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COMPETITION LAW ASPECTS OF MERGERS AND ACQUISITIONS IN THE EU AND TURKISH LAW

Does Turkey Call for a Merger Reform? The Answer and a Policy Proposal

PhD Thesis

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Once upon a midnight dreary, while I pondered weak and weary,
Over many a quaint and curious volume of forgotten lore,
While I nodded, nearly napping, suddenly there came a tapping,
As of some one gently rapping, rapping at my chamber door.
`'Tis some visitor,' I muttered, `tapping at my chamber door -
Only this, and nothing more.'

Edgar Allan Poe

ABSTRACT

The purpose of this thesis is to set out whether or not the rules governing concentrations between undertakings in EU competition law that are reshaped subsequent to a reform in 2004 must be reflected in a possible legislative amendment in Turkey.

In order to determine the dynamics of Turkey, as an empirical study, Competition Board decisions on mergers and acquisitions containing reasoning for dissenting votes rendered until the end of 2006 are examined to observe whether they make direct or indirect reference to matters involved in the EU reform process. This study is baptised as "Dissenting Vote Analysis". The dissenting votes are classified under jurisdictional, substantial and procedural matters. In the next stage, sub-classification were made under each of these three main categories in accordance with subject of each dissenting vote, where the frequency of these classifications were made subject to process of examining relevant final decisions according to dissenting member and time parameters.

The study also sets out whether regulations, presently proposed and announced by Competition Authority in 2005 as legislative amendment on merger and acquisition transactions will meet the needs mentioned in the outcome of the Dissenting Vote Analysis. Finally, arrangements that should be introduced within the Turkish legislation that are contained neither in the Dissenting Vote Analysis nor in the Competition Authority proposal but stemming from the EU legislation are also presented within the context of a comprehensive recipe.

ÖZET

Bu Tezin amacı, Avrupa Birliği Rekabet Hukuku kapsamında teşebbüsler arası yoğunlaşma işlemlerinin 2004 yılında gerçekleşen reform süreci akabinde tabi olduğu kuralların Türkiye'deki olası bir mevzuat değişikliğinde ne şekilde yansıması gerektiğinin ortaya konmasıdır.

Türkiye'nin dinamiklerini belirlemek üzere bir ampirik çalışma ile Rekabet Kurulu'nun 2006 yılı sonuna kadar almış olduğu "karşı oy gerekçesi içeren" tüm birleşme ve devralma kararları sınıflandırılarak bu karşı oyların AB reform sürecindeki herhangi bir hususa doğrudan veya dolaylı bir biçimde gönderme yapıp yapmadığı incelenmiştir. Çalışma "Karşı Oy Analizi" olarak adlandırılmıştır. Karşı oylar yetki, değerlendirme kriteri ve usul başlıkları altında üç ana grupta tasnif edilmiştir. Bir sonraki aşamada ise bu üç ana kategori altında her bir karşı oyun konusuna göre alt-tasnifi yapılmıştır ve bu tasniflerin frekansları karşı oy kullanan üye ve zaman parametreleri çerçevesinde ilgili nihai kararların incelenmesi sürecine tabi edilmiştir.

Tez ayrıca Rekabet Kurumu tarafından 2005 yılında önerilen ve duyurulan kanun değişikliği taslağı kapsamında birleşme ve devralma işlemlerine yönelik düzenlemelerin Karşı Oy Analizi'nin sonuçlarında değinilen ihtiyaçlara cevap verip vermeyeceğini ortaya koymaktadır. Son olarak ayrıca, ne Karşı Oy Analizi'nde ne de Rekabet Kurumu önerisinde değinilmiş olan ancak mevcut çalışma esnasında edinilen tecrübeyle şekillenen ve Avrupa Birliği mevzuatı dikkate alındığında Türk mevzuatına aktarılması gerektiği düşünülen düzenlemelere de ayrıca yer verilerek kapsamlı bir reçete önerisi yapılmaktadır.

ABBREVIATIONS

CFI	Court of First Instance
DG COMP	Directorate General for Competition
DOJ	Department of Justice (USA)
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECMR	European Community Merger Regulation
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EU	European Union
Fn.	Footnote
FTC	Federal Trade Commission (USA)
HHI	Hirschman-Herfindahl-Index
MD	Market dominance
MTF	Merger Task Force
SLC	Substantial Lessening of Competition
UK	United Kingdom
USA	United States of America

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1. INTRODUCTION

Mergers and acquisitions have become a typical practice in contemporary business life shaped by the dynamics of free markets and globalization. Business journals announce new bids or transactions every single week. Most people therefore are likely to overlook the fact that this efficient method for expanding businesses and reducing costs would probably not be that available unless the suitable legal framework, namely merger control regime did not exist. Either all concentrations would be regarded as attempts at monopolization and prohibited right away as a reflection of the mood in the late 19th Century United States (US) or unchecked increases in market power would actually result in the formation of monopolies or oligopolies creating entry barriers such that there would be no rationale or opportunity left for further mergers or acquisitions, with the possible exception of sun rise industries.

Merger control, of course, has not only made its subject matter available, but also ensures that mergers and acquisitions are not detrimental from a welfare perspective given that these transactions create positive and negative externalities, that is divergences either between the marginal private cost and marginal social cost of production or between the marginal private benefit and marginal social benefit of consumption.

Some elaboration would be beneficial. Many markets have imperfect structures where even a single merger can modify the competitive process of an entire industry. Therefore, these transactions are of importance not only to its parties, but also to the other actors of the relevant markets. Undoubtedly, or at least in theory, undertakings involved are expected to gain benefits from a merger. However, in some cases these benefits may be off-set by the adverse effects of the transaction on competition, especially due to an increase in market power of the merged entity. These adverse effects, for example market closure and price increases, are felt by the rest of the competitors as well as the consumers. These are known as anti-competitive consequences.

Thereon, two quick conclusions follow: First, mergers come up to with risks for competition depending on the market conditions and nature of the transactions; second, mergers that are detrimental to competitive process have to be prohibited by the competent authorities. Merger control is the result of this necessity. Its consolidation as a distinct field of expertise is an outcome of the complexities involved in the evaluation of mergers. These complexities arise from the fact that courts or competition authorities must balance the beneficial effects of mergers against risks to competition thus created and so protect competitors and consumers. Whish puts it in a simpler explanation by stating:

> "Merger control therefore is essentially about prediction: will the market be less competitive, and therefore be harmful to consumer welfare, if the merger is allowed to go ahead? This idea is a simple one; what is extremely difficult, however, is to devise techniques that enable competition authorities to predict accurately, and in a way which stands up to scrutiny, the likely effects of mergers."[1]

Accordingly, answering the question *"What criteria should be taken into consideration when prohibiting a merger?"* is not easy as the field of merger control is a host to many controversial issues, most radically illustrated by the following words of Clyde and Reitzes:

> "In some cases, agreements that confer market power on their participants may raise welfare by facilitating market development. Specifically, when externalities exist in the form of marketing spillovers, horizontal agreements that could harm welfare under other conditions may lead to expansions in output and improved consumer and social welfare. Actions by firms to directly harm potential competitors, such as cost-raising strategies and commitments to predatory behavior, also may improve welfare in the face of marketing spillovers." [2]

Fortunately, merger control has demonstrated a capacity of making the necessary adjustments for coping with such controversies. Adjustments were made as merger control had to adapt to the new rules of the game with each new wave of mergers, which is each period of intense merger activity. A US-centric analysis, that is relevant for the world economy both because of historical dynamics of business management and public policy

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[1] Whish, R. *Competition Law, 4th Edition*. London, Butterworths, 2001, p:729.

[2] Clyde, P. and J. Reitzes. Can Mergers to Monopoly, Price Fixing, and Market-Division Agreements Raise Welfare?. *International Journal of the Economics of Business* 11 (1), 2004, p. 70.

diffusion and the process of globalization, reveals that there have been five merger waves since the industrial revolution, each of them corresponding to a period of economic expansion and having a distinguishing characteristic[3].

The first merger wave took place between 1897 and 1904 and provided a historic consolidation of American business life. It also showed the inadequacy of the Sherman Antitrust Act despite its vigorous enforcement and was functional in the adoption of the Clayton and Federal Trade Commission Acts of 1914. The second wave took place between 1916 and 1929 when the Great Depression hit the world economy. It is said that while the first wave was one of mergers towards monopoly second was one of mergers toward oligopoly. The first wave consisted of horizontal mergers while the second wave introduced vertical mergers, especially thanks to the merger control regime that had become more effective following the Clayton Act. The third merger wave that began in 1965 and ended in 1969 featured conglomerate mergers. Again, it was the reinforced enforcement of antitrust rules that channeled the demand for mergers and acquisitions to new markets. The fourth merger wave (1981-1989) came right after the beginning of the current phase of globalization and coincided with the New Right Reagan Administration in the US. Compared to the previous waves, the size of the transactions were markedly larger and involved large business groups with several affiliates creating new challenges for merger control. The fact that hostile takeovers, although still being the exception rather than the norm, played a prominent role, it was another distinguishing characteristic of the fourth wave. The last of the merger waves took off in 1993, after the dissipation of the hang-over from the recession of 1990-91 in the US, and lasted until 2000 when the "New Economy" bubble came to a sudden collapse[4]. In this period the emphasis was on the longer term business strategies versus short-term gains of a purely financial nature[5].

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[3] See Bainbridge, S.M. *Mergers and Acquisitions*, New York, Foundation Press, 2003, p.2; See also Kleinert, J. & Klodt, H. (2002). Causes and Consequences of Merger Waves. *Kiel Working Papers* No. 1092. Available from the World Wide Web: <http://www.ifw-kiel.de/pub/kap/2002/kap1092.pdf>.

[4] However, the US agencies place a significant importance to the mergers in the so called "new economy" fields. The Antitrust Modernization Commission's Report and Recommendations issued in the USA in April 2007 draw attention to the issue as follows:

> "The term 'new economy' can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. [T]he key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those economic characteristics include innovation, intellectual

Through this process, the final observation is that the quantity and quality of mergers and acquisitions in the globalized economy has already reached a certain level of maturity and complication creating a challenge for public policy towards mergers. If merger control is to stay relevant and be effective, it should not be surpassed by the business life and should constantly develop itself accordingly. Indeed changes in business practices and market structures do act as a source of stimuli for regime change in merger control, as applications and investigations expose the authorities to the current developments and trends.

Two further sources other than the above economic dynamics could be distinguished for perpetual changes in merger control regime. The first one is the *internal dynamics* of merger control regime covering diverse issues such as institutional capabilities of competition authorities[6], domestic political pressures and most importantly difficulties and disagreements that surface regarding the evaluation of specific merger cases, especially those of a high profile and/or complicated nature. Such disagreement can take place either simply within a competition authority or between an authority and a judicial body competent for the legal review resulting in case-law that provides a binding feedback for the merger control regime.

The second source is *policy transfer among jurisdictions*. Policy transfer is a concept described as "the process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system"[7]. It is an umbrella term capturing a wide range of phenomena. Indeed

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property, and technological change. [T]he new economy includes those industries in which innovation, intellectual property, and technological change are central features".

[5] Gaughan, P. A. *Mergers, Acquisitions, and Corporate Restructurings, 2nd Edition*. New York, John Wiley & Sons, 1999; Brakman, S., H. Garretsen and C. V. Marrewijk. Comparative Advantage, Cross-Border Mergers and Merger Waves: International Economics Meets Industrial Organization. *CESifo Forum* 1/2006, pp. 22-26.

[6] For example scarcity of financial and human resources allocated to the authorities causing the emergence of fast-track procedures.

[7] Dolowitz, D. P. and D. Marsh. Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making. *Governance* 13 (1), 2000, pp. 5-24.

Dolowitz and Marsh place varieties of policy transfer on a continuum from voluntary to coercive through lesson-drawing, voluntary, but driven by perceived necessity, obligated transfer (for example as a result of treaty obligations), conditionality and coercive transfer[8].

Although policy transfer has been playing a major role in merger control right from the beginning, move towards a globalized economy has substantiated its effects. Indeed the adoption of the Sherman Antitrust Act can be evaluated as a policy transfer from federated states to the federation as state-level initiatives preceded the adoption of this first modern competition law by the US Congress in 1890[9]. Of course, international policy transfer has been more prominent in this field. Mergers and merger control were diffused to the eastern side of the Atlantic in the post-war period and to the developing world during the current phase of globalization.

Indeed, in the widest perspective, as its title reveals, this study is a quest for identifying the grounds of the policy transfer directed from the European Union (EU) towards Turkey.

It can be argued that the merger control regimes of what is today called the EU[10] and Turkey are respective outcomes of these two waves of policy transfer (policy transfer among jurisdictions and internal dynamics).

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[8] Not being legal scholars the authors fail to differentiate "obligated transfers" from conditionalities and especially coercive transfers that also frequently originate from legal obligations such as peace treaties. The continuum is also open to criticism when one remains within the field of political science since the central organizing principle of international relations, namely political deterrence, reduces the difference between voluntary and obligatory policy transfer to one of legal form. Nevertheless, Dolowitz and Marsh provide a useful framework for focusing on policy transfers. Another form of smooth policy transfer can be classified as "comity", known as the legal courtesy rule which requires one jurisdiction to follow the path of another jurisdiction, being the origin of the subject matter.

[9] For an historical account of the adoption of the Sherman Act see: Ilıcak, A. *Sherman Antitröst Yasasının Ortaya Çıkışı: Yanılsamalar ve Gerçekler*. Ankara, Rekabet Kurumu, 2003.

[10] Even though using the name European Union has become conventional in both the media and the academic literature, it is not legally proper to refer to European Union competition law since it is the primary and secondary provisions of Community law and their application by the institutions of the Community in the field of merger control that constitutes the subject matter of the present thesis. However, for both the sake of simplicity and also differentiating the nature of the arguments put forward, the name European Community or just Community is used in strictly legal contexts and European Union is preferred in more general, policy-oriented parts of the thesis.

The EU, with its unique supra-national nature was subject to two distinct dynamics. The first one is the internal dynamic, mostly shaped by the emphasis of the leading national economies, mostly Germany and France. However, due to EU's decision taking process, this emphasis is digested and dissolved within the system, undoubtedly leaving main traces. The second dynamic is a more global one, channeling the merger control policies of the EU towards other economic blocks, mainly the US.

Turkish merger control regime, on the other hand, has been strongly subject to a direct policy transfer from the EU, where it is destined to belong, leaving her global direction conducted by the EU, benefiting from a legitimate free-riding. Turkey, hence, transferred its merger control regime from the EU as a conditionality of customs union between the parties. Since 1997, it has a complete legislative framework and an effective application. Moreover, since its adoption, Turkey continued aligning its competition regime to that of the EU following the changes occurring there, in a process that would be qualified as "voluntary, but driven by perceived necessity" policy transfer in the framework of Dolowitz and Marsh. These alignments are observed not only in the implementation of the basic principles of the EU competition law but also in the implementation of the secondary legislation as well. As a clear example, though, apart from implementing a competition regime in line with the EU, Turkey's specific obligations listed in the Customs Union decision also includes the application of block exemption regulations and EC case-law and the adoption of the aid schemes to Community rules.[11]

As the latest example for the policy transfer from the EU, the Turkish Competition Authority, the independent regulatory administrative body responsible for the application of the competition legislation, has prepared and disclosed a set of proposed amendments to Turkish Competition Law[12] on 19th of April 2005, incorporating, among other proposed amendments to remedy the bottlenecks of the legislation, the main principles of the merger reform of 2004 in the EU. This proposal currently stands for as the single most important declaration of the Turkish Competition Authority illustrating its main policy direction for the upcoming application of the merger control regime in Turkey.

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[11] See Erdem, E. Birleşme ve Devralmalar, İstanbul, Beta, 2003, pp.8-11.

[12] Law No. 4054 on the Protection of Competition, Official Journal no. 22140 of 13th of December 1994.

We have mentioned that the wide perspective of this thesis was built on policy transfer, in general. To narrow it further, we have selected a playing field focusing more on the internal dynamics of Turkey rather than the direct policy transfer resulting from her obligations towards the EU. Accordingly, within this thesis, we will avoid questioning the political dynamics that leads Turkey to harmonize its legislation with the EU. However, we will nevertheless take into account the EU merger control applications in order to create a technical basis for comparison in order to evaluate the effectiveness of the Turkish merger control regime and in order to come up with a policy proposal that would render this regime more efficient.

Although, as described, a direct flow of legislation is undeniable, one cannot fully explain the necessity of change in Turkish merger control regime only with respect to policy transfer. There are also internal dynamics at work, encapsulating the lessons drew from the application thus far, mainly arising from the handling of cases by the Turkish Competition Authority. Accordingly, the case-law in Turkey represents another major resource at hand in determining not only the application level of the policy at hand, either being strict or lax, but also to collect evidences on the specific adjustment needs of the legislation, either calling for further alignment to the sourcing legislation, being the EU, or favoring the specific requirements of the enforcement area, being the territories of Turkey.

As a clear outcome of the parallelism between the rules, it would not be a wrong reasoning to conclude that the Turkish Competition Authority would have faced obstacles similar to that of the EU in implementing an effective merger control regime. These obstacles are mainly observed in the allocation of resources between policies as to create a balance between the emphasis put on the pursuit of other anti-competitive practices, such as cartels and abuses of dominance, and merger control, deserving a relatively peaceful approach.

A fair measurement of the balance between the policies should be subject to quantifiable data. From the side of the fight against anti-competitive practices, the effective use of the deterrence mechanisms play an important role. The level of fines imposed by the

authorities and consequences with regard to compensation requests of the victims through the private law mechanisms are the most quantitative sources in evaluating the efficiency of the policy application. Undoubtedly, such data must be coupled with a study showing the recurrence of anti-competitive behaviors in the investigated markets where players were subject to sanctions. On the other hand, from the merger control side, along with such deterrence mechanisms, measuring the effectiveness of the applied policy can be performed through statistics showing out of how many transactions notified competition problems are detected and remedied. However, this data may cause a serious fallacy, in cases of low prohibition ratios, in identifying whether it is the assessment technique of the authority that eliminates the attempts by the firms to conclude competition sensitive transactions, or the notification requirements are set at such easily triggered levels that transactions having no capacity to create competitive harm are anyway notified resulting to the allocation of limited resources to such transactions.

We have pointed out that the case-law is an essential source for detecting application problems. Accordingly, in order to eliminate the possibility of such fallacy, an in-depth analysis of the reasoned decisions of the subject authority should be of great source of hints in observing the policy application level. However, complexities should be expected in the classification of such data. The nature of the decision taking body and the decision quorums may be of first monitor. A distinguishing feature may be differentiating between the unanimously taken decisions and those taken by qualified majority, with the simple fact that a decision taken by qualified majority contains objections directed either to any one or more aspect of the decision related to either jurisdictional, substantial or procedural matters.

Originally named as “dissenting vote”, the decisions of the Turkish Competition Authority incorporate such objections, if any, through an explicit requirement of the legislation in force. Within this framework, we qualified the classification of such dissenting votes as a valuable source of quantifiable data which may help us detect specific problems of the Turkish legislation. Consequently the present study utilizes an original methodology, an empirical study baptized as the *Dissenting Vote Analysis* (DVA), besides conventional channels of legal induction for shedding light to the problematic areas of

merger enforcement in Turkey, the remedy of which may lead to the implementation of a more effective policy.

The outcome of the DVA, although being a sufficient monitor, should be subject to a comparative study with other sources of information designed to reshape the path of the Turkish merger regime. These sources are, as touched upon above, the proposed amendments of the Competition Authority and the EU Merger Reform. Such a comparison should be expected to lead us to reach a sounder policy approach for Turkey. Accordingly, through the use of these three sources, our policy proposal will combine, first, the specific elements of the EU merger control regime which may remedy the problem areas determined through the DVA; second, the analysis of the Competition Authority's amendment proposal and determination of its deficiencies; and third, determination of issues existing in the EU merger legislation that should be implemented in the Turkish legislation but which are neither mentioned within the Competition Authority's amendment proposal nor existent in the DVA.

The present study thus aims to determine and analyze the internal dynamics of merger control regime change in Turkey and accordingly to present a policy proposal. It is organized into seven chapters including the present introduction. The second chapter includes a brief overview of economic aspects of mergers and acquisitions. The third chapter presents an in-depth review of EU merger control regime with a focus on the 2004 merger reform. In the fourth chapter Turkish merger control regime is made subject to an introductory analysis in order to make the reader ready to absorb the rationale of the DVA for which a whole fifth chapter is devoted. The sixth chapter is devoted to the explanation and presentation of the policy proposal which, it is hoped, would serve as a stimulus of "lesson-drawing" merger reform in Turkey. The final section, though, will serve as not more than a concluding remark.

2. ECONOMICS OF MERGERS AND ACQUISITIONS

2.1. The Economic Rationale of Mergers

Despite being diverse operations in company law, mergers and acquisitions are essentially the same phenomenon from the perspective of economic theory as well as competition law that takes the former as its basis: concentrations among independent enterprises. However the term "concentration" is rarely used outside its technical context even in economics literature as it has been replaced through convention by "merger". Since this study is a policy-oriented, the conventional term is preferred unless it is strictly necessary to differentiate between concentrations in general and mergers in particular.

