserting the public benefit in their municipal law, but it is possible to take the judicial measures against this decision.

2.2. Formation of a Holding European Company Statute

While Article 2 of the SE/RE gives the right to establish a SE by merger only to incorporated companies, in the establishment of Holding Societas Europe, this facility is also given to limited companies. Just like in mergers, in the establishment of holding companies a project is prepared. The companies to prepare the project should be subject to the law of at least two of the member states, or if the founders are subsidiary companies or branches, then

[202] Keskin, p. 22, Da Costa, Carla Tavares – Meester Bilreiro, Alexandra de, p. 28

they should have been existing at least since two years. Moreover, these companies have to possess at least 50% of the interests of the Holding SE that is to be established and they have to fulfill the requirements of SE/RE on the representation of the employees in the administration.[203]

Regarding the Article 32/2 and 32/6 of SE/RE The project prepared should be announced at least one month before the general assembly in which the establishment of the Holding SE will be decided on in the method and law of the member state to which the companies that will realize the establishment are subject. Just like it is in the establishment of SE through merger, in the establishment of Holding SE, the project will be presented for acknowledgement in the general assembly of the companies that participate in the establishment. By the fulfillment of all the conditions in item 2 of Articles 32 and 33 of the SE/RE, Holding SE can be registered.

2.3. Formation of a Joint Subsidiary European Company Statute

It is permitted that the subsidiary companies or companies with branches which are subject to the law of another member state at least for two years, and that have their company centers and executive centers in the borders of the European Union may establish SE has subsidiary companies with item 3 of Article 2, and the sentences of the Articles 35 and 36 of the SE/RE.

While establishment through merger permits incorporate companies, and establishment through a holding company permits both incorporate and limited companies, establishment through subsidiary company permits all types f companies anticipated in Article 48 of the EEC Treaty to establish SE. However, with the completion of establishment procedures, the company will be subject to the sentences for incorporate companies in the member state in which its center is located.

[203] Keskin, p. 26, Da Costa, Carla Tavares – Meester Bilreiro, Alexandra de, p.37

2.4. Conversion of a Public Limited- Liability Company into a European Company Statute

Establishment in this way is a right given to only incorporate companies. Since the company that changes type does not dissolve, no new legal entity comes about. The most important advantage of the method of establishment by the changing of type is the rapid change of a company's center from one member state to another. In order to prevent complications that can arise as a result of this, the changing of the company's center is prohibited in the establishment of SE by changing type. [204]

The executive board of the company that is to change type is responsible for mentioning the novelties and the impacts that this operation will bring about for the employees and share holders by preparing a report that explains the legal and financial reasons of the changing of type. The report to be prepared should be announced at least one month before it is accepted in the general assembly of the company that is to change type as anticipated in the methods of the legal regulations of member states. Since the status of a will also be accepted in the general assembly in which the change of type will take place, the quorums of vote have to be made in the aggravating quorums anticipated in the law of the member states.[205]

C. THE EFFECT OF THE EUROPEAN COMPANY TO MERGERS AND ACQUISITIONS

The SE was designed as a company type unique to the EC law and independent from the laws of Member States.[206] The SE/ RE will facilitate mergers of companies from different Member States and will allow corporate groups to expand more easily under the new regime, without recourse to the complicated cross-border merger structures often created today.[207] This is likely to be of particular interest to large international groups seeking to simplify their

[204] Da Costa, Carla Tavares – Meester Bilreiro, Alexandra de, p.37
[205] Keskin, p. 30,
[206] Fatih Bilgili, "Avrupa Anonim Ortaklığı". Elektronik Sosyal Bilimler Dergisi, 2003, p. 21. World Wide Web: http://www.e-sosder.com/dergi/4FBLGLavr_6.doc (Last accessed 12.02.2007)
[207] Ulutaş, p. 3.