The basic motivation behind mergers is augmentation or sometimes conservation of corporate income and shareholder value. In other words, firms choose to engage to a merger or acquisition agreement if the expected post-merger net present value (NPV) is greater than the sum of the NPVs of the pre-merger enterprises. Overlapping rationales exist for having recourse to concentrations instead of or along to in-house measures.

First of all, mergers or acquisitions can provide a desired growth *less costly*. Even if the bidding enterprises pay a certain premium for the acquired resources, the total cost can still be lower than the alternative, namely internal growth, given that the usual trial and error process would be skipped[13]. The market value of the intellectual and industrial property rights, of which the latter include know-how, that are in certain cases crucial for motivation behind a concentration is a possible component of the advantage of such external growth over the internal option.

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[13] Gaughan, P. B. Mergers and Acquisitions: An Overview. In: Bryer, L & Simensky, M. (eds.). *Intellectual Property Assets in Mergers and Acquisitions*. New York, John Wiley & Sons Ltd, 2001, p. 11.

Second, mergers lead to benefits arising from *synergy*, such that following the merger activity the enterprises are expected to become more efficient in general. Synergies may flourish in the operational, financial or managerial level as the so-called efficiency theory suggests[14]. Synergetic mergers would benefit from economies of scale and economies of scope, avoid various double-cost functions and be able to exploit increasing amounts of capital[15]. Economies of scale may be *product-specific*, where they enable a product to be produced more cheaply; *plant-specific*, where they mean that the overall use of a multi-product plant is made more rational; or *firm-specific*, where they result in lower overall costs[16]. One should not confuse the real economies resulting from synergy with pecuniary savings that result from cheaper procurement, possibly through increased bargaining power. Such savings constitute only a redistribution of income among the sellers and buyers thus creating no surplus.

Of course, such synergy does not come forward by itself and should be revealed through what Farrell and Shapiro[17] calls "cooperation and coordination of the two firm's assets that allow production on a superior production function than a fixed production function". Indeed Hughes argues that enterprises often fail to realize the foreseen efficiency gains, or sometimes overestimate them in the first place[18]. However, it is not possible to quantify the economic gains resulting from the synergies in question, as their existence and dimension cannot be known for certain. Therefore, the efficiency theory can only be tested using indirect data, which is the adjusted stock market returns, an approach that has resulted in inconsistent observations[19].

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[14] Lubatkin, M. Mergers and the Performance of the Acquiring Firm. *Academy of Management Journal* 8, 1983, pp. 218-225.

[15] Ravenscraft, D. and F. M. Scherer. *Mergers, Sell-offs and Economic Efficiency*. Washington D.C., The Brookings Institution, 1987.

[16] Whish, *op cit*., p.725

[17] Farrell, F. & Shapiro, C. Scale Economies and Synergies in Horizontal Merger Analysis. *Competition Policy Center Working Paper Series* CPC00-015, 2000.

[18] Hughes, A. The Impact of Merger: A Survey of Empirical Evidence for the UK. In: Fairburn, J. & Kay, J. (eds.). *Mergers and Merger Policy*. Oxford, Oxford University Press, 1989.

[19] Cf. Agrawal, A. and J. F. Jaffe. Does Section 16b Deter Insider Trading by Target Managers?. *Journal of Financial Economics* 39, 1995, pp. 295-395; Franks, J., R. Harris and S. Titman. The Postmerger Share-price Performance of Acquiring Firms. *Journal of Financial Economics* 29, 1991, pp. 81-96.

The distribution of synergetic gains among the merging parties is also subject to a certain degree of uncertainty. An uneven or inefficient distribution of the resulting surplus is possible depending on the market structure and especially pre-merger bargaining among the parties. Theoretical approaches shedding light on the equilibria of such bargaining cannot be directly tested neither, due to the same reason. The substituting experimental approaches underline the importance of pre-merger expectations[20] supporting Hughes' above-mentioned claims. Competition law does not of course concern itself with the feasibility of mergers; but measures falling within the scope of company law and financial law might be required in order to correct informational market failures that might distort such expectations leading to inferior equilibria.

A third rationale of mergers is *diversification*. Enterprises diversify their activity portfolios in order to obtain a better risk distribution. However, there are few successful diversifying mergers in practice. Still it is observed that related diversifications perform better that unrelated ones perhaps because of the greater synergetic benefits involved[21].

Other notable justification behind mergers are reducing management inefficiencies resulting from conflicting interest of managers and shareholders or more general class of principal-agent problems and financial incentives such as income-tax advantages and financial bottlenecks.

Lubatkin provides a simplistic, but insightful scheme enumerating the motives lying behind mergers as follows: valuation theory that managers have better information about the target firms' financial performance than the stock market, monopoly theory that the ultimate motivation is gaining market power, efficiency theory that post-merger value is greater that the sum of the values of the pre-merger enterprises, empire building theory that the managers maximize their own utility instead of those of the shareholders', process theory that the manager's decisions are based on imperfect information, raider theory that managers create wealth transfers from the stockholders of the companies they bid for and

[20] Croson, R. T. A., Gomes, A., McGinn, K. L. & Nöth, M. Mergers and Acquisitions: An Experimental Analysis of Synergies, Externalities and Dynamics. *Review of Finance* 8 (4), 2004.
[21] Berger, P. G. & Ofek, E. Diversification's Effect on Firm Value. *Journal of Financial Economics* 37 (1), 1995, p. 3965.

disturbance theory that merger waves are induced by macroeconomic or industrial shocks[22].

Whereas Lubatkin's first six theories are concerned with firm-based motives, the disturbance theory presents a more general perspective on the motivations behind mergers. Kleinert and Klodt too argue that firms may decide to merge as a result of industrial or macroeconomic shocks such as changes in the regulatory environment (privatization, deregulation, abolition of state monopolies) or the effects of globalization. The past experience indicates that the decision to merge creates spill-over effects that trigger the mergers of other firms[23], thus supporting the industrial shock claim.

2.2. Types of Mergers

The principal categorization of mergers takes into account the respective markets where the merging entities operate. Accordingly, there are three main types of mergers categorized based on the market level. These are *horizontal*, *vertical* and *conglomerate*[24] mergers.

2.2.1. Horizontal Mergers

Horizontal mergers involve enterprises that produce identical or substitute goods. These enterprises do not only operate in the same level of the production process, but also in the same geographical market[25]. They eliminate the pre-merger competition among the

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[22] Lubatkin, *op cit*.

[23] Kleinert, J. & Klodt, H. Causes and Consequences of Merger Waves. *Kiel Working Papers* No. 1092, 2002.

[24] Also referred to as "conglomeral".

[25] Kulaksızoğlu, Ş. *Rekabet Hukukunda Yatay Birleşmeler: Antirekabetçi Etkiler ile Öne Sürülen Savunma ve Yararlar*. Ankara, Rekabet Kurumu, 2003 p. 8.

parties; as their immediate outcome is the removal of an active competitor from the relevant market and thus the increase of the market share of another one. Horizontal mergers constitute the most important type of concentration from the perspectives of both industrial organization and competition law. Not only that the post-merger structure of the market includes at least one firm less, the post-merger entity often has a larger market share than the sum of those of the merged parties before the merger[26]. This phenomenon, called as the *realignment effect*, can be explained as the result of the newly attained ability of the firms to compete as a single entity with a higher market power. In the presence of a functioning competition policy, that practice would be considered as illegal in the absence of the merger transaction.

Such increased market power may result in enhanced economic efficiency. It might also, on the contrary, create a threat of predatory or oligopolistic pricing, either through increased size and market control or by merger-induced collusion between the combined firm and other competitors within the market. Thus the antitrust concern is that, as a firm's market power grows, prices will increase above competitive levels[27].

Nonetheless, although the merged firms eliminate competition between themselves, horizontal mergers may lead to movement of assets from lower to higher-valued uses, remedy ineffective corporate management and, most importantly, produce efficiencies through economies of scale and thus improve social welfare despite the possible anti-competitive effects. Therefore it would be wrong to jump to the conclusion that horizontal mergers should be prohibited in principle; but they should be subject to closer scrutiny nevertheless.

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[26] Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and Its Practice.* St. Paul, Minnessota, West Publishing, 1994: p. 445.

[27] Sullivan, E. T. & Harrison, L. J. *Understanding Antitrust and its Economic Implications.* New York, Matthew Bender, 1998: p. 339.

2.2.2. Vertical Mergers

Vertical mergers involve enterprises that operate in different levels of the production process, in other words, that cooperate in the production of the final good. *Per se* the principal rationale behind vertical mergers is the prospect of less costly growth compared to the *de novo* option for an enterprise that desires to expand its operations to different levels of the chain of production. However, other motives might also be at work; for instance, in the case of a diversifying merger, the ownership and/or management of the expanding enterprise may not have an appetite for venturing into unknown industries and choose to capitulate on their existing knowledge.

Vertical expansion may have two directions: upstream or downstream. The production process is usually schematized by placing the final consumer at the bottom. Those levels of production that are comparatively closer to the final consumer are therefore called downstream and those that are farther apart, upstream. Upstream and downstream levels of production constitute different markets. This distinction is not always certain however. For example, assume that an automobile producer expands into the field of spare part production. Those parts can be utilized both in the production of the automobiles, that is the upstream market, and in the repair and maintenance services, that is the downstream market[28].

Nevertheless, this distinction is generally employed in the categorization of vertical mergers, such that, an upstream or backward merger occurs when a customer acquires a supplier; where in downstream or forward merger, the supplier acquires the purchaser. In either type of transaction, the competitive levels remain unchanged in each market. Since only the ownership changes, apparently both markets have the same number of competitors as before[29].

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[28] Warren-Boulton, F. R. *Vertical Control of Markets: Business and Labor Practices*. Cambridge-Massachusetts, Balinger Publishing, 1978.
[29] Sullivan, *op cit*., p. 340.

However, although not altering the number of competitors, vertical mergers may give rise to unwanted competition consequences when it constitutes a *vertical integration* or creates a *foreclosure effect*. In the case of vertical integration, sources of supply and demand are controlled by the same entity creating advantages such as economies of scale, distribution efficiencies, and reduced transaction costs over existing or potential competitors which are not integrated. These advantages can act as entry barriers[30]. The foreclosure effect that is the employment of business strategies that limit the access of sellers to buyers or vice versa is much critical, especially when the rest of the competitors in an upstream or downstream market are dependent to the integrated firm[31].

Vertical integration and the foreclosure effect are usually interrelated since the former generally leads, to a certain level, to the creation of the latter. Church notes that vertical mergers are welfare increasing when foreclosure by the vertically integrated firm is not credible and entry is not issue. This welfare-increasing effect is achieved through efficiency gains by the vertically-integrated firm and lower consumer prices. However, antitrust practitioners are prone to mistakenly treating vertical mergers as if they are welfare-decreasing when they exert market power[32]. Such view has been criticized on the grounds that the existence of market power is a necessary, but not sufficient condition to come to a conclusion that the vertical merger is welfare-decreasing[33].

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[30] Çınaroğlu, S. *Rekabet Hukukunda Dikey Birleşmeler: Etkinlik ve Rekabet*. Ankara, Rekabet Kurumu, 2003, pp. 32-37.

[31] See: Ekdi, B. Dikey Anlaşmalar Yoluyla Piyasanın Kapatılması. In *Rekabet Hukukunda Güncel Gelişmeler Sempozyumu II*. Ankara, Rekabet Kurumu, 2004: pp. 97-135; Karakurt, A. *Ekonomik ve Hukuki Açıdan Piyasa Kapama Etkisi*. Ankara, Rekabet Kurumu, 2005.

[32] Church, J. Impact of vertical and conglomerate mergers, 2004, Available from the WWW: <htpp://europa.eu.int/ comm/competition/mergers/others/merger_impact.pdf>.

[33] Cooper, J., Froeb, L., O'Brien, D., Vita, M. A Critique of Professor Church's Report on the Impact of Vertical and Conglomerate Mergers on Competition. *Journal of Competition Law and Economics*, 1, 2005: pp. 785-795.

2.2.3. Conglomerate Mergers

A conglomeration involves the merger of enterprises that do not have related product lines or do not share the same market. There are three distinct categories of conglomerate mergers: *market extension*, *product extension* and *purely conglomerate* mergers[34]. As the name reveals, market extension conglomerations involve enterprises that do produce the same goods, but operate in different geographical markets. Such mergers aim to expand and diversify the geographical coverage of the business. A product extension conglomeration, on the other hand, diversifies the product lines, as two or more enterprises that sell different, but related products in the same market are merged. The combined market shares of the enterprises enable a more efficient marketing. Pure conglomerations are mergers among enterprises that do not operate either in the same product or geographical market.

Conglomeral mergers have no clear cut effect upon competition or market shares, since they merely change the number of firms in the markets. However, it will not be appropriate to completely omit the possible anti-competitive effects that they may have. First of all, market or product extending conglomerate mergers may eliminate potential competition as the acquired enterprise might, in the future, *de novo* extend into the product and/or geographical markets of the acquirer. Therefore, competition authorities should examine whether or not the rationale behind the conglomeration is economic or -in the technical sense of the word- strategic. Two other major anti-competitive effects that conglomerate mergers may bring about are *reciprocity* and *entrenchment*[35]. Reciprocity takes place when enterprises having reciprocal procurement merge and increase the size and amount of these purchases in a way that creates a foreclosure of the market for the competitors. Entrenchment, on the other hand, occurs when a dominant firm is acquired by another major firm operating in a different market; it reinforces the market position of the acquired firm and discourages competitors from expanding or creating barriers to entry

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[34] See Burnley, R. *Who's Afraid of Conglomerate Mergers? A Comparison of the US and EC Approaches*, World Competition 28(1), 2005, pp. 43-70.
[35] Sullivan, *op cit*., p. 342.

for new competitors. Closely related phenomena are *cross-subsidization*, off-setting the costs incurred for obtaining market power in one product or geographical market with the profits gained in another one, and *economic tolerance* where potential competition in one market is restrained taking into consideration retaliation in another one where both competitors have investments[36]. Nonetheless, in all cases, previously non-existing linkages of competition are formed between markets.

Although the theory states that both vertical and conglomerate mergers may give rise to unwanted competition consequences there exists a strong counter argument: "competition rules should never interfere with vertical or conglomerate mergers. They never put together rivals and do not, therefore, create or increase the ability to restrict output through an increase in the market share"[37].

2.3. Measuring Concentrations

The starting point for analyzing the competitive effects of any merger is the determination of the relevant market. The relevant market is an applied concept that differs from the theoretical construct in economics with its emphasis on market power, instead of prices *per se*. The determination of the relevant market makes available the measuring of the concentration level of that specific market, an initial indicator of the market power, the echelon of which is a determining factor in deciding wheter to clear the transaction or to prohibit it. The calculation of market concentration is quantitative and thus universal.

[36] Kulaksızoğlu, *op cit*., p. 11.
[37] See Bork, R. H. *The Antitrust Paradox: A Policy at War with Itself*. The Free Press, Basic Books, 2003, chs. 11-12.

The choice of method is of course another question as there are several options for measuring concentrations recognized by experts with the general form

$$CI = \sum_{i=1}^{n} s_i w_i$$

where s_i is the market share of firm i expressed as a percentage, w_i is the weight attached to the market share and n is the number of firms in the market.

The Concentration Ratio (CR), the Hirschman-Herfindahl Index (HHI), Entropy Index or measure (H or E), the Rosenbluth Index and the Hall-Tideman Index as well as their combination, the Rosenbluth-Hall-Tideman Index, the Comprehensive Measure of Concentration, the Bain Index of Monopoly, the Lerner Index of Monopoly Power, the Landes-Posner Index, the Hannah and Kay Index, the U Index, and the multiplicative and the additive Hause Indexes have received attention in the methodological or industrial literatures[38]. The first three indexes that are also the most commonly used methods in practice are described below.

2.3.1. Concentration Ratio

The CR is the sum of the market shares of the largest k firms where k, although it may depend on the market structure, is usually set to four:

$$CR_k = \sum_{i=1}^{k} s_i = s_1 + s_2 + \ldots + s_k$$

[38] Bikker, J. A. & Haaf, K. Measures of Competition and Concentration in the Banking Industry: A Review of the Literature. *Economic & Financial Modeling* Summer 2002: 1-46; Banovac, E. Measuring Concentration in the Energy Markets. *Nafta* 56 (6), 2005, pp. 249-255.

CR takes a value between 0 and 100. A CR4 value close to zeros would indicate that the largest four firms do not have a significant combined market share whereas a value close to 100 would mean that the market is oligopolistic with at least one of the four firms holding a significant market share. As a rule of thumb, if the CR_4 is around 40 % then the market is considered to be competitive since the largest four firms only hold about that much of the market. A CR_1 of approximately 90 % indicates that one firm has a near monopoly power and thus market is highly concentrated.

As it can be seen the CR is very easy to calculate and interpret. However, it has its drawbacks: CR does not take into account the shares of all firms in the industry and is not very informative regarding the distribution of firm size. HHI, on the other hand, is both more complicated and more informative.

2.3.2. Herfindahl-Hirschman Index

HHI is calculated by squaring the market shares of the firms and summing the resulting values up:

$$HHI = \sum_{i=1}^{n} s_i^2 = s_1^2 + s_2^2 + \ldots + s_n^2$$

HHI deliberately gives a greater weight to the market shares of larger firms by squaring them. US Horizontal Merger Guidelines of 1992, as amended in 1997, categorize markets as unconcentrated, moderately concentrated and highly concentrated, according to their level of concentration as measured by the HHI[39]. If the post-merger HHI index is below 1000, the relevant market is considered to be unconcentrated. In this case, the merger is considered to be in the safe harbors and free of anti-competitive effects;

[39] Although the HHI levels for the assessment of transactions in the EU differ from the US, the application principle is similar. Accordingly, we have preferred to explain the subject through the US system since it is the origin jurisdiction which declared the use of HHI in merger control.

consequently, further in-depth investigation is not necessary. The market is considered to be moderately concentrated if the post-merger HHI lies between 1000 and 1800. Within this interval, if the change in HHI resulting from a merger is less than 100, the merger is considered to be competitively harmless and no further in-depth investigation is required. In highly concentrated markets, the post-merger HHI is above 1800. The necessity of further in-depth investigation depends on the change in HHI. If the change is less than 50, the merger is not considered to have significant adverse effects on competition. However, when the change in post-merger HHI is more than 50, the merger is considered to have anti-competitive affects. If the increase in HHI goes above 100, the merger has a significant potential to raise market power and additional factors should be taken into consideration in order to reach a conclusion about its legality via in-depth analysis[40].

2.3.3. Entropy Index

Despite its wide spread use, HHI has the drawback of presenting a distorted picture of the market concentration as it gives sometimes an excessive weight to the market shares of larger firms. This drawback can be corrected by the Entropy Index that has the opposite effect.

The Entropy Index is calculated by multiplying the market shares of the firms with their logarithms and summing the resulting values up:

$$E= -\sum_{i=1}^{n} s_i \ln(s_i)$$

The value of E is inversely related to the level of concentration. It approaches to zero in a monopolistic market, and it approaches to the highest value, which is *ln (n)*, in a

[40] Kalkan, E. *Yatay Birleşmelerin İncelenmesinde İktisadi Tekniklerin Kullanılması*. Ankara, Rekabet Kurumu, 2004.

market with perfect competition[41]. The Entropy Index gives relatively more weight to smaller firms; therefore taking only the *k* largest firms in the market as in the CR would seriously distort its values.

The Entropy Index is more difficult to compute and requires more input. Therefore, it is not used as frequently as the HHI. Studies that appeal to the Entropy Index usually report HHI and E together so as to present a more balanced picture.

[41] Bikker & Haaf, *op cit*., pp. 15-16.

3. EC MERGER CONTROL REGIME

The review of EC merger control regime herewith, has an instrumental value, not an essential one, given the aims of the present thesis, namely analyzing and assisting the question of merger control reform in Turkey. Therefore, this chapter does not seek to present an all-encompassing theoretical study of merger control in the Community, a task that has already been accomplished at least from the legal perspective. Instead, major aspects of the regime are highlighted in order to build a basis for comparison and contrast with the Turkish spin-off.

The approach adopted here is, of course, original: A historical account opens the chapter and the reader is directly exposed to the bottlenecks of the old regime as well as the main elements of the new one leaving, however, the detailed assessments to the following sections where jurisdictional, substantial and procedural issues are laid down based on this background and keeping in mind the necessity of explaining certain common concepts of competition law and policy to facilitate the discussions.

In this scope, main elements of the EU mechanism of controlling concentrations will be anatomised, considering the reform process. Another matter handled in this section is the European Commission's series of rules applied in assessment process of concentration transactions. At this stage, special emphasis shall be given to the assessment criteria of the Commission in process of reviewing mergers and acquisitions (in accordance with Dominant Position Test and Significant Lessening of Competition Test). One sub-section below includes review of Commission's and Court of First Instance's decisions triggering the reform package, and a process analysis on reform package which brought into agenda the major structural and procedural amendments to legislation on control of concentrations in the European Union.

Review of the procedural issues is kept as short as possible since differences in constitutional and administrative qualifications of a *sui generis* supra-national entity and a nation-state significantly restricts the possibility of drawing lessons for the latter from the former in such matters.

3.1. Historical Development of Merger Control in EC

3.1.1. The Genesis of EC Merger Control Regime

Competition policy diffused to Western Europe from the United States in the early postwar period. While in the United Kingdom (UK) it was economic necessities such as encouraging productivity that led the authorities to draw lessons from the US experience in Continental Europe, especially in Germany, the US had a more direct influence. According to the occupation forces, there had been a convergence of interests between German industrial cartels and the Nazi regime; so Germany was decartelized by law. In late 1950s the country adopted its own competition laws following the US anti-trust regime[42].

The United States were also influential in the preparation of the Paris Treaty of 1951 that established the European Coal and Steel Community (ECSC) since it desired a Franco-German reconciliation for strategic purposes[43]. As a result, the Treaty included severe articles for the protection of competition that included detailed provisions that one would normally expect from a secondary legislation: Article 65 on restrictive practices and Article 66 on concentrations and also the question of abuse of a dominant position in paragraph seven thereof. Moreover, the High Authority of the ECSC, later merged with the Commissions of EEC and Euroatom by the virtue of the so-called Merger Treaty of 1967, was given exclusive competence in the application of Articles in question; that is, there was no referral mechanism neither a principle of *subsidiarity* operating in the realm of ECSC law[44].

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[42] Cini, M., McGowan, L. *Competition Policy in the European Union*. London, Macmillan Press, 1998: pp. 5-10.

[43] Cini, M., McGowan, L., *ibid*., pp. 15-17.

[44] The Treaty of Paris, unlike the Treaties of Rome, was a finite act and its fifty-year long period of application laid down in Article 97 of the Treaty expired on the 23rd of July 2002. Since that date the primary

Member States of ECSC came to the conclusion that these provisions, while suitable for the two strategic sectors covered by the Paris Treaty were not appropriate for other markets while negotiating the Treaty of Rome later in the decade. This was no surprise, since while the ECSC Treaty was an instrument of direct regulation; the Treaty of Rome was more like a framework including general and flexible provisions that required further action[45].

It is still remarkable to observe that although one of the activities of the Community listed in Article 3 (1) (g)[46] of the Treaty establishing the European Community (EC) is to promote *"a system ensuring that competition in the internal market is not distorted"* the Treaty was not containing any special provisions related to concentrations of undertakings[47,48].

It was strongly believed at the time of drafting the Treaty that the gradual integration of European markets in the context of a customs union (that was completed in 1968) and the resulting reallocation of factors of production and industrial restructuring would create a stimulus for mergers and acquisitions and thus merger control provisions could be an obstacle to obtain the desired level of efficiency. In other words, the drafters of the Treaty were expecting a decrease in the number of enterprises and a corresponding

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provisions of Treaty of Rome and the secondary legislation adopted accordingly apply to the sectors previously covered by the Treaty of Paris. The resulting jurisdictional and substantial changes in the regulation of the sectors in question have been explained by the Commission: Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ESCS Treaty. OJ [2002] C152/5. It is noted in the Communication in paragraph 3 that the practices under the two Treaties have been converging for a number of years by then.

[45] Bulmer, S. Institutions and Policy Change in the European Communities: The Case of Merger Control. *Public Administration* 72 (3), 1994, pp. 423-444.

[46] All references are made to the consolidated version of the EC Treaty, which is incorporated into the Treaty on the European Union, unless otherwise stated. The numbering of the Articles is thus based on the new system introduced by the Treaty of Amsterdam. Pre-Amsterdam numbers are given in parentheses the first time an article is referred to.

[47] Recital 2 of the Regulation (EC) No 139/2004 also underlines that Article 4 (1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

[48] Article 293 (ex Article 220) under Part Six titled General and Final Provisions refers to mergers in the context of mutual recognition of companies; but this provision is related to company law and does not affect rules on competition.

increase in market concentration.[49] It is clear that they had further asked themselves the questions rephrased by Baldwin and Wyplosz[50] as follows:

> "First, as the number of firms fall, is there a tendency for the remaining firms to collude in order to keep prices high? Second, since industrial restructuring can be politically painful, is there a danger that governments will try to keep money-losing firms in business via subsidies and other policies?"

The confirmatory answers given to these questions explain why the Treaty includes provisions against practices and state-aids of restrictive nature but it overlooks the anti-competitive effects of concentrations. National competition regimes of the period in Europe did not cover mergers either. This was in contrast to the situation in the US where the mergers to monopoly of 19th Century had created sensitivity towards this business practice. Therefore one reading of the events suggests that the European policy-makers realized the efficiencies of mergers earlier than their US counterparts. There was also an uneasiness caused by the forced decartelization by US occupying forces that had taken place in the postwar period[51].

Attitudes about concentrations changed rapidly in 1960s as dangers of market dominance were realized. UK was the first European country to include merger control in its rather non-structural competition rules. Germany followed in 1973 and became the first Member State of the Community to do so; but things moved more slowly at the European level[52].

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[49] Jones, A., Sufrin, B., *EC Competition Law 2nd Edition*. New York, Oxford University Press, 2004: p.855

[50] Baldwin, R., Wyplosz, C. *The Economics of European Integration*. United Kingdom, McGraw-Hill Education, 2004: p. 163.

[51] Hamner, K. J. The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China. *Journal of Transnational Law & Policy* 11 (2), 2002, p. 393.

[52] Cini, M., McGowan, L., *op cit*., p. 117.

3.1.1.1. An Introduction to Merger Control through Articles 81 and 82

Initially in 1966, the increased merger goings-on within the Community directed the Commission to establish a system of merger control utilizing the provisions available at hand. The Commission announced in its Memorandum on the Problems of Concentration in the Common Market of 1966[53] that it would apply Article 82 (ex Article 86) of the Treaty that forbids the abuse of a dominant position against the "possibility" of abuse of dominant position related to concentrations between undertakings. The Commission was stressing that since concentrations could change the structure of the market and could create the possibility of total elimination of competition in the market by the new structure, the situation had to be assessed according to the Article 82. The Commission concluded further that: "[T]he generally accepted differentiation in the legal treatment of cartels and concentrations is justified" and that "Article 81 cannot be applied to agreements pertaining either to the acquisition of an ownership in an undertaking or parts of undertakings or the rearrangement of ownership relationships in undertakings (merger, acquisition of shares, and acquisition of assets)"[54]. These statements were explicitly rejecting the possibility of application of Article 81 (ex Article 85), that bans restrictive practices, to concentrations.

At that time, many experts of competition law criticized the perspective of the Commission. The claims were that the possibility for mergers or acquisitions to impair the market structure could in no way be assessed within the scope of Article 82, since it would be treating a possibility of an action as if committed. Other experts, on the other hand, maintained that the assessment of Article 82 during concentration process should be considered if the undertaking concerned uses its financial and technological power in a hostile manner to force its competitors to surrender to acquisition; but this interpretation was limited in scope with only a subset of mergers and acquisitions, hostile takeovers.

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[53] Commission Memorandum on the Problem of Industrial Concentration in the Common Market, Competition Series No. 3 (1966).
[54] *ibid.* para. 24.

Despite all the criticisms, the Commission continued to maintain its Article 82 approach that was confirmed by the European Court of Justice (ECJ) when the High Court issued its judgment on the well-known case of *Continental Can&Europemballage vs. Commission*[55] which enabled *a posteriori* control on concentrations[56].

According to the ruling of the ECJ:

> "…where an undertaking in a dominant position acquires a competitor, thereby substantially fettering competition, this may constitute an abuse; the dominant company does not have to have "used" its dominance in order to bring about the concentration, for example by threatening to harm the target unless it agrees to be taken over. The abuse lies in the fact of further limiting competition in a market which is already, ex hypothesis, dominated"[57].

Although the ECJ annulled the decision of the Commission for not providing a sufficient and conclusive basis that indicates the dominant position of Continental Can, it has principally agreed, parallel to the Commission's view, that the Article 82 of the Treaty could also be applied to mergers[58].

The decision of the ECJ highlighted the necessity of controlling concentrations reinforcing dominant position and – in the event that concentration process generates restriction or prevention of competition – the necessity of considering such transactions within the scope of the Article 82 of The Treaty.

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[55] Case no 6/72, *Continental Can & Europemballage v. Commission*, [1973] ECR 215, CMLR 864.

[56] In this case Continental Can, which is a U.S. Company, had bought 85 % of SLW operating in metal packaging sector in Germany. A year later Continental Can, by founding a company in Belgium under the name of Europemballage Corporation, bought 11 % of TDV, a Dutch company operating in the same sector with SLW. As a result of the examination conducted, the Commission had assessed the case as abuse of dominant position by Continental Can when SLW was acquired which in turn was used to acquire TDV. Therefore the Commission agreed that reinforcing further the already achieved dominant position by acquisition is abuse of dominant position within the context of Article 82.

[57] Whish, *op cit*., p. 405.

[58] We notice that this first judgment on a merger decision of the Commission also emphasized what was to become the traditional weakness of the Brussels-based agency in merger control: giving primacy to theoretical considerations instead of factual examinations. This practice also triggered the 2004 Merger Reform through a series of annulment decisions of the Court of First Instance based on similar grounds as in the *Continental Can* case.

Notwithstanding the opinion of the Commission on rejecting the use of Article 81, it is observed that the Court has applied the same principle in *Philip Morris vs. Commission*[59] case. This is the first time when Article 81 was taken into consideration in the partial acquisition of a competitor undertaking.

Furthermore, the Commission took a decision related to Article 81 (3) of the Treaty in a case in which Philip Morris was again a party. Philip Morris Company operating in the cigarette production sector had acquired 30 % of the shares of its competitor Rothmans. In addition to some supplementary rights, Philip Morris had obtained 24.9 % of voting rights in Rothmans against its 30 % share. Furthermore, according to the agreement between the parties, Philip Morris was not to be represented in the Board of Rothmans and did not have power to exercise on Rothmans Management. The Commission granted an exemption to this agreement between Philip Morris and Rothmans according to Article 81 (3) of the Treaty. However, the competitors BAT and RJ Reynolds filed a suit at ECJ against this decision of the Commission[60]. The Court in its decision[61] agreed that the agreements which provide a company legal or actual control over the commercial activities of another company through such as purchase of the shares of that company or which form a structure that enables a close cooperation between the parties can be included as a principle in the scope of the Article 81 of the Treaty.

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[59] Case no 730/79, *Philip Morris Holland BV vs. Commission,* [1980] *ECR* 2671

[60] Case no 142&156/84, *BAT & Reynolds v. Commission,* [1987] *ECR* 4487, [1988] 4 CMLR 24.

[61] The ECJ ruled:

> "Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.
>
> That will be true in particular where; by an acquisition of a shareholding... the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for commercial cooperation..
>
> That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan".

Upon application of Articles 81 and 82 to concentrations by ECJ and the Commission, the need for a regulation that governs *a posteriori* control of concentrations was felt. Notwithstanding the endorsement given by the Court to the application of Articles 81 and 82 to mergers in Philip Morris and Continental Can, these Treaty rules – and especially Article 82 – have mostly been considered as insufficient means of merger control for a number of reasons. First of all, Article 82 is only triggered by the involvement of an already dominant firm and is not triggered where a firm's dominant position results from a merger among enterprises where none of them is occupying a dominant position; a weakness that even allows the creation of a merger-to-monopoly among several small-scale enterprises[62]. Second, unless the transacting party that has a dominant position also abuses that position the merger cannot still be captured by Article 82. Third, Article 82 does not cover instances where a dominant company is acquired by a financially powerful firm that does not operate in the same market. That would constitute a conglomerate merger. Fourth, Article 82 does not provide for exemptions from its prohibition and so once the abuse of a dominant position is established under Article 82, there is no possibility of balancing other desirable benefits resulting from the merger. Fifth, when an anti-competitive concentration is not prohibited beforehand, Article 81 or 82 either cannot be applied to the resulting lessening of competition in the relevant market or their application is not economically efficient.

3.1.1.2. Attempts for a Separate EU Merger Control Regime

The Commission in 1973 brought up the initial proposals for a regulation aiming the control of concentrations. Strongly inspired by Article 66 of the ECSC Treaty, the Commission had proposed preliminary control of concentrations[63]. The legal bases for the Regulation were determined as Articles 83 and 308 (ex Articles 87 and 235) of the Treaty. Article 83 empowers the Council to adopt regulations that give effect to the principles set

[62] See Jones, A., Sufrin, B., *op cit*. p. 857 and especially footnotes 51 and 52.
[63] The Commission submitted to the Council of the European Community a proposal for a regulation "on the control of concentrations between undertakings", OJ [1973] C 92 1.

out in Articles 81 and 82; while Article 308, the so-called *flexibility clause*, authorizes the Council to take any additional measures necessary to attain Community objectives not sufficiently provided for in other provisions and thus creates a third category of Community competence besides explicit and implicit competences.

This proposal by the Commission received strong reactions from the Member States who, anxious about an unwarranted limitation of their competence as well as the capacity of the Commission, initially objected to the proposal. As a result, the proposal was left aside until 1980s when the Community, no longer satisfied with the depth of economic integration provided by its customs union, started a period of intense discussion and action.

In this context, the Commission finally felt the necessity in 1986 to remind the Member States that despite their unwillingness in taking a positive political position in the fight against abuses of dominant position created by concentrations, it could still create a control mechanism through the Treaty[64]. Following this warning, the Council Regulation (EEC) No 4064/89 concerning control of concentrations, frequently referred as the EC Merger Regulation (ECMR), was adopted after 16 years, on the 21st of December 1990 by unanimous vote of the Council as provided in Articles 83 and 308 of the Treaty. The momentum of market integration that took off with the Cecchini Report of 1985 and culminated in the Single European Act signed in 1986 laying down the Single Market Programme that foresaw the completion of the internal market by 1992 had finally created the suitable environment for the creation of a merger control regime in the EU.

From thereon concentrations having Community dimension were subject to prior notification requiring clearance from the Commission. Finally, the power to clear major cross-border transactions that fall within the scope of the ECMR and to prohibit them when they are incompatible with the common market was left to the authority of the European Commission. Accordingly, contrary to the application of Articles 81 and 82, the Commission was given exclusive authority in operations falling within the scope of the

[64] IBA Declaration: New Friends in European Community Competition Policy, 1986

merger control. The Commission was to exercise this power according to the compulsory and exclusive notification of significant structural transactions that have an impact on the Community market which goes beyond the territories of a member state[65]. The system of notification was described as "one-stop-shop" since, as a requirement of administrative efficiency, the parties of a transaction did not have to apply to any other authorities.

The adopted text included a number of conciliations between the sole proposer and the Member States, the most important of which was that the new regulation would not be applied retroactively. The Member States were also worried about the application by the Commission or – to be more specific – about the fact that the Commission was to become the "one-stop-shop" permitting or prohibiting a merger activity having effect on trade between Member States under certain circumstances. Therefore, some countervailing provisions considering the member states' economic sovereignty were incorporated in the Regulation. For instance Article 9 of the ECMR, the so-called *German Clause*, regulated referral to national competition authorities and Article 21, the so-called *Legimate Interests Clause*, enabled Member States to take into account interests other than those protected by the Regulation such as public security and prudential rules[66].

3.1.2. The Modernization of EC Merger Control Regime

EU fought against anti-competitive mergers for almost fourteen years via Regulation (EEC) No 4064/89. As new merger waves came with the progress of globalization in general, and the deepening of economic integration in Europe in particular, the Commission was forced to deal with an increasing number of transactions within the restricted timetable set out therein[67]. As a result, the Commission had to gain the

[65] These essential characteristics of EC merger control regime remain intact.

[66] One should not forget that the ECJ has created a body of case law that obliges Member States to interpret such general interests in the same way.

[67] Mario Monti underlines this fact in its speech at the IBA Conference by stating: "The number of concentrations notified to the Commission increased spectacularly during the 1990's, to the point where the Commission now annually reviews more than five times as many cases as in the early years." See: Monti, M. (2002). European Commission/IBA Conference on EU Merger Control, 7 November 2002. Brussels.

necessary experience in applying the merger control rules. The concerns of the member states at the time of the adoption of the ECMR, namely that the Commission would not be able to abide by the strict procedural rules provided by the Regulation and furthermore obtain the political capacity to actually take the necessary decisions, faded out[68] as the application ran smooth, at least in comparison to what was to come, for a long period of time. The fact that the substantive criteria used by the Member States in their own merger control regimes were very dissimilar and therefore the arguments between them determined the approach, strict or lenient, taken in appraising the effects of mergers also helped the consolidation of the EC merger control regime.

Merger control came to play a major role within the enforcement of the competition rules by the Commission both from the perspective of number and the complexity of cases handled, thus establishing itself as a distinct branch of European competition law and policy reflected in the organization of Directorate-General Competition (DG COMP[69]).

Most of the practitioners would come to the conclusion that mergers and acquisitions are among the most standard issues compared to other more complex competition related issues, such as Article 81 or 82 cases. This statement might be perceived true when coupled with the statistics showing that 19 cases out of a total of 3.368 cases notified to the Commission were prohibited and only in four cases the Commission asked for the restoration of effective competition. However, we believe that the conclusion that might be drawn from the same statement is that the ECMR has been an exceptional mechanism in order to control the concentrations in the Union in a competitive manner with its assessment technique, in a timely manner with its tight and pre-determinable deadlines and in a transparent manner with its decisions and their reasoning. Otherwise, it wouldn't be possible to claim that the practice side of merger control is standardized. Moreover, as Varona *et. al.* indicate, "the experience of merger control had a profound impact on the application of competition policy in general by the Commission

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[68] Varona, E. N., A. F. Galarza, J. F. Crespo and J. B. Alonso. *Merger Control in the European Union: Law, Economics and Practice, Second Edition*. Oxford: Oxford University Press, 2005, pp. 3-4.

[69] Directorate-Generals of the Commission were referred to by their numbers in the past. Today abbreviations of their titles are used instead. Therefore one refers to DG COMP instead of DG-IV.

who both improved its administrative operations thanks to the deadlines of the ECMR and its economic assessment thanks to the necessity of theoretical and empirical forecasting in merger control"[70].

We believe that the Commission, through this application, gradually made it a practice for the undertakings operating within the EU, to foresee possible competition problems that might occur in their concentration projects and take necessary steps in the architecture of their transactions.

However, despite its strengths, the EC merger control policy still was faced with a crisis during years 2001 and 2002, the period just before the adoption of the new ECMR examined in detail below. During this period, the Commission issued five prohibition decisions including *GE/Honeywell*, *Schneider/Legrand*, and *Tetra Laval/Sidel* all of which were very controversial[71]. Furthermore, the Court of First Instance (CFI) gave three important judgments in 2002 annulling the Commission's 1999 decision[72] that had prohibited the merger between UK travel operators Airtours and First Choice[73] in June as well as those in *Schneider/Legrand*[74], and *Tetra Laval/Sidel* cases[75] in October. CFI's judgments were perceived as heavy blows to the Commission by the public.

These developments in the EC merger control regime raised questions about the Commission's practice. Alarmed, the Commission took the necessary steps and, on 11 December 2002, adopted a package of measures that would make important substantive and procedural changes in the regime[76]. The reform package had three parts: (i) a proposal for a Council regulation replacing the Regulation (EEC) No 4064/89, (ii) a draft Notice on

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[70] Varona, Galarza, Crespo & Alonso, *op cit*., p. 4.

[71] Case no COMP/M.2097, *SCA/Metsä Tissue*, EC Commission Decision of 31 January 2001, OJ [2002] L 057; Case no COMP/M.2220, *GE/Honeywell*, EC Commission Decision of 3 July 2001; Case no COMP/M.2283, *Schneider/Legrand*, EC Commission Decision of 10 October 2001, OJ [2003] C 029; Case no COMP/M.2187, *CVC/Lenzing*, EC Commission Decision of 17 October 2001 and Case no COMP/M.2416, *Tetra Laval/Sidel*, EC Commission Decision of 13 January 2003, OJ [2003] C 137.

[72] Case no IV/M.1524, *Airtours/First Choice*, EC Commission Decision of 22 September 1999, OJ [2000] L 93/1.

[73] Case T-342/99, Airtours/First Choice, judgment of 6 June 2002, ECR [2002] II 2585

[74] Case T-77/02, *Schneider v. Commission,* judgment of 22 October 2002, ECR [2002] II-04201

[75] Case T-80/2, *Tetra Laval v. Commission*, CFI judgment 25 October 2002, ECR [2002] p.II- 4519

[76] See Commission Press Release (IP/02/1856) of 11th of December 2002.

the assessment of horizontal mergers clarifying certain important substantive matters, such as how anticompetitive effects should be analyzed, and (iii) draft "Best Practice" guidelines aimed at improving the parties" rights of defense and the Commission's decision-making process in merger cases. The package also included some non-legislative measures related to institutional and procedural issues.

The proposed new ECMR was published in the *Official Journal of the European Union* (OJ) in January 2003. This draft regulation required the consent of the Council of Ministers and the European Parliament. After the consultations and procedural necessities were completed, the Regulation (EC) No 139/2004 on the control of concentrations between undertakings was published in the OJ on 29.01.2004 and came into force on 01.05.2004, the date of the enlargement of the EU from 15 to 25 Member States, bringing important changes to the merger control regime.

The process leading up to the adoption of the new ECMR had begun earlier and was not simply a reaction to the events of early 2000's. The review of the ECMR actually began in 2000 with the Commission report to the Council on the workings of the jurisdictional turnover thresholds. This review was actually prompted by a revision clause of the ECMR that calls for the Commission to evaluate the rules and procedures periodically. However, after eleven years of application of the ECMR, at that time, the European Commission did feel that it was necessary to initiate a new discussion on the efficiency of the EC merger control law; because, as the report in question indicated, there were a large number of cross-border mergers within the Community which were not being captured because of the ECMR thresholds. The Commission had decided to use this pressing issue as a window of opportunity to review some other matters related to the operation of the ECMR as well. In other words the review clause in ECMR, even though not explaining the necessity of review itself, has fulfilled its purpose of ensuring that the provision of the Regulation are kept up-to-date and effective.