business structure and to companies that regularly engage in cross-border joint ventures with entities outside their own group. As Article 48 of the EEC Treaty defines that the place where the seat of the organs of the company is located and where are decided the general goals of the corporation, then, a multinational firm will have no difficulty in establishing that its central administration wherever it likes especially if the SE has been formed though a cross-border merger.[208] Establishing an SE may also be worth considering in cases where a company has significant operations in more than one jurisdiction and wishes to improve international cooperation and avoid giving the impression that management in one jurisdiction controls management in the others. SEs will be able to transfer their registered office from one EU Member State to another without going through the costly and often time-consuming process of liquidating operations in the Member State from which they are moving. The European Commission has stated that the administrative cost savings resulting from these reforms for companies operating across the internal market will be substantial. The Commission estimates that businesses could save as much $32 billion a year from the elimination of red tape and other bureaucratic requirements. An SE will be taxed in the same way as any other multinational company, in accordance with the national fiscal legislation applicable at company or branch level. However, the Commission has stated that an SE may have tax advantages over a company registered in a Member State but which operates through branches in other Member States, because if the Member State where an SE's registered office is located taxes the SE's worldwide income, it will be possible in that Member State for the SE to offset losses from permanent establishments in some Member States against profits in others. This would not be possible for companies that registered a headquarters in every Member State in which they operated.

The Commission believes that the SE will be a useful for companies, and that many companies will wish to establish an SE. Although the SE/RE concerns itself with company law provisions for SEs, not tax issues, it has emphasized the possible fiscal advantages, together with the reduced administrative burden of having a single corporate vehicle throughout Europe. However, as noted above these advantages will not necessarily apply to

[208] Nicolas Tollet, ***The Societas Europea: Europeanization via Americanization of Corporate Law. Corporate Governance: Only One Model?*** (2005), Global Jurist Topics *Volume* 5, *Article* 3, http://www.bepress.com/gj/topics/vol5/iss2/art3 (last accessed on 17.02.2007)

all companies. For example, some may find there are disadvantages to SE establishment from a fiscal viewpoint. Moreover, the new legislation does not create an SE which is truly pan-European. Many matters still remain subject to national law and given that there may well be significant differences in how Member States give effect to the new legislation, the possibility of forum-shopping and a "race to the bottom"[209] exists even as regards the SE. Some companies may also be deterred by the complexity of the process of setting up an SE, in particular the need to enter into negotiations with employee representatives. Many may be uncomfortable with the idea of worker participation in the corporate decision-making process (although as explained below, on the whole this system works well in Germany). For some companies, the decision whether or not to set up an SE may depend on whether the default rules on worker participation would apply if negotiations failed. Despite these criticisms of the European Company Statute, the SE should be an important tool in improving international cooperation, facilitating corporate restructuring, and making the free movement of companies within the EU possible.[210]

With all these benefits, SEs can be an alternative solution for enterprising business firms instead of intensive bureaucratic administrative and establishment procedures of mergers and acquisitions. After the implementation of the Regulation there have been many attempts inorder to constitute SEs across the European Union. For example, MAN B&W Diesel, a famous automotive enterprise has changed its statute to a SE by conversion of a Public Limited- Liability Company into a European Company Statute, named as MAN Diesel SE.

In particular, SE's can benefit from cross border migration, cross border mergers, and reduced administrative costs through the consolidation of diffused companies; advantages historically granted to United States (U.S.) companies, but previously denied to European corporations. Through the harmonization of corporate law, the drafters of the European

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[209] III. Edward A. Storey, ***Does the European Company Provide an Opportunity for Jurisdictional Competition and is this/would this be Desirable?*** http://www.juridix.net/eu_soc/essay5_se.htm(12.02.2007), p.5 (last accessed on 17.02.2007)

[210] Robert Drury, ***The European Private Company,*** European Parliament Committee On Legal Affairs, Public Hearing 22 June 2006 http://www.europarl.europa.eu/comparl/juri/hearings/20060622/drury_en.pdf. (last accessed on 12.02.2007)

Company Statue endeavored to facilitate corporate migration and remove the incentives for jurisdictional exploitation at the same time. In effect, the SE intended to meet the possible negative affects of the freedom of movement by the announcement of an autonomous body of corporate law.[211]

Regarding SE/RE and other legal documents, to put in a short clarification; the advantages of a SE are mobility for cross-border mergers and facility for the transfer of the seat, simplification of the legal structure rather than the complicated officiality of mergers, although it is still in doubt for some tax administrators, reduction of administrative and legal costs, in the field of business reduction of operational risks, enhancement of capital efficiency, possibility to improve credit rating through out the EU and of course a stronger European image. Besides these advantages, there are some weaknesses of legal arrangements for Societas Europaea. For instance; the absence of unified legal regime; an SE is first regulated SE/RE then by its supplementary documents. However, if a matter is not covered by the Regulation, it will be regulated inorder by the provisions of laws which are adopted by Member States inorder to implement EU legal arrangements relating to SEs, national laws of the Member State in which the SE is registered applying to public limited liability companies in that Member State, and lastly the SE's relevant documents, such as the articles of association. These multiple layers of regulation seem to lead to legal uncertainty.[212] And further more, another significant disadvantage is the lack of the provisions for tax issues, in consideration that each SE will be subject to tax in all countries where it has a permanent establishment forming a SE is not a tax saving vehicle.[213]