With this purpose, first a Green Paper was published[77] to sum up the views of the Commission on a possible amendment of the Regulation (EEC) No 4069/89 that had been last amended by Council Regulation (EC) No 1310/97[78]. The Green Paper invited comments on issues connected with the operation of the ECMR, jurisdictional, substantive and procedural. The Commission received and reviewed comments from a range of interested parties in March 2002 (lawyers, economists, business associations, national competition authorities and major companies). The Council, the European Parliament (with a non-binding resolution) and the Economic and Social Committee also expressed their opinions.

Comments received by the Commission were concentrated on three areas, as did the Green Paper and the eventual reform: (i) the operation of the turnover thresholds and case referral mechanisms that determined the division of work between the Community and the Member States (jurisdictional issues), (ii) the substantive test to be applied for the review of concentrations by the Commission (substantive issues), and finally (iii) procedural issues. The review of the comments still showed that, after eleven years of application, Community merger control has been widely considered as a success with few weak points.

The Commission based its 2002 proposal on the Green Paper and these comments. It was also decided that, for the sake of clarity, replacing the ECMR with a new one would be more beneficial than amending it. This decision was also a reflection of the Better Regulation initiative of the Commission that, it is hoped, would contribute to the formation of a healthier regulatory environment for undertakings as a part of the Lisbon Agenda of the EU, today re-launched as the Growth and Jobs Agenda.

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[77] Green Paper on the Review of Council Regulation (EEC) No 4064/89, Commission of the European Communities, COM (2001) 745/6 final, Brussels, 11.12.2001

[78] The Merger Regulation was last amended in 1997 as a result of a review process generating much debate. Regulation (EC) No 1310/97 introduced a second set of lower turnover thresholds with the aim of eliminating the problem of "multiple filings to national competition authorities and also expanded the scope of merger control to all full-function joint ventures.

Indeed, one cannot separate the adoption of a new ECMR from the general economic developments affecting the EU. Undoubtedly, during its application, the Regulation had provided effective merger control across the EU with its short, strict legal deadlines. However, with the changing economic situations in global terms, the expected growth in the number of notifications due to the then coming enlargement of the EU, the introduction of the Euro and, above all, the experience gathered during the application of the Regulation made it necessary to undertake such a reform[79]. This fact is also underlined in Recital 3 of the new ECMR:

> "[T]he completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganizations, particularly in the form of concentrations".

Accordingly, this reform was planned to meet the challenges posed by global competition, monetary union, market integration, enlargement and the need to cooperate with other jurisdictions. These challenges, with the absence of a practical and also effective merger control regime, may result in decreasing competitive environment and may harm the consumers of Europe. Therefore, it is the Union's policy that such accelerated economic activities "are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community" [80].

As the new ECMR explicitly recognizes, it was economic dynamics that provided the main rationale for merger reform. However, had the internal dynamics mentioned above, the pressure of increased workload on the institutional capacity of the Commission and, most importantly, the CFI's annulment of Commission decisions in three separate merger cases in 2002 that caused considerable additional scrutiny and consideration, did not exist, the review of the ECMR would probably have been limited to a periodical

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[79] Toksoy, F. The Future of the EU Merger Control Regime: The Review of the Merger Regulation. *Rekabet Bülteni* 7, 2002, p. 12.
[80] Council Regulation (EEC) No 139/2004 Recital 4

exercise and would not amount to a comprehensive reform. The judgments of CFI criticized the thoroughness and rigor of the Commission's analysis and its economic assessment and highlighted certain procedural deficiencies in its review process. Commission's decision to announce reforms to clarify and improve its internal procedures and analysis simultaneously with legislative proposals was an outcome of such criticism. This is also reflected by the words of Mario Monti who was the Competition Commissioner in that period:

> "I believe that, in a certain time, with more hindsight, we will say that these judgments, no matter how painful, came at a right moment. Indeed, there are no doubt three lessons to be drawn from the judgments: in particular, it is clear that the CFI is now holding us to a very high standard of proof, and this has clear implications for the way in which we conduct our investigations and draft our decisions. We have taken very seriously into account the shortcomings in our process highlighted in the judgments by strengthening our reforms even further" [81].

It is therefore appropriate to review the judgments on mergers with some detail. Article 229 (ex Article 172) of the Treaty confers the Court of Justice unlimited jurisdiction with regard to penalties laid down in Council regulations such as the ECMR. Therefore the interested parties have the right to appeal against the Commission decisions for the purpose of merger control. This fact is explicitly, and unnecessarily, repeated and elaborated in the new ECMR[82].

It should be mentioned that appeal procedure in European competition law is usually related to Commission decisions concerning Article 81 or Article 82 cases. Appeals in merger cases are rare due to the characteristic of the issue subject to decision: It is usually a clearance decision where the parties are given the authorization for their request, or a conditional clearance where the parties usually negotiate the situation beforehand and show their consent for the continuance of the transaction or, in few

[81] Monti, M. European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002.

[82] Article 21 (2) of the ECMR states that 'subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decision provided for in this Regulation". Article 16 provides that the "Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed."

examples, it is a decision which forbids the transaction. In the third situation, the decision is almost without exception brought to the Court for appeal. Such an action may be taken by the addressee of the decision or by any other person for whom the decision is of direct and individual concern[83]. This brings into subject the possibility of a simple clearance decision to be appealed by a third party who claims that the decision is of direct effect to its interests. An example is the challenge by employees of Perrier to the substantive decision of the Commission in *Nestlé/Perrier*[84]. The employees were concerned that the acquisition would result in the loss of several hundred jobs and they asked the Court to suspend the Commission decision[85]. The Court recognized the right to appeal of the employees while refusing, on the other hand, to suspend the decision based on the reasoning in the Recital 13 of the old ECMR stating that:

> "[t]he Commission was required to appraise of the merits of a concentration within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion referred to in Article 158."[86]

The first annulment of a merger decision by the ECJ was the *Kali und Salz* case[87] in 1998 where the Court decided that the transaction would result to the creation of a dominant duopoly. The parties, after eliminating the concerns of the Court, re-notified for the transaction and got the clearance from the Commission. However, this first annulment case showed how costly an annulment decision can be for the parties of a transaction. The second annulment came in *RJB Mining* case[88] again on a narrow ground. Since 1999 there have been nine more appeals against Commission's decisions in merger cases including

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[83] Article 230(2) of the Treaty. Goyder notes that:

> "The third party must first show that the Commission acts under the ECMR, and that the measure is intended to have a legal effect, a condition not normally difficult to satisfy as the Court interprets "decision" broadly, relying on substance rather than form. The third party must then show that the relevant decision is capable of affecting his interests by bringing about a specific change in his legal position. Finally, the appellant has to show that it is "individually concerned". This means that the decision must be shown to have affected him by reason of the particular characteristics which distinguish him from all other persons."

Goyder, D.G. *EC Competition Law*. New York, Oxford University Press, 1998, p. 420.

[84] Case no IV/M.190, *Nestle/Perrier*, EC Commission Decision of 22 July 1992, OJ [1992] L 356/1.

[85] Goyder, *op cit*., p. 420.

[86] ECMR (4064/89), Recital 13.

87 Case No IV/M 308, (1994) OJ L186/38.

[88] Case T-156/98., RJB Mining vs. Commission, 2001.

those three cases that served as the triggers of an extensive merger reform and therefore examined[89] in detail below in chronological order: *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel.*

3.1.2.1. Airtours/First Choice Case

Both Airtours and First Choice were UK companies active in the markets of tour operating, travel agencies, charter airlines notably in UK, Ireland and North America. Airtours proposed to acquire the entire equity of First Choice. The notified operation therefore constituted a concentration within the meaning of the Article 3 (1) (b) of the ECMR. The Commission blocked the merger of Airtours and First Choice by applying the collective dominance doctrine, stating that the acquisition would give incentive for the three remaining operators (Airtours/First Choice 31 % of the market share, Thomson 27 % of the market share and Thomas Cook 20 % of the market share) to avoid or reduce competition among themselves[90]. According to the Commission, the merger between Airtours and First Choice would lead to a creation of collective dominance position in the UK market for *short-haul foreign package and holidays* and, as a result, competition would be impeded in the common market. The major arguments of the Commission were that (i) tacit collusion was unnecessary for the finding of collective dominance and the doctrine of unilateral effects could be applied to the merger, (ii) a retaliation mechanism is not necessary for the finding of collective dominance and (iii) the detrimental effects on capacity competition, rather than price competition were important in this case.

The Commission came to the conclusion that the substantial concentration in the market structure, the resulting increase in its already considerable transparency and the weakened ability of the smaller tour operators would reduce competition between the three

[89] We preferred to explain the three CFI annullment cases before providing the overwiev of the EC Merger Regime since the primary focus here is the bottlenecks of the EU system which led it through a comprehensive reform, rather than the theory behind it. Accordingly, we expect the reader to have a common knowledge of EU Merger control legislation.

[90] Airtours/First Choice, M.1524, OJ 2000 L93/I, prohibited by Commission (2002) ECR II-2585

main tour operators by constraining overall capacity. If the capacity is constrained, prices and profits would be higher than otherwise; whatever competition takes place during the sales season. The Commission reached the overall conclusion that the merger would result in a market structure which would create an incentive for the three main remaining large market shares operators to constrain capacity.

These arguments of the Commission, while creative, caused the criteria for the assessment of mergers in oligopolistic markets to become even less clear than before. The merger was prohibited because it was supposed to give rise to unilateral effects in the absence of dominance (single dominance or tacit collusion) and these effects would be detrimental to competition and welfare.

As a result, although the prohibition might have been correct from certain perspectives, the CFI annulled the Commission's decision on both legal and factual grounds. CFI's role in Airtours has demonstrated that the European Courts will not be introverted in carrying out a thorough analysis of the merits of the case put to them no matter how complex the issue involved. The judgment of CFI was significant; because it implicitly reconfirms that the ECMR can apply to post-merger collective dominance and it sets out a road map for merging parties and the Commission to apply when assessing the likelihood of post merger tacit collusion.

Consequently, the CFI has, for the first time, set out clearly and comprehensively the three elements that need to be evaluated and proved by the Commission in order to find that there is a collective dominance issue in the *Airtours/First Choice* case. These are tacit co-ordination, retaliation and competitor and consumer reaction.

Furthermore, the CFI posted that Commission has failed to produce convincing evidence of the following preconditions for the establishment of collective dominance: First, the market must be sufficiently transparent for all members of the oligopoly to be aware of the other members' conduct in order to be able to adopt the same policy. Second, there must be a retaliation mechanism which serves as an incentive not to depart from the common policy, in order to ensure that the situation of tacit coordination is sustainable

over time and although there is no requirement for a specific retaliation mechanism involving a degree of severity, sufficient deterrents must exist. Third, the policy must be able to withstand the foreseeable reaction of existing and future competitors and consumers.

The strong wording used by CFI to annul the Commission decision is a clear indication that the Commission must adopt decisions based on the legal standard of the ECMR. CFI emphasized the proper scope of the dominance test and expect Commission to prove that the three remaining operators would have an incentive to cease competition with one another, that there were adequate deterrents to secure within alleged dominant oligopoly and the smaller tour operators, potential competitors and consumers would not be in a position to destabilize the alleged dominant oligopoly[91].

The CFI further found that the Commission was erroneous in identifying adequate deterrents and underestimated the likely reaction of smaller tour operators, potential competitors and consumers as a countervailing force. CFI requires Commission to define clearly the competitive situation existing at the time of the notification, before speculating on the possible consequences of the concentration on this market. CFI concluded that the Commission's decision:

> "is far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to -factors fundamental to any assessment of- whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market."[92]

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[91] Loughran, M., Parplies, K. & Schade, R. Merger control : Main development between 1st May 2002 and 31st August 2002. *Competition Policy Newsletter* 3, 2002, p. 59.
[92] Para 294.

3.1.2.2. Schneider/Legrand Case

In February 2001, Schneider Electric, a French company active in the production of electrical equipment, notified the Commission of its proposed acquisition of Legrand. A detailed investigation was opened in March and Commission blocked the acquisition of control of Legrand by Schneider[93] in October 2001 and announced that Schneider would have to divest of all of its shares in Legrand at once, and would not be permitted to keep more than 5 % shareholding. Further, the Commission announced that Schneider had failed to put forward adequate remedies on time to ensure effectiveness of competition in France and in a number of other countries and published a decision prohibiting the merger.

There were three reasons behind the decision. First, the Commission had looked at the merged group positions as a whole and argued that the merged entity panoply of products and wide geographic presence support for the dominant position in any single national market (without defining national market). Second, it had argued that vertically integrated channel sales to end users are not sold in the wholesale market where Schneider and Legrand operate, and therefore could not constrain the "market power" of the merged entity. Third, it stated that the merged entity would have "unassailable" position vis-à-vis distributors who would then have no power or interest in resisting price increases.

However, CFI accepted Schneider's contention that the Commission had made a number of errors, omissions and contradictions in its analysis. CFI judgment in *Schneider/Legrand* was a second major blow to the Commission's merger control policy in just over four months, annulling the decision on both substantive and procedural ground. CFI rejected the basic economic reasoning and facts put forward by the Commission. Regarding the case, the Court also stated that "there had been a serious infringement of rights of the defense in decision making process". The Court had found out that Commission has committed both legal and procedural errors in opposing the deal[94].

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[93] Schneider Electric v. Commission (2002) ECR II-4071.

[94] Cases T-310/01 , Schneider Electric v. Commission, Judgment of First Court of Instance of 22 October 2002.

CFI provided economic reasoning and evidence to respond to Commission's arguments and stated that the actual conditions of competition in terms of number of competitors, size of distributors and sales channels are significantly different from one country to the other. This evidence proved that Commission abstract reasoning that applied the same conclusions to all markets without taking into account the differences between their market structures is incorrect. They have overestimated the economic power of the merged entity. Furthermore, the evidence demonstrated that all manufacturers of components essentially competed in both wholesale and retail markets. Despite this evidence presented at the hearing in August 2001, the Commission maintained its position that sale of components in vertically integrated channels were "captive" and were not "sold" in the "free" market. The Commission, in essence, had misdefined product markets by not including sales in vertically integrated channels. Commission's assertions of significant brand loyalty were also incorrect. Promotions are a significant factor of competition in many countries, and the presence of such promotions seems at odd with an assertion of significant brand loyalty.

The Court held that the Commission's analysis and prohibition to merger was insufficient and did not provide detailed country specific data and analysis on detailed workings of individual countries networks. In its decision, the Commission stated that the different relevant markets were national; however, the assessment of the competitive impact of the proposed merger was based on transnational considerations, extrapolating to other markets the results of its assessment to the French market. The CFI held that the Commission could not reach a proper conclusion without conducting a country by country analysis; yet the Commission did not mention the market shares in each member states. Besides, the Commission statements relating to the position of wholesalers was supported by generic data instead of country by country analysis. To sum up, the CFI rejected all of the Commission's substantive findings, except for those relating to the French market.

The Court further determined a major procedural weakness. The decision of the Commission was mainly based on factors which are not truly explained in the Statement of Objections. As the CFI pointed out, the Statement of Objections in a merger has dual

purpose: It sets out the Commission's objections and gives the parties an opportunity to rebut them. Therefore, insufficient or misleading information in a Statement of Objections amounts to an infringement of the parties" rights.

3.1.2.3. Tetra Laval/ Sidel Case

Tetra Laval is the worldwide leader in the cardboard packaging business and Sidel is active in the PET (polyethylene terephthalate) packaging segment and manufactures a 'stretch blow molding" machine (SBM machine[95]) used in the PET packaging process. While Tetra and Sidel have a common customer base, they operate in different market segments and are not actual competitors, although in the future they may become so.

In blocking the Tetra Laval deal with Sidel, the Commission argued that the merger would give rise to anti-competitive repercussions in the future by eliminating potential competition and strengthening the merged entity's overall market positions and thus prohibited the acquisition of Sidel by Tetra Laval[96]. The Commission argued that Tetra Laval would be able to leverage its strong dominant position in the cardboard market. The Commission, thus, argued that Tetra Laval will likely exploit its dominant position in cardboard packaging industry in order to leverages its leading, but not dominant position in PET packaging equipment on which the Commission has relied to show foreseeable conglomerate effect. The Commission found that substitution between carton and PET, though too weak to be in the same market, was still significant enough to strengthen dominance in the cardboard market following the elimination of the purported constraint exerted by Sidel. Furthermore, Commission stated that the substantial overlap of customers would be a problem for competition in the supply of SBM machines. As a result, Tetra Laval would enjoy selling their products at higher prices in this sector in the long run.

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[95] SBM machines are the primary machines used in the manufacture of PET bottles and the principle product affected by the transactions.

[96] Tetra Laval v. Commission (2002) ECR II-4381, appealed to ECJ.

> "In Tetra Laval v. Commission, CFI struck down the Commission's product market definition for reasons to product use. The Commission had defined separate markets for different types of SBM machines used in the production of PET plastic bottles, because certain SBM machines could only be used for specific purposes. CFI disagree with the Commission's strict definition, stating that "the contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their uses." [97]

Tetra Laval used its right-to-appeal as expected and the CFI, on the 25th of October 2002, overturned for the third time in a short period a merger prohibition decision of the Commission. The ruling follows the CFI's annulment of two other controversial Commission prohibition decision – *Airtours/First Choice* and *Schneider/Legrand*.

CFI judgment provided some very important insights on certain substantive issues, especially the economic theory of "conglomerate effects" as the CFI overturned the Commission's decision to prohibit the proposed merger on the basis that the Commission failed to prove that a merged entity would not only have the ability to harm competition, but that it would actually act anti-competitively[98,99].

However, in this case it was not necessary to prove the existence of conglomerate effects, since the merger's horizontal effects were sufficient to establish that the concentration was incompatible with the common market. CFI had held that EC does not have sufficient strong evidence that the merger would be anti-competitive and had failed to take due account of certain commitments offered by Tetra Laval to alleviate its concerns. The Court held that the trilogy of "anti competitive effects were overestimated" by the Commission.

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[97] Van Bael, I. & Bellis, F. *Competition Law of European Community, 4th edition*. The Hague, Kluwer Law International, 2005: p.783.

[98] Case T-5/02 and T-80/02 , Tetra Laval v. Commission, Judgment of Court of First Instance of 25th October 2002. The second judgment, in case T-80/02 annulled the Commissions decision ordering separation of Tetra and Sidel.

[99] In *GE/Honeywell,* another controversial decision, once again the theory of "conglomerate effects" formed the basis of the Commission's decision.

CFI also showed a fact that a firm has an ability to leverage does not mean that it will have the incentive to extend its monopoly power towards the market structure. The Commission has failed to show the circumstances for profitable leveraging actually exist in the market under review. The Court examined several impacts and methods of leveraging studies and conducted that none of them would be sufficiently profitable. Moreover, the Court made clear that the Commission has to undertake detailed, fact based market-by-market assessment of the foreseen effects of leveraging before it can block a merger. CFI also emphasized that the Commission did not take into account the behavioral commitments in reducing the risks that anti competitive leveraging will result from merger. Blocking a merger on the basis of the possibility of bundling is inherently more difficult and speculative than prosecuting a firm after bundling and leveraging has already occurred in the market. CFI has thus set a high bar for the Commission to clear in prohibiting mergers on the basis of leverage.

The judgment is important for reasons beyond the *Tetra Laval/Sidel* case, such that it classifies as the Commission's duty to rely on accurate, reliable, consistent, and complete evidence when reviewing mergers in general and conglomerate mergers in particular. In its judgment the CFI, in essence, concluded that the Commission had provide insufficient evidence to support its conclusions that the merger would strengthen Tetra Laval's dominant position and lessen competition in the cardboard and PET plastic packaging industry. Besides, Commission has dramatically failed to demonstrate plausibly why the merged Tetra/Sidel entity would find it profitable to engage in such business activity.

3.1.2.4. The Triggering Effect of the CFI Decisions

To sum up, in all of the three judgments of CFI, the Commission was heavily criticized for its less than satisfactory ability of case handling and the body of evidence relied on. The judgments provided an internal dynamic that turned the periodical review of the ECMR to an overhaul of the merger control regime in the EC.

It would not be wrong to say that with three consecutive decisions the CFI burned down the merger control regime to ashes. Shortly thereafter, the Commission adopted the package of measures that paved the way for the adoption of the new ECMR, Council Regulation (EC) No 139/2004. The Commission also finalized the Horizontal Notice[100], Commission Notice on a simplified procedure for treatment of concentrations[101], Commission Notice on restrictions directly related and necessary to concentrations[102], Commission Notice on Case Referral in respect of concentrations[103], Best Practice Guidelines[104] and DG Competition Information note on Art. 6(1) (c) second sentence of Regulation 139/2004 (abandonment of concentrations) as well as the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004[105], thus renewing the soft law of merger control. Further steps were taken with the presentation of the draft Consolidate Jurisdictional Notice covering both the concept of concentration and the determination of Community dimension and the draft Commission Guidelines on the assessment of non-horizontal mergers on the DG Competition website for comments in 2007.

The resulting reform of the EC merger control regime consists of three interrelated parts like the original Green Paper of 2001: (i) Jurisdictional reform that reshaped the division of work between EC and member states; (ii) substantial reform that replaced the dominance test used to evaluate the competitive effects of mergers with the 'significant lessening of competition" (SLC) test and changed the way efficiencies were taken into account by the Commission; and (iii) procedural reform that improved the

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[100] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *Official Journal C 31,* 05.02.2004*,* pp. 5-18.

[101] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, Official Journal C 56, 05.03.2005, pp. 32-35.

[102] Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, pp. 24-31

[103] Commission Notice on Case Referral in respect of concentrations, Official Journal C 56, 05.03.2005, pp. 2-23

[104] DG Competition Best Practices on the conduct of EC merger proceedings

[105] Commission Notice of 13 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C325, 22.12.2005, p. 7.

"checks and balances" within the Commission's administrative procedure especially by breaking up the Merger Task Force and appointing a Chief Competition Economist.

After all, as also stated by the Commission and the Council, all of the above point to the desirability of revising the overall system of merger control so that the Commission and each national authority, individually and together, can make use of their resources in the optimal way for protecting competition in the Community, while at the same time reducing any unnecessary burden on industry, in terms of compliance costs and legal uncertainty. This is particularly true for medium-sized companies which, owing to their limited size, fail to meet the current thresholds of the ECMR, but who still remain subject to the burden of multiple national filings[106]. This search for further efficiency has been one of the main focuses of the Commission in the restructuring of the ECMR. Recital 8 of the Regulation confirmed this vision by stating that:

> "[T]he provisions to be adopted in [the] Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States."[107]

As one can see from the above Recital, the pre-condition for the application of ECMR is the determination of jurisdiction. So shall be the starting point of its analysis.

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[106] Green Paper, p. 9.
[107] Council Regulation (EEC) No 139/2004 Recital 8.

3.2. Jurisdictional Issues

3.2.1. The Concept of Concentration

In order for a transaction to fall within the jurisdiction of EC merger control regime, or any such regime for that matter, it should qualify as a concentration. In EC competition law a concentration is defined as an act by an undertaking to takeover exclusive or joint control of another undertaking. The defining characteristic of these operations is the requirement of a permanent or lasting change in the control structures of the undertakings resulting from the concentration process. In this sense, it is possible to talk about two types of concentration: (i) The merger of two or more previously independent undertakings or (ii) the acquisition of direct or indirect control of the whole or part of one or more other undertakings by one or more undertakings (or one or more persons already controlling at least one undertaking), whether by purchase of securities or assets, by contract or by any other means[108]. In the latter case the legal personality of the acquired enterprise is terminated.

Apart from this, even if it is not a "merger" within the narrow meaning of the concept, the assembly of the activities of undertakings under a single economic unit are also considered as a merger. This situation is generated particularly when two or more undertakings create a joint economic unit -a joint venture-, while maintaining their separate legal entities. In order to rule about the existence of joint economic unit, the presence of a permanent and single management should be established.

Joint ventures create further difficulty in the field merger control; because they are deemed to be concentrations only when they are autonomous as indicated in Article 3 (4) of the ECMR. Such autonomous joint ventures are called *full-functional* in merger

[108] Article 3(1), Merger Regulation.

terminology[109]. In order to qualify as autonomous, a joint venture should have the capacity to carry out all of its functions by itself, hence the term full-functional. These functions include, but are not limited to, management, production and sales. As a benchmark, a joint venture is expected to fulfill all the functions a competing undertaking is carrying out in the relevant market. Thus, joint ventures that are formed for the purpose of outsourcing some of the tasks of the parent companies do not qualify as full-functional. Moreover, a joint venture should also be in possession of the necessary means, such as management, assets and employees, to carry out functions in question. If a joint venture is not full-functional, its anti-competitive effects, if there are any, can be examined under Article 81 of the Treaty[110].

When there is no change of control, mergers or acquisitions are not assessed as concentrations in competition law. However, the requirement of a lasting change in control, essential for differentiating between business strategies in the relevant markets and other financial or legal operations, was included only in recital 23 of Council Regulation (EEC) No 4064/89, the old ECMR, and was detailed in the Commission notice on the concept of a concentration[111]. In the new ECMR the general definition provided in Article 3 (1) begins with stating that a concentration should be deemed to exist in case a change of control takes place on a lasting basis. However, the term lasting basis itself is not defined, i.e. the duration that suffices for a lasting basis is not given. For example in *John Deere Capital/Lombard*[112] a joint venture was determined to have a lasting basis when it could be terminated by either party after four years.

Article 3 (5) laying down the situations when a concentration shall not be deemed to exist, remains unchanged too in the new ECMR. As a result the amendment of Article 3

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[109] See: Commission Notice on the concept of full-function joint venture under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ [1998] C66/1.

[110] It was considered to include non-full-functional production joint ventures of a certain size in the ECMR during the latest reform process; but this idea was abandoned. See: Van Bael and Bellis, *op cit*., p. 749.

[111] Commission notice on the concept of a concentration under Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2.3.1998, p.5.

[112] *John Deere Capital/Lombard*, M. 823, 1996, paras. 9-10: *"The joint venture agreement provides that the joint venture will have indefinite duration, subject to the right of either parent to withdraw by giving one year's notice three years after its commencement. JD Credit will therefore perform on a lasting basis all the functions of an autonomous economic entity"*.

(1) has no significant impact in practice in order to clarify Article 3 (5) since transactions such as venture capital or private equity investments where the transaction may create a change of control on a lasting basis but which, at the same time, may fall within the exception described in Article 3 (5) are subject to further clarification by the Commission in terms of the criteria of *a change of control on a lasting basis*.

According to the Article 5 (2) second subparagraph, that may also be considered as a clarification to the definition of concentration, two or more partial transactions which take place within a two-year period between the same persons or undertakings are to be treated as one and the same concentration arising on the date of the last transaction. This clause is primarily designed to prevent circumvention of the ECMR by separating one concentration into two or more transactions.

3.2.1.1. The Question of Change of Control

The term control is defined as the decisive influence of one or several undertaking over another undertaking. For change of control to be deemed to occur, it is simply sufficient that one party acquires the possibility of exercising decisive influence over another company[113]; which may be acquired, without a necessity for legal control, through the acquisition of property rights, assets, through shareholders agreements or may result from economic dependence[114]. The determining feature is whether the transaction will lead to a lasting change in direct or indirect control over one or more undertakings, regardless of the legal form by which the change of control may be brought about.

It stems from Article 3 of the ECMR, which follows the definition of control presented above[115], that control of an enterprise may be acquired by a single undertaking leading to *sole control*, or jointly by two or more undertakings leading to *joint control*. An

[113] Article 3(2), Merger Regulation.
[114] Jones, A., Sufrin, B., *op cit*. p. 866
[115] Varona, Galarza, Crespo & Alonso, *op cit*., p. 13.

acquisition of sole control will mean that there is a concentration in the form of a merger, while an acquisition of joint control means that the concentration is in the form of a joint venture[116].

Article 3 paragraph 2 gives a very broad definition for "other means" conferring the possibility of exercising decisive influence over an undertaking. Based on to the Commission Notice on the Concept of Concentration, sole control, is acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. This is the basic for determining the change in control. It is not in itself significant that the acquired shareholding is more than 50 % of the share capital or that it is 100 % of the share capital. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital[117]. The Commission accepted that sole control might also result from the acquisition of a "qualified minority" of the share capital[118].

On the other hand, joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence means the power to block actions which determine the strategic commercial behavior of an undertaking. Therefore, unlike sole control, which confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions[119]. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial

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[116] A concentration will also arise if there is a change from sole control to joint control or from joint control to sole control, including where this is a return to an earlier situation. Transactions in which there is a change in the structure of joint control (such as an increase in the number of shareholders exercising joint control) are also considered as a concentration.

[117] Commission Notice on The Concept of Concentration, para. 13.

[118] Verloop, P. (ed.) *Merger Control in the EU: A Survey of European Competition Laws. 3rd Revised Edition,* The Hague, Kluwer Law International, 1999 p. 6. For an application of this principle, Case IV/M.754, *Anglo-American Corporation/Lonrho***,** Commission Decision of 23 April 1997, OJ [1998] L 149/21. There, the Commission found that the acquisition of a qualified majority of 27.5% of the share capital sufficed to acquire sole control. See also Case IV/M.315, *Mannesmann/Valourec/llva*, EC Commission Decision of 31 January 1994, OJ [1994] L 102/15.

[119] See Varona, Galarza, Crespo & Alonso, *op cit*., pp. 14-16.

policy of the joint venture[120]. This is a natural outcome where the shareholders have equal voting rights.

As explained above, control, whether sole or joint, can be exercised on a *de facto* or on a *de jure* basis regardless of the size of the shareholding concerned. For example, in *Ameritech/Tele Danmark*[121], a shareholding of 34 % which was to be increased to 42 % has been held to confer decisive influence[122]. Control can be found to exist even where there is a shareholding of less than 25 % as in *CCIE/GTE*[123]. 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[124].

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[120] Commission Notice on The Concept of Concentration, para. 19.

[121] Case no IV/M.1046, *Ameritech/Tele Danmark*, EC Commission Decision of 5 December 1997, OJ [1998] C 025/18, para. 4:

> *"Ameritech and the Minister of Research and information Technology of the Kingdom of Denmark (.MRIT.) entered into the Share Disposition and Purchase Agreement on 27 October 1997 (.the notified agreement.) . Through the notified agreement, Ameritech will acquire from MRIT 4,500,000 A shares, amounting to 34% of the share capital of Tele Danmark. A subsequent capital reduction of the share capital of Tele Danmark through redemption of substantially all the shares owned by the Danish government will increase Ameritech.s stake to 42%. Ameritech will be de facto able to appoint half (6) of the members of the board of Tele Danmark and to appoint the chairman and vicechairman, who have a casting vote. The parties argue that under these provisions, Ameritech will gain a de facto control over Tele Danmark, since :*
>
> *(i) the rest of the shareholdings in Teledanmark will be widely dispersed. None of the remaining shareholders in Tele Danmark post transaction will hold a stake in excess of 7.5%.*
>
> *(ii)in the last three years, attendance to the shareholders meetings has been below 54%, so Ameritech is expected to control a de facto voting majority at the shareholders meeting".*

[122] Nourry, A. Van Kerchove, M. *EU Merger Control: Application and Recent Developments,* London, Competition Law Handbook, 2002/3, pp. 5-22.

[123] Case no IV/M.258, *CCIE / GTE*, EC Commission Decision of 25 September1992, OJ [1992] C 265, para 8:

> *"Following completion CCIE will hold [a minority] of the voting rights, the balance being held by other investors and management. CCIEL will have a permanent seat on EDIL's board and will appoint the Chairman and CEO. Other investors will together have only one seat on the board. The CCIE director's prior written approval will be required for all significant decisions (such as appointments and removal of board members, engagement and dismissal of senior employees, material capital expenditure, disposal of significant assets and approval of the annual budget). The parties state that this veto right will also apply to shareholder meetings and will be provided for in a new shareholders' agreement. CCIE will thus continue to control EDIL following completion".*

[124] Whish, *op cit*., p. 747.

Accordingly, there are various factors which may be relevant in deciding whether *de facto* control exists. There may be *de facto* control where, for example, a shareholder is highly likely to achieve a majority at shareholders' meetings or if the remaining shares are widely disperse[125]. There are also cases where a minority shareholder has the right to manage the activities of the company and to determine its business policy; minority shareholders may have a strong common interest which means that they would not in practice act against each other[126]. Here, it is important to highlight the perception of the Commission in determining which veto rights may be qualified as having control of an undertaking. There is a variety of vital elements for a company to exercise its activities on a lasting basis. The veto right conferred to the approval of the business plan, the budget and the appointment of the senior management are considered to be sufficient to have a control over an undertaking[127].

However, the grant of an option to purchase or convert shares will not of itself confer control, but it may do so if, at the time when the Commission carries out its appraisal of the concentration, it is shown that the beneficiary of the option has formed an intention to exercise the option[128]. In cases where the existence of such an intention cannot be established, "the fact that there is a strong likelihood of the option being exercised can be a factor which, in combination with other factors, may lead to the conclusion that control has been conferred"[129].

In cases where such veto rights are not directly conferred to shareholders, there might be cases where these minority shareholders may act in consensus and may reach a majority vote or a necessary voting right to block or take the decisions regardless of the vote of the majority share holders[130]. Furthermore, there may also be cases where neither of the shareholders qualify for the sole control, but may well reach a voting level through a

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[125] Nourry, A. Van Kerchove, M., *ibid*., pp. 5-22.
[126] Nourry, A. Van Kerchove, M., *ibid*., pp. 5-22.
[127] See especially Varona, Galarza, Crespo & Alonso, *op cit*., pp. 24-25 for extreme cases of decisive influence exercised over an undertaking in order to be deemed to have control over the entity.
[128] Nourry, A. Van Kerchove, M., *ibid*., pp. 5-22. See Case T-2/93 Air France v. EC Commission, CFI [1994] ECR II-323.
[129] Commission Notice on the concept of a concentration, OJ [1998] C 66/5.
[130] See Varona, Galarza, Crespo & Alonso, *op cit*., pp. 22-27.

concerted action. Although very difficult to determine such a collusive practice, the case may be for specific transactions where the holding of the control by one or two firms *de jure*, may risk the clearance by the Commission. This method, though, can be seen as an attempt to avoid the Community merger control.

As a result, whether the control of an undertaking is acquired or not is determined at each transaction. Although agreements between the shareholders and the Articles of Association are decisive at the first place in acquisition of control, in some cases, *absolute economic dependency* can also create a decisive influence over an undertaking, a clear example being a long term supply agreement.

3.2.1.2. Determination of Undertakings Concerned

The need for the operation to involve a change in control in order for a concentration to exist is a result of one of the essential features of the concept of concentration mentioned above: the existence of lasting structural change in the undertaking in question[131]. The possible forms of such occurrences are listed in the Commission Notice on the Concept of Undertakings Concerned[132] as follows: mergers, acquisition of sole control, acquisition of joint control, acquisition of control by a joint venture, change from joint control to sole control, change in the shareholding in cases of joint control of an existing joint venture, "demergers" and the break-up of companies, exchange of assets, acquisitions of control by individual persons, management buy-outs and acquisition of control by a state-owned company.

The notice and the forms of change of control described therein are important in identifying the scope of merger control with respect to specific transactions as well as in calculating the turnovers (of more below) of the undertakings in question in order to check whether a transaction meets the thresholds for being treated as concentrations with

[131] Varona, Galarza, Crespo & Alonso, *op cit*., p. 28.
[132] Commission Notice on the Concept of Undertakings Concerned, OJ [1998] C 66/14.

Community dimension[133]. Therefore it would be beneficial to briefly overview these possible forms.

In a merger, two or more previously independent companies come together to create a new company or, while remaining separate legal entities, to create a single economic unit. In such transactions the undertakings concerned are simply each of the merging entities.

In the case of acquisition of sole control, the undertakings concerned are the acquiring company and the acquired or target company. However, in cases of acquisition of sole control of part of a company the undertakings concerned will be the acquirer and the acquired part(s) of the target company. In cases of staggered operations or follow-up deals the second subparagraph of Article 5(2) of the ECMR applies. In such cases, the undertakings concerned are the acquirer and the different acquired part(s) of the target company taken as a whole. If the acquisition of sole control is effected after reduction or enlargement of the target company, the undertakings concerned will then be the acquiring company and the target company or companies in their configuration at the date of the operation. If the target company has divested an entity or closed a business prior to the date of the event triggering notification or where such a divestment or closure is a pre-condition for the operation, then sales of the divested entity or closed business are not to be included when calculating the turnover. Conversely, if the target company has acquired an entity prior to the date of the event triggering notification, the sales of the latter are to be added[134]. In cases where the target company is acquired by a subsidiary of a group of companies, the undertakings concerned for the purpose of calculating turnover are the target company and the acquiring subsidiary.

In the case of acquisition of joint control of a newly-created company, the undertakings concerned are *each of the companies acquiring control of the newly set-up joint venture.* The joint venture itself cannot be considered to be an undertaking concerned since it does not exist and thus has no turnover of its own yet. In the case of acquisition of

[133] Toksoy, F. Birleşme ve Devralma İşlemlerinde İlgili Tarafların Tespiti. *Rekabet Bülteni* 9, 2003, p. 1.
[134] Commission Notice on the Concept of Undertakings Concerned, para. 17.

joint control of a pre-existing company or business, the undertakings concerned are *each of the companies acquiring joint control* on the one hand, and the *pre-existing acquired company or business* on the other. In the case of acquisition of joint control with a view to immediate partition of assets where several undertakings come together solely for the purpose of acquiring another company and agree to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction, there is no effective concentration of economic power between the acquirers and the target company since the assets acquired are jointly held and controlled for only a "legal instant". This type of acquisition with a view to immediate partition of assets will in fact be considered to be several operations, whereby each of the acquiring companies acquires its relevant part of the target company. For each of these operations, the undertakings concerned will therefore be the *acquiring company* and *that part of the target which it is acquiring* (just as if there was an acquisition of sole control of part of a company)[135].

In transactions where a joint venture acquires control of another company, it is important to determine whether the joint venture should be regarded as a single undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. Where the acquisition is carried out by a full-function joint venture, the Commission will normally consider the joint venture itself and the target company to be the undertakings concerned (and not the joint venture's parent companies). Conversely, where the joint venture can be regarded as a vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company.

For changes from joint control to sole control, the undertakings concerned are the *remaining (acquiring) shareholder* and *the joint venture*. As is the case for any other seller, the "exiting" shareholder is not an undertaking concerned. The *ICI/Tioxide*[136] case

[135] Commission Notice on the Concept of Undertakings Concerned, para. 24.
[136] Case IV/M.023 - ICI/Tioxide, of 28 November 1990.

involved such a change from joint (50/50) control to sole control. The Commission considered that

> "[d]ecisive influence exercised solely is substantially different to decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties concerned. By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties."

In this case, the undertakings concerned were held to be ICI (as acquirer) and Tioxide as a whole (as acquiree), but not the seller Cookson"[137].

In the complicated case of change in the shareholding in cases of joint control of an existing joint venture, although the Commission assesses each operation on a case-by-case basis as to whether an operation leads to a change in the quality of control, a distinction must be made according to the circumstances of the change in the shareholding: First, one or more existing shareholders can exit; second, one or more new additional shareholders can enter; third, one or more existing shareholders can be replaced by one or more new shareholders. In the first case the Commission Notice points out that it is not the reduction in the number of shareholders per se which is important, but rather the fact that by whom their shares are acquired. Since, there may be a change from joint control to sole control of the remaining shareholder. The undertakings concerned in such cases will be the remaining (acquiring) shareholder and the acquired company (previously the joint venture). In the second case, in other words where after the transaction there is a reduction in the number of shareholders having joint control, but without leading to a change from joint to sole control and without any new entry or substitution of shareholders acquiring control, the proposed transaction will not to lead to a change in the quality of control and will therefore not be a notifiable concentration. This would be the case where, for example, five shareholders initially have equal stakes of 20 % each and where, after the operation, one shareholder exits and the remaining four shareholders each have equal stakes of 25 %. In the last case where one or more existing shareholders are replaced by one or more new shareholders is not comparable to the simple acquisition of part of a

[137] Commission Notice on the Concept of Undertakings Concerned, para. 32.

business as it implies a change in the nature and quality of control of the whole joint venture, even when, both before and after the operation, joint control is exercised by a given number of shareholders. The Commission therefore considers that the undertakings concerned in cases where there are changes in the shareholding are *the shareholders (both existing and new) who exercise joint control* and the *joint venture itself*. An example of such a change in the shareholding is the *Synthomer/Yule Catto* case[138], in which one of two parent companies with joint control over the pre-existing joint venture was replaced by a new parent company. Both parent companies with joint control (the existing one and the new one) and the joint venture were considered to be undertakings concerned[139].

What is called "demergers" or break-ups occurs when two undertakings merge or set up a joint venture, then subsequently demerge or break up their joint venture, and in particular the assets are split between the "demerging" parties, particularly in a configuration different from the original, there will normally be more than one acquisition of control[140]. For such demerger operation or break-up of a joint venture, the undertakings concerned (for each operation) will be, on the one hand, *the original parties to the merger or joint venture* and, on the other, *the assets or the part of the joint venture that each original party is acquiring*.

Where two or more companies exchange assets, each acquisition of control constitutes an independent concentration. Although transfers of assets in a swap are considered by the parties to be interdependent, the purpose of the ECMR is to assess the impact of the operation resulting from the acquisition of control by each of the companies. In such transactions the undertakings concerned are, for each property transfer, the *acquiring companies* and the *acquired companies* or assets.

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[138] Case IV/M.376 - Synthomer/Yule Catto, of 22 October 1993
[139] Commission Notice on the Concept of Undertakings Concerned, para. 45.
[140] Commission Notice on the Concept of Undertakings Concerned, para. 46.