From the point of view of Turkey, regarding the Article 2 of SE/RE only companies which are formed under the law of a Member State of European Union may form a European Company. Therefore, the conditions for regulating the SE do not exist for non-member states

[211] Storey, Edward A., p.4
[212] James Killick and Thomas Hartnett, ***European Company Statute: What Does it mean?,*** White & Case Publication, http://www.whitecase.com/files/article_eu_company_statute_10_2001.pdf. (last accsesed on 12.02.2007)
[213] *Nathalie, Berger.* ***The European Company Statute,*** *Presentation of Company Law Acquis (2006)* http://www.euturkey.org.tr/tarama/tarama_files/06/SC06EXP_SE.pdf

such as Turkey. Furthermore, legally, the SE is adopted by a regulation which is directly applicable in Member States according to EU legislation and in consideration of it does not need to be transposed into domestic law. The SE Regulation shall become directly applicable in Turkish law upon accession.

CONCLUSION

Mergers and acquisitions that are concluded not to be effecting the competition negatively are authorized. However, if there may be any possible negative effects of a merger and acquisition in the market, there is also the possibility that this operation may not be authorized. The duty of competition authorities is to provide and protect the conditions of competition and their interference in the commercial preferences of the undertakings that do not violate competitive rules contradicts the needs of free market economy. Since the prohibition of mergers and acquisitions by competition authorities is a directly effective decision on the commercial strategies of the relevant undertakings, the prohibition of the aforesaid operations sometimes may bring more restrictions to mergers than the necessary and sufficient precautions to protect the competitive environment and may result in the over-interference to the freedom of mergers to make decisions. The prohibition of mergers and acquisitions may also result in the hindrance of the possible positive effects of these operations on competition in the market and the increase of effectiveness of the relevant undertakings. For all these reasons, before the competition authorities take the decision of prohibition which restrict such commercial decisions of undertakings greatly, it is convenient for them to analyze whether there are any other alternatives in order to overcome the competitive problems caused by the operation.

The Competition Board shall issue communiqués to announce the categories of mergers and acquisitions which to be considered as legally valid and require a permission by prior notification to the Board.

As mergers and acquisitions Law is a living branch of Law, the decisions of the Commission, ECJ and all the other competition authorities will enhance the application of the rules according to Mergers and Acquisitions.

Any mergers and acquisitions including to create a dominating situation or further reinforce an already existing dominating situation is prohibited if the competition in the market is restricted to a great extend as a result of such actions. In this context and mergers

and acquisitions realized by the dominant enterprise is subject to investigation as to whether such an operation is majorly restrictive upon competition in the relevant market.

The approval of the European Company's Statute enables companies to take full advantage of the internal market, providing a common structure those trancends national borders. In practice, it will create an enhanced flexibility, allowing business to merge and move across borders with greater ease and at a lesser expense, and to adopt themselves to a competitive environment in a globalized world. The new European Company Statute has become a more attractive position, with many groups taking an interest in it. They insist that the simplification of their structure by the establishment of a European Company Statute will make financial markets more transparent and will offer SEs great visibility on the Europea and international scene. They also believe that the formation of an SE will strengthen some firms and thus enable them to withstand hostile take-over bids and that significant economy of scale and even greater productivity gains will be achievable and thus will reduce the necessity of mergers and acquisitions. The benefits of a SE organized under a supra-national European law rather than the law of an individual Member State, so that the companies that are active across the Internal Market can operate throughout the EU with *one* set of rules and a unified management and reporting system. For companies doing business throughout the Internal Market, SE is an alternative which offers reduced administrative costs and a legal structure. The need for setting up costly and complex network subsidiaries may not be needed. By SEs fast and easy trading possibilities will be achieved. So basic freedom of European Union which is freedom of movement would maximized for such public companies.

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