According to the ECMR, a concentration is deemed to arise, where "one or more persons already controlling at least one undertaking" acquires control of the whole or parts of one or more undertakings[141]. This clearly indicates that acquisitions of control by individuals will bring about a lasting change in the structure of the companies concerned only if those individuals carry out economic activities of their own. The Commission considers that the undertakings concerned are *the target company* and *the individual acquirer* (with the turnover of the undertaking(s) controlled by that individual being included in the calculation of the individual's turnover)[142]. Based on the Commission decision referred to in the Notice, the *Asko/Jacobs/Adia*[143] case, where Asko, a German holding company, and Mr. Jacobs, a private Swiss investor, acquired joint control of Adia, a Swiss company active mainly in personnel services. Mr. Jacobs was considered to be an undertaking concerned because of the economic interests he held in the chocolate, confectionery and coffee sectors.

Management buy-outs, acquisition of control of a company by its own managers, is also an acquisition by individuals. However, the management of the company may pool its interests through a "vehicle company" so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, an undertaking concerned. At such circumstances, the general rule on acquisitions of control by a joint venture applies here. With or without a vehicle company, the management may also look for investors in order to finance the operation. Very often, the rights granted to these investors according to their shareholding may be such that control within the meaning of Article 3 of the ECMR will be conferred on them and not on the management itself, which may simply enjoy minority rights.

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[141] Merger Regulation, Article 3 (1).

[142] Commission Notice on the Concept of Undertakings Concerned, para. 51.

[143] Case IV/M.082 - Asko/Jacobs/Adia, of 16 May 1991, para. 6: *"ASKO is a German holding company with substantial retailing interests, mainly in Germany. KJJ is a private Swiss investor whose principal interests are industrial chocolate, sugar confectionery, and coffee. ADIA is a Swiss company active mainly in personnel services"*.

In the *CWB/Goldman Sachs/Tarkett*[144] decision, the two companies managing the investment funds taking part in the transaction were those acquiring joint control, and not the managers[145].

Lastly, when a State-owned company merges with or acquires control of another company controlled by the same State, although the new ECMR contains no specific reference, Recital 12 of the old ECMR may help clarify the question of whether such a transaction is a concentration or it is an internal restructuring operation of the "public sector group of companies":

> "in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them".

3.2.2. The Community Dimension

3.2.2.1. The Concept of Community Dimension

In order to apply the substantive provisions of ECMR it is necessary for the Commission to determine that the concentration has a Community dimension; because the competence and responsibility with regard to the transaction is only in that case vested with the Commission subject to the exceptions of one-stop-shop principles explained

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[144] Case IV/M.395 - CWB/Goldman Sachs/Tarkett, of 21 February 1994, para. 7:

> *"According to the shareholders' agreement, CWB and Goldman Sachs have certain rights as the managers of the largest shareholder groups. These include the right to three representatives on the Supervisory Board of TI, three representatives on the Shareholders Committee of TI, the right to approve the consolidated budgets and rights of information about TI and the Tarkett Group. In addition, a number of management actions require the approval of the shareholders' committee or for the subsidiaries of the Tarkett Group the shareholders or for TPAG the approval of the Supervisory Board. These include the adoption of or variation in any revenue or capital budgets of any division of the Tarkett Group, any acquisition or joint venture exceeding DM 1 million or having any outstanding loans other than specifically allowed for in the operation. These rights confer on CWB and Goldman Sachs the possibility significantly to influence management as well as rights of veto over certain significant decisions. CWB and Goldman Sachs will therefore have joint control over Tarkett".*.

[145] Commission Notice on the Concept of Undertakings Concerned, para. 54.

below. Therefore once it is established that a transaction constitutes a concentration within the meaning of the ECMR, it is time for the determination of Community dimension in order to assess whether or not it falls within the jurisdiction of ECMR.

At the first look, the concept of Community dimension seems to be developed to reflect the principle of *subsidiarity* in the field of merger control. However, as laid down in Article 5 of the Treaty Establishing the European Community and Protocol 30 thereof, both of them being introduced by the Treaty of Maastricht, the principle in question states that when the Community does not have exclusive competence in a specific area it should take action only if the objectives of the action cannot be sufficiently attained by the Member States (or sub-national level of government) and also if they can be achieved better by the Community. Eventhough the current Treaty does not enumerate the exclusive competences of the Community, a reading of the provisions and ECJ case-law clearly demonstrates and the proposed Constitutional Treaty explicitly provides that competition policy is such a competence. In other words, the Community does not share its powers in the area of merger control with the Member States. Therefore the concept of Community dimension does not derive from the principle of *subsidiarity* in the legal sense. However, the term "*subsidiarity*" is conventionally used, even by official authorities, in a casual way to discuss the delineation of competences and even tasks between Community, Member States and sub-national governments thus leading to such a confusion while, in fact, Community dimension is the reflection of a simpler necessity, that of efficiency. The Commission does not have the necessary financial or human resources to process each and every business transaction taking place in the Community. Nor does it have to since many transactions are too small in size to have a significant effect on the competitive process and thus are also excluded from the scope of national regimes of merger control. The difference between the jurisdictional provisions of the Community and national merger control regimes is that the former one differentiates between concentrations according to the particular level of government -in the multi-level governance structure of the EU- they should be assessed, not whether or not they should be assessed at all. Accordingly, those concentrations that have the potential to affect competition in the single market are cleared by the Commission; the others are left to the individual Member States.

The scope of Community dimension is basically determined with respect to thresholds. However in order to calculate the thresholds themselves one has to determine the relevant markets first. As the determination of relevant markets is also necessary to begin with the substantive assessment, which is the subject of a separate sub-section, this issue should be taken into consideration first.

3.2.2.2. Definition of Relevant Markets

The relevant market is an applied concept that is different than the economic market where, according to economic theory, the prices for equivalent goods are equalized save the transport costs. In competition policy the emphasis is not on prices *per se*, but on market power. Therefore the relevant market is where an undertaking or a group of undertakings perform market power. It follows that the relevant market does not need to be equivalent to the economic market[146]. There are two types of relevant market: relevant product market and relevant geographical market.

Relevant markets are likely to shift over time as changes take place that affect the factors taken into consideration in their assessment. Such changes might include technological advances that create new substitute goods and decreases in transport costs that erode the differences in the conditions of competition among neighboring areas. Therefore the relevant time period should also be established when the relevant markets are determined[147].

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[146] Senyücel, O. & Aktaş, C. İlgili Pazar Kavramı. *Rekabet Dergisi* 2, 2000, pp. 41-44.

[147] This is especially important in examinations on the abuse of a dominant position. See: Su, K. T. *Rekabet Hukukunda Teşebbüslerin Hakim Durumunun Belirlenmesinde Pazar Gücünün Ölçülmesi*. Ankara, Rekabet Kurumu, 2003, p. 14.

It should also be stressed that the relevant market is used both as a criterion for the determination of the jurisdiction and, once it is found that the transaction falls within the scope, the assessment of decrease of competition. Accordingly, the principal "objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure"[148].

3.2.2.2.1. The Relevant Product Market

The relevant product market comprises all the products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the products, their prices and its intended use. Thus the market includes the products that form the subject matter of the concentrationand also other products that are usually regarded as substitutable. In making this analysis the demand and supply-side substitutability is taken into account.

The Commission defines the relevant market only when necessary and in general will limit itself to an examination of the different alternative markets as mere working hypothesis, if this approach enables it to conclude that a concentration does not result in the creation or reinforcement of a dominant position[149].

However, there are cases where the Commission tends to define the market in a narrow way; for example, it differentiated between "matches for resale", "disposable lighters" and "publicity matches and disposable lighters" pointing out that "mere functional substitutability is not in itself sufficient to conclude that two products belong *to*

[148] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 , 09/12/1997, p. 5.
[149] Varona, Galarza, Crespo & Alonso, *op cit*., p. 90.

the same market"[150]*;* and in *WorldCom/MCI*[151]*,* it identified a separate market for "top level" or universal internet connectivity[152], based on a vertical dependency test combined with a hypothetical monopolist test[153].

The Commission's analysis in defining the relevant product market also takes into account the *demand substitution*. The basis in determining the demand substitution is how much the consumer is sensitive in price changes between the products. Also called the SSNIP test (small but significant, non transitory increase in price), it is the starting point of the Commissions analysis. In *Du Pont/ICI*[154] the Commission underlined that "[F]or two products to be regarded as substitutable, the direct consumer must consider it a realistic and rational possibility to react to, for example, a significant increase in the price of one product by switching in a relatively short period of time". Although establishing a certain

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[150] Case no IV/M.997, *Swedish Match/KAV*, EC Commission Decision of 18 December 1997, OJ [1998] C 048/5, paras. 10-20:

> *"Firstly, there is a clear distinction between lighters, which are mainly used by smokers, and matches which are preferred for domestic purposes. ... Secondly, the fact that customers buy matches and lighters from the same suppliers, cannot be regarded as significant in this case. ... In any event, matches were traditionally used by a certain number of potential lighters' consumers because the only available alternative were the relatively expensive 'gift' lighters; as soon as disposable and semidisposable lighters became widely available, these consumers switched to them. Subsequently the markets for matches and for lighters became stable and remained distinct. ... This is supported by the fact that prices of matches and lighters differ widely, matches being much more expensive in terms of cost by number of lights. ... It can therefore be concluded that <u>two different markets must be distinguished</u> for the purposes of the assessment of this case: (i) a distinct relevant market for resale matches, and (ii) a distinct relevant market for disposable and semi-disposable lighters".*

[151] Case no IV/M.1069, *WorldCom/MCI*, EC Commission Decision of 8 July 1998, OJ [1999] L 116/1.

[152] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.

[153] *WorldCom/MCI*, *op cit*. paras. 69-70:

> *"Secondary peering ISPs who wanted to offer complete connectivity could not avoid continuing to buy some transit from the top-level networks, and their cost base is therefore captive to the extent that they continue to have to do so. There is no evidence that customers would accept a limited-access service as a substitute for a full service, and a price increase of say 5-10% is unlikely to be sufficient to encourage switching. Applying the hypothetical monopolist test, if the top-level networks were to act as one unit, then there is no one capable of providing an adequate substitute service in response to price increases. If all top level ISPs were to increase their transit interconnection charges by say 5%, the ISPs outside this group could still provide a competitive constraint to the extent that they were able to use their peering agreements with some of the top-level networks to avoid the impact of the increase in transit charges. However, if faced with such a challenge to their price increase strategy, the top-level networks could react by charging for any interconnection, whether described as peering or transit. If this were to happen the unequal bargaining power of the secondary peering ISPs would not permit them to offer an effective competitive response.*
>
> *In summary therefore, the relevant market on which the merging parties are active is the market for the provision of <u>top level or .universal. Internet connectivity,</u> as explained above".*

[154] Du Pont/ICI Case IV/M214, (1992), [1993] OJ L7/13.

policy, this definition does not clarify the extent of increase in price level and the period in which the consumer is expected to switch to another product. The Commission, in its Notice on the definition of the relevant market, did not also prefer to give clear cut percentages for the price increase by stating an interval of 5 % to 10 %. Neither did it prefer to set a period of time, so as not to provide wrong guidance based on the fact that, accompanied with the price increase, the switching period may not provide a healthy conclusion due to the nature of the product.

However, the price sensibility of the consumer is not the only element in determining the relevant market. Other factors, such as *functional substitutability* which was the primary source of reasoning the Commission carried out in determining the relevant market in *Nestlé/Perrier*[155] case, are also considered. In this case the parties argued that soft drinks and mineral water are substitutes based on the functionality in their use: satisfying the thirst. However, the Commission rejected this argument by indicating that a partial overlap in functionality between two products does not demonstrate that they are in the same product market[156].

In *Guinness/Grand Metropolitan*[157], concerning the spirits industry, the product market is defined as each of the internationally known main spirit types individually, such as whiskey, vodka and gin. The occasions of consumption of the spirits as appetizer, digestive etc. also played an important role in this determination:

> "The strongest determinant of product market boundaries in spirits appears to be that of consumer demands and preferences, since they will drive the stocking and marketing policies of retailers, wholesalers and ultimately manufacturers. Third parties - both competitors and customers - consulted by the Commission generally supported a relatively narrow definition, characterising most spirit drinkers as having a degree of loyalty towards one or a few specific brands within the category (or categories) of choice, and with occasion-based consumption patterns, which were well-entrenched and unlikely to be seriously disturbed by relatively small price variations between types"[158].

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[155] Nestlé/Perrier Case IV/M190, OJ 1992 L356/1.
[156] See Varona, Galarza, Crespo & Alonso, *op cit*., p. 97.
[157] Guinness/Grand Metropolitan M 938, OJ 1998 L288/24.
[158] *Ibid*. Para. 13.

Accordingly, an important factor in determining the relevant product market is the *consumer preferences*. The consumer preference became an important determining factor through the use of market researches and consumption surveys of the companies. In *Procter&Gamble/VP Schickedanz (II)*[159] the notifying parties argued that tampons and sanitary towels were in the same market. However, although both products were serving the same function, the market researches supplied by other firms in the market showed that a consumer using sanitary towels would not switch to tampons even in the case of an increase in price of the former.

Supply substitution is another major complementary factor to consider in defining the relevant market. It is simply described as the ability of the producers to switch to other products. However, there are a number of conditions for supply substitution to be effective in the definition of the market. First of all, the switch should take place in a short period of time. Furthermore, it should not require a considerable investment and the products should be marketed in a short time. The supply substitution is important because it is a potential risk causing profit losses for the producers of the switched products. The supply substitution approach has been used by the Commission in *Torras/Sarrio*[160], among other examples, where papers with different qualities are considered to be in the same market since the producers could switch between the products in less than one day, using the same production means:

> "From the supply side, there is a rather high substitutability. Indeed, since the difference between coated and uncoated paper results from extra processing, the coating processing can be included whenever required. Since the different grades of paper result mainly from the blend used, the coating materials used and some other extra processing, it is relatively easy for a producer to switch from production of one paper type to another. This is particularly true with regard to the older non-integrated machines, which can be used for various kinds of paper production. The high speed, high capacity and highly integrated new mills are also able to switch from production of one paper type to another, although to a lesser extent than older non-integrated machines"[161].

[159] Procter&Gamble/VP Schickedanz (II), Case IV/M430, [1994], OJ L354/32.
[160] Torras/Sario, Case IV/M166, (1992).
[161] *Ibid.* Para. 18.

3.2.2.2.2. The Relevant Geographic Market

The relevant geographic market is the geographical area in which the companies concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently uniform, and which can be distinguished from neighboring areas because conditions of competition are appreciably different in those areas. Conditions of competition which would indicate separate geographic markets include the existence of significant price differentials or transport costs[162], differences in customer preferences, and trade barriers such as licensing requirements[163].

The Commission's approach as regards defining the geographic market can be summed up in the following manner: The Commission will initially identify possible geographic markets (that is, whether they have a local, national, Community or world dimension) on the basis of general indicators, such as the distribution of market shares of the principal suppliers or possible differences in price between different regions[164]. Accordingly, taking the market shares and the price differences into consideration, the Commission will be left with few possibilities. However, market shares and price differentials may not be sufficient in order to determine the relevant geographical market. This may be due to the existence of other factors, as the case may be, such as consumer preferences, protection of national producers, language, culture and lifestyle.

Out of the 1295 merger control decisions taken by the Commission in a recent five year period, 184 decisions (14.2 %) defined the relevant geographic markets as national. In 187 cases (14.4 %) markets were wider than national. In the remaining 924 (71.4 %), the scope of the markets was left open, because competition concerns would not arise under any alternative definition (either EEA-wide, regional or national)[165].

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[162] The famous example is the cement market where the relevant geographical market is characterized by the profitable transportation distance of 300 to 400 kilometers.
[163] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.
[164] Varona, Galarza, Crespo & Alonso, *op cit*., p. 124.
[165] Van Bael & Bellis, *op cit*., p. 792.

3.2.2.3. Thresholds

The thresholds in the ECMR are designed to establish jurisdiction and not to assess the market position of the parties to the concentration or the impact of the operation. In so doing the thresholds include turnover derived from all activities of the parties, and not just those directly related to the concentration. While Article 1 of the ECMR sets out the thresholds to be used to determine a concentration with a "Community dimension", Article 5 explains how turnovers should be calculated[166]. Both articles were long debated during the modernization process; however, no changes occurred in their application. The topics discussed shall be analyzed below to better emphasize the standing point of the Commission.

The fact that the thresholds mentioned in Article 1 of the ECMR are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria, shows that their aim is to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable[167]. However, despite the aim of the Regulation to provide a simple jurisdictional test, the quantification of "turnover" and the identification of the "undertakings concerned" are not as simple as it might seem at first[168]. This is maybe why the Commission has chosen to clarify the meaning of turnover and undertakings concerned in separate Commission Notices.

A concentration will have a Community dimension where the turnover thresholds set out in the ECMR are exceeded. The turnover thresholds are deemed to be exceeded where according to Article 1 (2), (i) the combined aggregate worldwide turnover of all the companies concerned is more than five billion Euros[169] and (ii) the aggregate Community-

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[166] Commission Notice On Calculation Of Turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ [1998] C 66/25 para. 4.
[167] Commission Notice on Calculation of Turnover, para. 5.
[168] Broberg, M. *The European Commissions Jurisdiction to Scrutinise Mergers.* The Hague, Kluwer Law International, 1998, chaps. 4-6.
[169] This threshold is intended to exclude mergers between small and medium-sized companies.

wide turnover of each of at least two of the companies concerned[170] is more than 250 million Euros[171], unless each of the companies concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State[172].

However, if Article 1 (2) threshold is not triggered, the additional and more detailed threshold of Article 1 (3) comes into play. Accordingly, a concentration can still have a Community dimension where the following conditions are met: (i) The combined aggregate worldwide turnover of all undertakings concerned is more than two and a half billion Euros instead of five billion Euros, (ii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million Euros instead of 250 million Euros, (iii) the combined aggregate turnover of all undertakings concerned is more than Euro 100 million in each of at least three member states, (iv) in each of at least three of these Member States the aggregate turnover of each of at least two of the undertakings concerned is more than 25 million Euros, (v) unless each of the companies concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

The second part (Article 1(3)) of the turnover test covers concentrations of a smaller size where the parties jointly and individually perform a minimum level of activities in three or more Member States.

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[170] This so-called "at least two of the undertakings" rule is intended to overcome the possible anti-circumvention technique of including one or more undertakings with small Community turnovers in the transaction in order to escape merger control.

[171] This threshold is intended to exclude relatively minor acquisitions by large companies or acquisitions with only a minor European dimension.

[172] This so-called "two-thirds rule" is intended to exclude cases where the effects of the merger are felt primarily in a single Member State and therefore it is more appropriate for the national competition authorities to deal with it.

This requirement was introduced in March 1998, by way of amendment to the old ECMR[173] that has been kept in the new one, in order to bring more mergers within the scope of the Regulation so giving the parties the benefit of its one-stop shop principle and so eliminating the problem of multiple filings to national competition authorities. The introduction of the second threshold has increased the number of notifications to the Commission as intended.

Once the undertakings concerned are identified, their turnover for the purposes of determining the relevant jurisdiction must be calculated according to the Article 5 of the ECMR[174] which sets the general rule that the turnover is based on the sale of products or the provision of services realized during the last financial year[175]. This can be obtained from the profit and loss statement in the audited accounts for that financial year. Deductions may be made from this figure in respect of sales rebates, and value added tax and other taxes directly related to turnover. Sales of goods or the provision of services between companies belonging to the same group are excluded from turnover[176].

Where the concentration consists of the acquisition of parts of one or more undertakings, unlike the general rule[177], only the turnover relating to those parts that are the subject of the transaction is to be taken into account[178].

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[173] The turnover thresholds of Article 1 of the ECMR were originally intended to be reviewed in 1993. At that stage, however, it was considered that the experience that had been gained was insufficient. The review of the thresholds was therefore postponed. In 1995, Karel Van Miert, the Competition Commissioner for the period 1995 to 1999, presented a proposal for amending the thresholds in order to diminish the worldwide turnover threshold from five to two billion Euros and the Community wide turnover from 250 to 100 million Euros. Further to this proposal the Commission announced in July 1996 a proposal for a regulation aiming at lowering the thresholds in order to remedy multiple notifications. Then followed the Green Paper on the Revision of the Merger Regulation, COM (96) 19 final, which highlighted that a number of concentration operations of Community interest having significant effect on trade between Member States were escaping the application of the Regulation because of the high level of thresholds. The resulting consultation supported the Commission's claims. Ultimately in 1998, after enough experience, the ECMR was amended by means of Council Regulation (EC) 1310/97.

[174] The rules for calculating turnover in accordance with Article 5 are detailed in the Commission Notice on Calculation of Turnover, OJ [1998] C 66/25.

[175] Merger Regulation, Article 5(1).

[176] Merger Regulation, Article 5(1).

[177] The general rule states that turnover should be calculated on a consolidated basis.

[178] Merger Regulation, Article 5(2).

Another main provision of Article 5 is that the turnover of the undertakings concerned in the transaction must also include that of all the other undertakings which belong to the same group. The relevant definitions of group companies for this purpose in the ECMR[179] and the Commission's Notice on the calculation of turnover[180] extend beyond legal control. The intention of Article 5(4), though, is to ensure that the total volume of the economic resources being concentrated should be taken into account when determining whether a concentration has a Community dimension[181]. In that regard, it is to note that special rules apply for the calculation of the turnover of banks and other financial institutions, and insurance companies[182].

There may also be cases where a transaction may be caught by the ECMR despite the fact that neither the parties nor the business concerned have a registered office, subsidiary or branch within the EU. In *Gencor Case[183],* Gencor argued that the ECMR should not be applied to economic activities carried out outside the EU. The CFI rejected this argument, concluding that the Regulation applies to all concentrations with a Community dimension. The Regulation does not require that the companies must be established or carry out production in the Community and their trading activities' volume can be decisive in the impact in the EEA:

> "The parties' total sales in the EEA are as follows: Lonrho ECU 1,281 million in 1994 and Gencor ECU 1,164 million in 1995. Furthermore LPD's sales of PGMs are made through Western Metal Sales, a Lonrho subsidiary, based in Brussels.
>
> AAC's platinum operation, Amplats, the third major South African supplier also sells a significant proportion of its metal through its exclusive sales' agent, Johnson Matthey in the UK. Johnson Matthey then sells to its customers and subsidiaries throughout the world. During the period 1993 to 1995 Western European consumption of PGMs accounted for some 20% of world demand. However this statistic must be treated with caution because, as concluded below, the PGM markets are worldwide. Accordingly PGMs travel freely, widely and easily; a sale in one region incurs a use in another. Some of the parties' sales to customers located in the EEA are exported to third countries, e.g. LPD sells to Mitsubishi in the UK which then sells to ultimate customers based in Japan. Conversely, Implats'

[179] Merger Regulation, Article 5(4).
[180] Notice on the concept of undertakings concerned, OJ [1998] C 66/25.
[181] Whish, *op cit*., p. 755.
[182] Merger Regulation, Article 5(3).
[183] Case T-102/96, *Gencor Ltd v Commission of the European Communities*, CFI, ECR [1999] II-753.

> largest customer is General Motors which make its purchases in North America. General Motors then resells to its subsidiaries in the EU.
>
> There is a considerable presence of the downstream "fabricator" industry (turning PGMs into semi-finished and finished products) in the EEA and includes multi-national companies based in the UK, Germany and France. Furthermore one of the three international markets for PGMs is based in London with good delivery, for this market, taking place in Zurich.
>
> On the basis of the above it has been concluded that any effects on the world market would be fully reflected in the European Union and the EEA"[184].

Two other major examples for mergers outside the EU are *Boeing/McDonnell Douglas*[185] and *WorldCom/ MCI*[186], where mergers between US companies were caught by the ECMR because each of the multinationals concerned had EU turnover in excess of Euro 250 million.

Many such transactions tend to be cleared as a matter of course, but the Commission will not hesitate to impose conditions on the mergers where it considers that they have a significant negative impact on competition in the common market, as it did in the *Boeing/McDonnell Douglas* and *World/Com/MCI* cases and it may even block a concentration, as it did in *Gencor/Lonrho*[187] and of course in *GE/Honeywell*[188].

3.2.3. Referral Mechanism

As stated before, the ECMR has a number of exceptions to the one-stop-stop principle that form the final and –at least currently– the most indefinite issue in the determination of the jurisdiction of the EC merger control regime. The exceptions in question reviewed and enhanced as part of the latest reform so as to either allow pre-

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[184] *Ibid*. Paras. 14-18.

185 Case no IV/M.877, *Boeing/McDonnell Douglas*, EC Commission Decision of 30 July 1997, OJ [1997] L 336/16.

186 Case no IV/M.1069, *WorldCom/MCI*, EC Commission Decision of 8 July 1998, OJ [1999] L 116/1.

[187] Case no IV/M.619, *Gencor/Lonrho,* EC Commission Decision of 24 April 1996, OJ [1997] L 11/30.

[188] M.2220, GE/Honeywell, EC Commission Decision of 3 July 2001.

notification referrals or allowing the interference of national competition authorities, enables notifications to be referred to Member States and vice versa.

The changes regarding the allocation of jurisdiction introduced by the new ECMR focus on the modification of the system of referrals both at the pre-notification stage (article 4 of the New ECMR) and post-notification under Articles 9 and 22 of the old ECMR. This change aim to achieve a better allocation of cases between the Commission and national authorities and at reinforcing the one-stop shop principle "by granting companies the possibility of requesting referrals to or from the Commission [. . .] so as to improve further the efficiency of the system for the control of concentrations within the Community"[189, 190].

3.2.3.1. Post-Notification Referrals

One exception to the exclusive authority of the Commission to clear transactions is the assignment of the control envisaged by the Regulation to the competent authorities of the Member State[191]. According to this rule - which is slightly redesigned regarding procedural concerns in the new ECMR - the competition authority of the subject Member State may request from the Commission, or the Commission may invite the subject Member State(s) to conduct the control instead of the Commission despite the fact that the operation in question may have a Community dimension, if the concentration operation may result in affecting competition in a market within that Member State which has the characteristics of creating by itself a distinct market. In such cases the Commission may authorize the related authority to control the operation. This is the so-called German Clause.

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[189] See Recitals 11, 12 and 16 of the new ECMR.
[190] Diaz, F. E. G. The Reform of European Merger Control: Quid Novi Sub Sole? *World Competition* 27 (2), 2004, p. 180.
[191] Merger Regulation, Article 9.

ECMR also included the Legitimate Interests Clause, Article 21 (4), right from the beginning. This provision enables the application of national legislation to concentrations with a Community dimension when interests such as public security, the plurality of media and prudential rules are at the stake. Other interests might also be protected via this mechanism; but the Member States have to take authorization from the Commission first. The Commission has 25 working days to decide on Member State demands for the application of this provision.

The Commission, however, with the fear that it may decrease its authority, did not usually welcome referrals during the application of the old ECMR. Only in cases where the transaction was likely to create a dominant position in the regional markets smaller than the national market of the Member State in question did the Commission accepted the referral of the case to national authorities under the German Clause[192].

ECMR also enables the Member States which do not have legislation for control of mergers to apply to the Commission to have the control made directly by the Commission for the operations of this scope that influences their countries, but does not have a Community dimension. However this procedure of referral to the Commission has been used only few times during the old regime[193].

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[192] See for example Case No IV/M.180, *Steetley/Tarmac*, EC Commission Decision of 12 February 1992, [1992] 4 CMLR 343, para. 37:

> *"The Commission considers it appropriate to refer this case to the competent authorities of the United Kingdom with respect to bricks since for this product the geographic reference market identified above is local in nature and the competition issues identified are limited entirely to the territory of the United Kingdom. In relation to clay tiles the reference market covers the whole of Great Britain. Nevertheless, the Commission considers that good grounds exist for also referring this aspect of the case to the United Kingdom authorities. Indeed, the low level of trade flows for this product between Great Britain and the rest of the Community has the result that the economic consequences of the merger will be materially limited to the United Kingdom".*

[193] Merger Regulation, Article 22.

Article 22(3), known as the Dutch Clause[194], as the reverse of Article 9, establishes the referral procedure to the Commission by the Member States. According to the Article 9 (2) (a) of the ECMR, following the receipt of a notification, a Member State may inform the Commission that the concentration threatens to affect significantly competition in a market within that Member State which presents all the characteristics of a distinct market[195].

In order to adopt the referrals to the newly introduced assessment test through the modernization, the Commission implemented to allow referral requests on the basis that competition would be significantly affected on a distinct market within a given Member State. In this case, national authorities would not be obliged to present elaborate preliminary conclusions with regard to the competitive assessment of the case, especially with regard to the alleged dominant position of the undertakings concerned.

From the same viewpoint, Article 22 is also applicable in cases which have a significant impact on competition beyond a single Member State. According to Article 22, one or more Member States may request the Commission to examine any concentration that does not have a Community dimension but affecting competition within the territory of the Member State or States making the request and trade between Member States.

3.2.3.2. Pre-Notification Referrals

Within the context of the old ECMR, the referral provisions could only be used after a merger has been notified to either the Commission or the national competition authorities. This fact seemed to be the major cause for the loss of time and administrative efficiency and also created unnecessary costs for the merging companies. In Article 22 cases, the delay could easily reach several months. To remedy the situation the new Article

[194] Based on a converse reasoning to that of the German clause, Article 22 is introduced following the requests of Netherlands, Belgium, Denmark, Greece, Italy and Luxembourg, which at the time of the preparation of the Regulation did not have sufficient merger control mechanisms. Among those, the only Member State that still does not have a merger control regime is Luxembourg. It should also be mentioned that in the UK notification is voluntary for undertakings that pass a certain threshold.
[195] Merger Regulation, Art. 9 (2) (a).

4 paragraphs 4 and 5 make it possible for Articles 9 and 22 to be applicable at a pre-notification stage, at the request of the merging parties.

According to new Article 4 paragraph 4, prior to the notification of a concentration, the undertakings or persons concerned may inform the Commission, by means of a reasoned submission, that the concentration affects competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State[196].

Further to the receipt of this submission, the Commission transmits it to all Member States[197]. After this stage, the Member State concerned has to express its agreement or disagreement as regards the request to refer the concentration within 15 working days of receiving the submission. Where the Member State concerned takes no such decision within that period, it will simply be deemed to have agreed[198].

Unless the Member State concerned disagrees, the Commission, where it considers that such a distinct market exists, and will be affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national legislation on competition[199].

The Commission is limited with a period of 25 working days starting from the receipt of the reasoned submission to take the decision whether or not to refer the case. When the Commission reaches a decision, it informs the other Member States and the undertakings concerned. However, in cases where the Commission does not take a decision within the specified period, it will be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned[200].

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[196] Merger Regulation, Article 4 (4) subparagraph 1.
[197] For the timing of transmitting the submission to the Member States the proposition does not specify any period but simply notes “without delay”.
[198] Merger Regulation Article 4 (4) subparagraph 2.
[199] Merger Regulation Article 4 (4) subparagraph 3.
[200] Merger Regulation, Article 4 (4) subparagraph 4.

The new article provides that if the Commission decides to refer the whole of the case to the competent authorities of the Member State concerned, no further notification can be made to the Commission.

According to the provisions laid down in the Article 4 (5) with regard to a concentration which would not have a Community dimension, the persons or undertakings concerned may, prior to its notification to the competent authorities of one or more Member States, inform the Commission by means of a reasoned submission that the concentration has significant cross-border effects and should therefore be examined by the Commission[201]. The Commission transmits this submission to all Member States, again without delay.

The Member State or States concerned are limited with a period of 15 working days whether or not to request the Commission to examine the concentration. In cases where a Member State takes no such decision within 15 working days, it will be deemed to have adopted a decision to make such a request to the Commission. It is also regulated that no notification of the concentration can be submitted to the Member State or States concerned before the decision whether or not to request has been adopted.

As to the possible outcome of this system, first of all, the new referral system forms a basis for focusing on cases that have a significant cross-border impact at the Community level. The system also has the advantage of creating a balance between Community and national interests by providing a "two-way approach" by way of referrals both from and to the Commission. Furthermore, the new rules also create a system of allocation of the cases when triggered by the parties at the pre-notification stage. The referrals at the pre-notification stage allows for notifications to find the right address. This, of course reduces legal uncertainty and cost for the merging parties. However, despite the criticism, Article 4(5) referrals may become very important under the new EC merger control regime in a EU composed of 27 Member States, since they may allow the parties to a transaction, if no Member State with jurisdiction over the case opposes the referral, to

[201] Merger Regulation, Article 4 (5) subparagraph 1.

have the concentration reviewed only by the Commission, with an EU-wide effect, instead of facing the burden of notifying the transaction to several EU Member States' competent authorities[202].

It should also be taken into account that, an application under Articles 4(4) or 4(5) requires submission of a "reasoned submission". Further, the consideration of the application in either case will take 25 working days. Therefore, the use of these provisions by the parties will require a substantial amount of preparation and would need to be factored into the transaction timetable. Diaz criticizes this system as highly complex and it might well be that the workload and costs involved in preparing a reasoned submission, which at least in its current version, requires much of the data required on a Form CO, and the threat of a single Member State vetoing the referral, will deter the notifying parties from seeking a referral[203].

Another issue is that it is still not clear whether in order for this pre-notification procedure to operate effectively the transaction will need to be in the public domain. In the case of confidential and highly price-sensitive transactions the parties will be concerned about the level of consultation and document exchange that may be required. On the other hand, third parties may feel that it is inappropriate for these questions to be determined without the ability to comment. Indeed, the Commission may not wish to form a view on the parties' submissions without the ability to consult third parties. To provide a clearer picture of the use of the referrals both ways in pre or post notification stages the above table depicting the breakdown of referrals is presented. The striking observation is that, despite all criticism, there is an extensive use of the pre-notification referral system during the short period of time of its introduction, when compared to the post-notification referrals.

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[202] Diaz., *op cit*., p. 183.
[203] *ibid.*, p. 184.

Table 1

Breakdown of Referrals

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07[204]	Total
Art 4(4) request (Form RS)															2	14	13	3	**32**
Art 4(4) referral to Member State															2	11	13	1	**27**
Art 4(4) refusal of referral															0	0	0	0	**0**
Art 4(5) request (Form RS)															20	28	38	15	**101**
Art 4(5) referral accepted															16	24	39	14	**93**
Art 4(5) refusal of referral															2	0	0	0	**2**
Art 22 request	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	4	4	0	**16**
Art 22(3) referral	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	3	3	0	**14**
Art 22(3) refusal of referral																1	1	0	**2**
Art 9 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	2	**77**
Art 9.3 partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	**36**
Art 9.3 full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	0	**30**
Art 9.3 refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	**3**

Source: <http://ec.europa.eu/comm/competition/mergers/statistics.pdf>.

[204] Figures for the year 2007 are up to March.

3.3. Substantive Issues

3.3.1. The Issue of Dominance

Even though one of the most important aspects of the 2004 merger reform was the replacement of the existing "creation or strengthening of a dominant position" test[205] with the "significant lessening of competition" (SLC) test, the issue of dominance or the so-called dominance test still plays a central role in the assessment of mergers as the creation or strengthening of a dominant position is the major sign of the anti-competitive potential of a concentration and a significant barrier to effective competition.

With a view to preserving the guidance that may be taken from past judgments of the European courts and Commission decisions pursuant to the old ECMR, while at the same time keeping consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, the new ECMR establishes the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market[206].

In assessing whether a concentration will create or strengthen a dominant position, the Article 82 case-law, as well as cases on dominance in the context of the ECMR, will be relevant. However, it is important to stress that, whereas Article 82 applies only to the abuse of a pre-existing dominant position, the ECMR can be used to control the creation, as well as the strengthening, of a dominant position. In other words while the former is a reactive *ex-post* tool, the latter allows proactive *ex-ante* application, at least as long as the parties of the transaction perform their notification obligations. The ability to prevent

[205] This will be referred to in this thesis as the 'Dominance Test'.
[206] Council Regulation (EEC) No 139/2004 Recital 26

concentrations that would bring about an undesirable market structure is a particularly important feature of the ECMR[207].

The dominance test cannot be used to prohibit the creation and reinforcement of dominant position as long as a healthy competitive environment exists. Accordingly, both the old and the new ECMR provide greater flexibility to the Commission in comparison with Article 82. The Commission may approve a concentration even if at the end of its assessment it comes to the conclusion that a dominant position will be created.

In order to analyze the dominance, the first thing to do is to work out the relevant markets which the transaction is going to affect. This, as explained in the previous sub-section, requires the working out of the product and geographical markets where a certain degree of market power exists concerning the transaction in question.

Market power usually shows itself through market shares. In assessing a concentration's compatibility with the common market, the Commission will, most of all, take into account the market share the merged entity would have. A market share below 25% will generally be presumed to be compatible with the common market[208]. This, of course, does not mean that those market shares above 25% cannot be cleared. However, this ratio can well make the legality of a merger resulting in a market share of below 25% less questionable. Hence, the Commission has not ruled out the possibility of market shares between 20% and 40% constituting a dominant position[209]. Large market shares, generally leading to a Phase II investigation, will not necessarily lead to prohibition[210] but

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[207] Whish, *op cit*., p:455

[208] Merger Regulation, Recital 32.

[209] IX[th] Report on Competition Policy, para. 22.

[210] For example, market shares of 80 % and 60 % were respectively cleared in Case IV/M.042*, Alcatel/Telettra,* EC Commission Decision of 12 April 1991, OJ [1991] L 122/48 and Case no IV/M.997, *Swedish Match/KAV*, EC Commission Decision of 18 December 1997, OJ [1998] C 048/5.

> "In Alcatel/Telettra which concerned the telecommunications transmission market in Spain, the Commission was prepared to accept that notwithstanding the merged entity would have an 81 per cent market share in line transmission equipment and an 83 per cent market share of the microwave equipment market, that this market power was countered by the buying power of Telefonica, the monopolistic purchaser in Spain. Indeed, it accepted that the high shares of Alcatel and Telettra were a direct result of Telefonica's choice of these companies as main suppliers."

Hawkes, L. The EC Merger Control Regulation: Not an Industrial Policy Instrument: The De Havilland Decision. *European Competition Law Review* 13 (1), 1992, p. 37.

a market share of 80% shared amongst the key players did lead to a decision of incompatibility in *Airtours/First Choice*[211].

In order to assess the impact of the market share, the Commission will look at the factors referred to in Article 2 (l) (a) and (b) of the ECMR. Accordingly, one of the major factors in assessing the effect of the market share will classify as the existence of potential new entrants to the market. In *ITS/Signode/Titan*[212], a case concerning the market for the supply of steel and plastic-strapping, the Commission found that the parties' combined market share of 40% in steel-strapping caused concern[213]:

> "Although the parties will have a high market share there is a large number of other suppliers, in particular in the plastic strapping segment. In view of the fact that the overall market for strapping is growing at about 3% a year and the steel segment is in relative decline (see point 30), the market share of the merging parties is expected to decline over time as their presence in the plastic strapping is relatively weaker. Furthermore, since there are continuing improvements in materials and technology, particularly for plastic strapping and equipment, the smaller competitors are likely to be able to further develop their businesses. Several competitors have been installing additional capacity in recent years, in particular Maillis, Lenzen, Teufelberger Strapex, Sander and Plastic Extruders. Even in the steel strapping area where the long term trend in consumption is downwards at least two competing producers are installing additional capacity"[214].

Countervailing buying power on the part of customer side is also important especially where a reduced number of clients represent a very high portion of the sales of the merged entity or the clients are professional buyers in terms of bargaining power. A clear example being *Enso/Stora*[215], where the Commission found that although the number of suppliers of liquid packaging board would be reduced to three, the merged entity would face countervailing buyer power from their three main customers, being the main customer Tetra Pak which realized 80 % of all of the purchases[216].

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[211] The incompatibility Decision of the Commission is annulled by the CFI.
[212] Case no IV/M.970, *ITS/Signode/Titan*, EC Commission Decision of 6 May 1998, OJ [1998] L 316/33.
[213] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.
[214] ITS/Signode/Titan, op cit. Para. 68
[215] Case No IV/M.1225, *Enso/Stora*, EC Commission Decision of 25 November 1998, OJ [1999] L 254/9.
[216] See also Varona, Galarza, Crespo & Alonso, *op cit*., p. 191.

The existence of *vertical linkages* is brought out in two cases[217] where the merged companies were to supply digital pay-TV services, but the Commission found that the concentrations would have created or strengthened dominant positions in certain vertical markets, including technical pay-TV services, set-top-box technology and access to cable networks[218].

Kali und Salz[219] is an example where the ECJ approved the Commission's consideration of the *failing firm defense*[220], where a concentration is deemed compatible with the common market, notwithstanding the parties' market position, if one of the parties is in a position to be forced out of the market if the merger were not put into practice, and if there are no other solutions which are less anti-competitive than the concentration[221]. A less anti-competitive option may well be the possible acquisition of the failing firm by another player in the market.

The creation or strengthening of a strong position in *neighboring markets* is another important issue. In *Walters Kluwer/Reed Elsevier*[222], the Commission determined that the merger of the top two publishers of professional and specialist information gave rise to concerns due to the effects of the merger on various neighboring markets, including academic journals and books world-wide, professional books on law and taxation in various member states, and educational publishing for schools in the UK. The Commission ruled that the combined strength of the parties across a wide range of neighboring markets could lead to competition problems[223]. This being mainly through the parties' size and

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217 Case IV/M.993, Bertelsmann/Kirch/Premiere, EC Commission Decision of 27 May 1998, OJ [1999] L 053/1; Case no IV/M.1027, Deutsche Telekom/Betaresearch, EC Commission Decision of 27 May 1998, OJ [1999] L 53/31.

218 Toksoy, F. Avrupa Topluluğu Rekabet Hukuku ve Medya Sektörü. *Rekabet Bülteni* 1, 1999, p. 12.

219 Joined Cases C-68/94 and C-30/95, Kali und Salz (France v. Commission) [1998] ECR I- 1375, [1998] 4 CMLR 829.

220 See *Infra*. Section 3.3.4.1.5.

221 Varona, Galarza, Crespo & Alonso, *op cit*., p. 337.

222 Case IV/M.1040, *Walters Kluwer/Reed Elsevier*, EC Commission Decision of 9 March 1998, abandoned by the parties.

223 The case is also important in the sense that the market definition is based on supply substitution; creating a strong basis for the phenomena of creation or strengthening of a strong position in neighboring markets. The Commission concluded that "in such markets the product market definition must be based on supply. Once editors had achieved recognition or prestige in a given professional area (for example, lawyers or academics) and had developed the necessary knowledge and experience the Commission's starting point was

copyright ownership having capacity to lead to a *foreclosure* effect discouraging possible market entries[224].

The Commission is also concerned if a merger creates *market foreclosure* through ties with customers and suppliers. In *Hoffmann-La Rachel Boehringer Mannheim*[225] concerning the market in clinical chemistry testing products, the Commission determined that the parties would benefit from an installed base of instruments needed to perform the tests, leading to the risk that customers would become "locked in" to buying the testing products from the parties due to their dependence on the parties for service and maintenance of these instruments[226].

The capacity to offer the whole range or portfolio of complementary products that are generally acquired by the same client or the same or adjacent market can be significant in determining the market power.[227] The phenomenon is called as the portfolio effect. Concerning the portfolio effects in conglomerate mergers, the OECD Roundtable concluded:

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that they were capable of publishing different titles in this area". Varona, Galarza, Crespo & Alonso, *op cit*., p. 118.

[224] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.

[225] Case IV/M.950, *Hoffmann-La Rachel Boehringer Mannheim*, EC Commission Decision of 4 February 1998, OJ [1998] L 234/14, para. 75:

> *"The customers' choice of a certain instrument tends to have a lock-in effect, irrespective of whether they have bought the instrument or whether they received it from the supplier in exchange for the conclusion of a reagent delivery contract. This lock-in effect arises both out of contractual commitments and from the economic rationale of operating a laboratory business. If a customer has bought an instrument, it would normally not be replaced before the end of its depreciation period (normally five years). If the customer has received the instrument, the reagent delivery contracts used by Roche and BM will typically be concluded for a period of five years. During the contractual period the customer is committed to purchase reagents (expressed either in terms of a certain yearly value or as a certain minimum number of test-kits) from the instrument supplier for several years. The standard contracts submitted by Roche do not foresee any possibility of early termination of the contract. This yearly purchase obligation is calculated individually for each customer, on the basis of its projected annual consumption. Customers also have an economic incentive to concentrate as large a proportion of certain tests as possible on a specific instrument, as this is the most immediate way to reduce its per-test cost (optimal use of invested capital, minimising cost for training of personnel, etc.). The total price to be paid by the customer will also include a rental fee for the instrument. The calculation of the latter takes account of the initial price of the instrument, the contractual period, its value after that period and capital costs. Typically, the agreement will also include the provision of additional services, such as training of the customer's staff, maintenance and supplies of disposables."*

[226] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.

[227] See Varona, Galarza, Crespo & Alonso, *op cit*., pp. 169-170.

> "Portfolio effects in conglomerate mergers include potential pro and anti-competitive effects that might arise due to a merger uniting complementary products in which one or more parties enjoy significant market power… The complementarities featured in conglomerate mergers displaying portfolio effects extend beyond classic economic complementarities. They cover as well "technical" complementarities (products which, for technical reasons, must be consumed together) and "commercial" complements (products forming part of a range which distributors need to carry, such as spirits, soft drinks, etc.). They also extend to products for which the strength of demand for one is positively correlated with strength of demand for the other (e.g. consumers with the strongest demands for spread sheets might also have the strongest demands for database managers)."[228]

In *Guinness/Grand Metropolitan*[229], the Commission assessed the effect of including strong brands belonging to separate markets in a range of drinks, and found that the inclusion of the brands could give each brand in the portfolio greater strength on the market than if it were sold individually, thereby strengthening the competitive position of the portfolio owner[230]. In *WorldCom/MCI*[231], the Commission established that *network effects*, a situation better termed as network externalities, where the attraction of a network to its customers is affected by the number of other customers connected to the same network, would have allowed the merged entity to behave independently of its competitors, and to reduce the quality of the internet-related services offered by its competitors[232]. This fact is also underlined and defined in Paragraph 36 of the Horizontal Merger Guidelines:

> "In markets where interoperability between different infrastructures or platforms is important, a merger may give the merged entity the ability and incentive to raise the costs or decrease the quality of service of its rivals. In making this assessment the Commission may take into account, inter alia, the financial strength of the merged entity relative to its rivals".[233]

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[228] OECD, *Portfolio Effects in Conglomerate Mergers*, p.07 (24 Jan. 2002). <http://www.oecd.org/dataoecd/39/3/1818237.pdf>

[229] Case IV/M.938, *Guinness/Grand Metropolitan*, EC Commission Decision of 15 October 1997, OJ [1998] L 288/24.

[230] See also Case IV/M774, Saint Gobain/Wacker-Chemie/NOM, OJ [1997] L247/1.

[231] Case IV/M.1069, *WorldCom/MCI*, EC Commission Decision of 8 July 1998, OJ [1999] L 116/1.

[232] Nourry, A. Van Kerchove, M.,op. cit., pp. 5-22.

[233] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31/3

3.3.2. Collective Dominance

When its decisions are examined it can be seen that the Commission does not simply calculate the total concentration rates and adds the market shares of leading companies. Instead, before arriving at the conclusion that the members of an oligopoly will form a group of companies which will follow parallel policies after concentration, the Commission looks at the characteristics of competitive interactions between the members of the oligopoly. This examination takes as its basis a group of criteria related to structure of the market and the undertakings concerned, none of which is decisive alone[234].

Accordingly, in collective dominant positions[235], an analysis procedure with two stages is followed. In the first stage what is examined is whether there is a possibility for the members of an oligopoly to act as a single group of companies. During the second stage, whether or not this group can act sufficiently independently of other competitors in the market is looked at. This second stage is same as the method followed when examining individual dominant positions. However, when the Commission decisions are reviewed, it can be seen that a systematic method is not used at all. The Commission, acting with a case-by-case approach, considers each criterion according to different characteristics of each market.

As for the examination of the Commission based on quantitative criteria, in most of the cases, the total market share of the two leading companies was more than 60% before the concentration transaction.

The Commission also served of the HHI index to calculate the market concentration in collective dominance cases. In many such cases, the Commission has

[234] See Van Bael & Bellis, *op cit*., p. 826.
[235] The terms collective, joint and oligopolistic dominance are used as synonyms in this Thesis.

given a conditional clearance after understanding that a duopolistic dominant position shall be created as the result of the concentration[236, 237].

A general and up to date approach of the Commission to collective dominance is quite briefly denoted in *Norske Skog/Parenco/Walsum*[238]:

> "Collective dominance is usually associated with the joint exercise of market power through the tacit co-ordination of market behaviour of a group of firms.
>
> The Commission investigated whether the ... proposed concentrations would result in the creation of a collective dominant position in the markets for newsprint and woodcontaining magazine paper by a subset of large firms called top-suppliers.
>
> In its investigation the Commission has carried out the same type of analysis as in past decisions in collective dominance cases such as Decision 92/553/EEC (IV/M.190 -Nestlé/Perrier), Decision Decision 97/26/EC (IV/M.619 . Gencor/Lonrho) and Decision 2000/276/EC (IV/M.1524 . Airtours/First Choice). In particular, the Commission has analysed:
>
> (a)The impact of the merger on competition;
>
> (b)Whether the characteristics of the market makes the market conducive to tacit coordination;
>
> (c)The sustainability of the co-ordination, that is to say:
>
> (i) whether any one of the top-suppliers has the ability and incentive to deviate from the co-ordinated outcome, considering the ability and incentives of non-deviators to retaliate;
>
> (ii) whether buyers/fringe players/new entrants have the ability and incentive to challenge the top-suppliers. anti-competitive behaviour.
>
> In addition, the Commission has examined the nature of past competition. The examination of collective dominance requires therefore examining a series of elements. In particular, in order to establish whether a market is conducive to collective dominance, it is necessary to consider a number of characteristics of the market. While these characteristics are often presented in the form of a list, it is necessary to examine all of them and to make an overall assessment rather than mechanistically applying a check-list.. Depending on the circumstances, the fact that one or another of the structural features usually associated with collective dominance may not be clearly established is not in itself decisive to exclude the likelihood of a co-ordinated outcome".

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[236] Case M.2498 Norske Skog/Parenco/Walsum, OJ 2002 L233/38, para. 149: *"In particular in the light of the arguments presented by the parties in response to the Statement of Objections, relating in particular to the degree of concentration of market shares attained, the size and competitiveness of the medium sized players and the problems identified above in relation to possible co-ordination on capacity, the Commission considers that the notified concentrations will not create collective dominant positions in the market for newsprint and wood-containing magazine paper in the EEA"*.

[237] There are also cases where the Commission has looked at the possibility of creating a collective dominant position where three or more companies are included before giving permission for the said operation. See Case M.1628, TotalFina/Elf, OJ 2001 L143/1

[238] *Norske Skog/Parenco/Walsum*, op cit. Paras. 74-77.

As clearly seen from the above decision, the Commission also looks at various qualitative criteria in its examination procedure concerning the characteristics of the market and the structural conditions of supply to decide whether or not a collective dominant position shall be created or reinforced. Among the market characteristics, the Commission looks at the distinctiveness of the products and services, the structural factors forming demand and how much transparency there is in the market which makes it easier for the undertakings to exchange business sensitive information such as strategies and plans.

If the market is made up of homogenous products (i.e. cement), in which case replacement has a smaller degree of effect, competition has important effects on the prices of these products. Such a condition is convenient for indirect coordination among the competitors in markets with a lot of concentration. These markets are very convenient for the existence of collective dominance. On the other hand, if the competing products can be characterized as heterogeneous or the services supplied have personalized characteristics, it is difficult in general to fix the prices and maintain a concerted practice.

The Commission also focuses during its examination on price flexibility and the medium/long term growth forecasts of the market. Generally speaking, there are two results of poor price flexibility: (i) a small decrease in supply increases prices significantly; (ii) a small increase in supply decreases prices significantly. According to the opinion of the Commission, the poorer the price flexibility the higher the possibility for oligopolists to operate in parallel conduct that may restrict competition[239]. This wiev has been strangely expressed by the parties' economic consultants in Pilkington/SIV as: *"[f]irms supplying a product which has a price-inelastic demand (at the competitive price) tend to have a strong incentive to form a cartel or to engage in cartel-like behaviour where this is feasible"*. The Commission in its assessment fully agreed to the view expressed and in particular to the

[239] Case IV/M.190, Nestle/Perrier, EC Commission Decision of 22 July 1992, OJ [1992] L 356/1, Case IV/M.315, Mannesmann/Valourec/llva, EC Commission Decision of 31 January 1994, OJ [1994] L 102/15 and Case no IV/M.358, Pilkington/SIV, EC Commission Decision of 21 December 1993.

inference that the elasticity of demand is very low and a strong incentive exists to engage in cartel-like, i.e. parallel, behaviour in the float glass industry[240].

In the same way, in markets where demand is fixed in the long term, the creation of oligopolistic dominance becomes easy. In a very concentrated market, the companies follow a competition policy which aims to keep the present market shares and which is not very aggressive in general[241].

Existence of an oligopolistic dominant position means that the oligopolists adapt their competition policies to one another. Such a strategy is possible only if the market is sufficiently transparent. Each company which is part of the oligopoly has to recognize and control the price policy of the competitor. Otherwise, each company may think about getting extra profit at the cost of breaking the agreement between them by increasing its sales volume[242] by establishing a price less than the price specified under the oligopoly, but higher than the "competition" price. In determining the degree of transparency of the market, the Commission takes into consideration various criteria such as the degree of concentration of supply, the homogeneity of the products, pricing policies, and negotiations between customers and companies.

On the demand side, *Nestlé/Perrier*[243] is a major case for showing how structural characteristics of supply may lead competitors to enter into parallel conduct. However, these characteristics may not allow parallel conduct although the characteristics of the market may be convenient. In Nestlé/Perrier, the Commission combined a good example of buyer power, supply characteristics and also portfolio effects assessment. In extract, it stated that:

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[240] Pilkington/SIV, *Ibid*. Para. 31.
[241] Case no IV/M.308, Kali&Salz/MDK/Treuhand, EC Commission Decision of 09 July 1998, OJ [1998] C 257/3.
[242] Case no IV/M.190, *Nestle/Perrier*, EC Commission Decision of 22 July 1992, OJ [1992] L 356/1; Case no IV/M.308*, Kali&Salz/MDK/Treuhand*, EC Commission Decision of 09 July 1998, OJ [1998] C 257/3.
[243] *Nestle/Perrier*, *Ibid*.

> "It must be concluded from the above that local water suppliers would not be able, at least in the short term, to significantly constrain the market power of the two remaining national water suppliers. Nestlé and BSN have clear competitive advantages compared with the local suppliers (much bigger sources, much better known brands, much better distribution and stocking systems) and have important financial resources to continue to invest heavily in national publicity and promotion campaigns. This strategy is liable to increase consumer fidelety to their well-known brands and thereby to reduce the cross-price elasticity of demand of their waters in particular vis-à-vis local spring waters. In addition, after the merger Nestlé would itself own a considerable number of local spring water sources. It would thus have a full range of sources comprising mineral and spring waters which it could use in its sales strategy on the market.
>
> It must [also] be concluded … that the buying power of retailers and wholesalers would not be sufficient to constrain significantly the market power of the two remaining national water suppliers after the merger. The merger would increase the portfolio of major well-known brands in the hands of Nestlé and BSN which must be on the shelves of each big retail store. The merger would also reduce the choice of the retailers from three to two sources of supply and would thus increase their dependency on the two major suppliers on the market. Given their increased dependency on the major brands, it would be more difficult for retailers to play one producer against the other. Also, the local spring waters do not represent a realistic alternative, at least not in the short term."[244]

The Commission in its assessment, analyses the differences in the scale, production technologies or levels of vertical integration, and therefore also the cost structures between the companies. Similarly, the Commission looks at distribution and excess capacity. Experience indicates that excess capacity may help competition based on the characteristics of production.

The Commission opines that the ECMR gives it competence to prohibit concentrations which create or strengthen an oligopolistic market structure, even if the merged entity on its own would not have a dominant position. This view was confirmed by the ECJ and the CFI respectively in the *Kali und Salz*[245] and *Gencor*[246] judgments.

Kali und Salz concerned a merger between two German potash manufacturers. The merger was cleared by the Commission subject to certain conditions. One of the conditions which related the structural links, required Kali to end all links with SCPA,

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[244] *Ibid*. Paras. 76 and 89 combined.
[245] Joined Cases C-68/94 and C-30/95, Kali und Salz (France v. Commission) [1998] ECR 1375.
[246] Case T- 102/96 Gencor/Lonhro OJ 1999 C I60/35.

previously its distributor in France, as Kali/Mdk and SCPA, following the merger, would have together controlled 60% of the French market creating a supposed duopoly. Commission's decision is brought to appeal by SCPA, claiming that the conditions imposed upon Kali had a direct negative effect on its own position, and asked for these conditions to be annulled. The ECJ annulled the Commission decision by holding that the Commission failed to prove a casual connection between the structural links and the alleged lack of competition that would result[247].

The issue of whether collective dominant positions fall within the ECMR was also raised in Gencor's appeal against the Commission's decision in *Gencor/Lonrho* to prohibit the proposed joint venture between the two parties. The CFI followed the ECJ's decision in *Kali und Salz* that collective dominant positions fall within the ECMR. The CFI held in *Gencor* that the Commission was right to decide that the concentration would have led to the creation of a collective dominant position between the newly formed entity and its competitor Amplats, on the basis that the products, platinum group metals, were high-value goods sold throughout the world on the same terms, there was high market transparency, a moderate growth rate and high barriers to market entry for competitors.

The collective dominance issue was also tackled by the Commission in the closely related *Exxon/Mobil* and *BP Amoco/ARCO* investigations[248]. Both of the cases went to a Phase II investigation on the grounds that the transactions could lead to a small group of companies dominating global oil exploration. The Commission cleared both mergers, subject to certain undertakings, which in the case of *Exxon/Mobil* represented one of the most extensive divestment commitments. On the issue of collective dominance, the Commission stated that in both cases, further investigation had removed the initial doubts it expressed that these concentrations might result in too small a group of "super major" oil companies, and that in the unexplored reserves market competition still existed from smaller companies.

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[247] Van Bael & Bellis, *op cit*., p. 821.

[248] Case IV/M.1383, Exxon/Mobil, EC Commission Decision of 29 September 1999; Case IV/M.1532, BP Amoco/ARCO, EC Commission Decision of 29 September 1999, OJ [2001] L 18/1, 4 CMLR 774.

Similarly, the Commission cleared the *Enso/Stora*[249] merger based on the grounds that there was not enough concentration to amount to collective dominance in the newsprint and magazine paper markets, although the merged entity would be the largest integrated paper and board group in the world and were previous to the transaction the two of the six largest suppliers in the EU. However, the Commission decided that although the market was characterized with low demand growth, homogeneity of the products, mature technology and high entry barriers, certain essential characteristics of collective dominance did not exist: there was no meaningful market transparency and secret discounts existed. The transaction is cleared with no undertakings.

A landmarking recent decision on collective dominance was the Airtours/First Choice case where the CFI draw a strict line in economic evidence aspects of the collective dominance. Lately, as a unique example, *Sony/BMG* case[250] demonstrated that the CFI was insisting on its clear call for sounder economic approach to collective dominance.

On 19.07.2004, the European Commission Decision in the merger case of Sony/BMG stated that:

> "the proposed concentration does not create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, and that it does not restrict competition within the meaning of Article 2 (4) of the Merger Regulation and Article 81 of the Treaty"[251].

Therefore, the Commission has cleared the combination of the global recorded music business of Bertelsmann AG and Sony Corporation in the form of a 50 % - 50 % joint venture. The transaction was subject to the previous Merger Regulation No 4064/89, since the merger agreement was signed prior to 01.05.2004, the date at which the regulation 138/2004 entered into force. However, this decision was annulled by the CFI two years after on 13.07.2006[252], where its annulment was again based on the substantive

[249] Case No IV/M.1225, *Enso/Stora*, EC Commission Decision of 25 November 1998, OJ [1999] L 254/9.
[250] Case No. COMP/M.3333 Sony/BMG, Commission Decision of 19 July 2004
[251] Sony/BMG, p. 53.
[252] CJE/06/06. The Court of First Instance annuls the decision authorizing the creation of Sony BMG. 13 July 2006.

errors by the Commission in determining whether the conditions for coordinated effects were established in relation to the market for recorded music. This annulment is significantly important since the CFI, for the first time, reversed an unconditional clearance decision by the Commission. In response to the CFI annulment, the Commission reopened an in-depth investigation towards the case on 01.03.2007, where required a more thorough analysis of the complex information in order to ascertain whether or not the Sony BMG merger would strengthen or create a dominant position in the market[253].

In assessing the Sony/BMG case, the Commission has examined the several steps whether or not the merged entity would create or strengthen the dominant position by identifying the relevant market; and has more or less used several economics tools in analyzing the potential of strengthening dominant market position. First, the Commission examined coordination pricing policy effects through three step analysis: (i) averaged the wholesale net price, (ii) wholesale list prices, and (iii) discounts to customers. The Commission has used econometric analysis in examining the development of the average wholesale net prices for major top 100 selling music albums which cover up to 70-80% of their total sale. Second, the Commission examined whether the price coordination would have been reached in using list prices, Published Prices Dealers (PPDs) as focal points. Third, the Commission looked at any indications of coordination on the level of discounts. Last, it tested whether the market for recorded music has been sufficiently transparent to enable the major players to monitor each other's pricing behavior. Taken into account the spill over effects of the transaction on the upstream markets for music publications, the Commission concluded that "the creation of the joint venture of Sony/BMG would not be likely to have as its effect the coordination of the competitive behavior of Sony/BMG's publishing businesses"[254].

Until the annulment of the CFI, it was believed that the Commission has carried out a very careful investigation in order to comply with the standards of proof set by the CFI in its Airtours case.

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[253] IP/07/272 Mergers: Commission opens in depth investigation into Sony BMG recorded music joint venture. 1 March 2007.
[254] Competition Policy Newsletter 3, 2004, pp. 9-10.

The Judgment by the CFI on the Sony/BMG Decision of the Commission represents the most important ruling on collective dominance since Airtours. In addition to criticizing the Commission's assessment and legal analysis regarding whether the major recorded music companies were collectively dominant, the CFI also suggested a refinement of the way to assess collective dominance as set out in Airtours vs. Commission[255]. As a reminder, for the *post-Airtours* phase, the CFI clarified the general standards for finding collective dominance that the Commission must meet by setting out three conditions: (i) the market must be transparent enough to allow for the monitoring of other firms' market conduct, (ii) coordination must be sustainable, (iii) the benefits of coordination shouldn't be jeopardized by the action of current or potential competitors or customers.

Now, even though in the Sony/BMG case, the Commission Decision showed that there has been effective efforts in binding the EU-US cooperation in the field of merger control, the CFI rejected almost all of the Commission's findings on actual grounds in Sony/BMG and harshly criticized the Commission handling the evidence and analysis in an unprecedented manner as "vitiated by a series of errors of assessment".[256] In its clearance in 2004, the Commission justified the absence of collective dominance on the heterogeneity of the product and the lack of transparency of the market. In this regards, the CFI found that the Commission's theory that

> "promotional discounts have the effect of reducing the transparency of the market to the point of preventing the existence of the collective dominant position, was not supported by a statement of reasons of the requisite legal standard and was vitiated by a manifest error of assessment…the arguments was founded were incomplete and did not include all the relevant data that ought to have been taken into account by the Commission"[257].

From the substantive aspects, the case of Sony BMG provides further guidance as to the establishment of coordinated effects within the context of the EU merger control. The Commission has time until the 2nd of July 2007 to reach its final decision on whether to approve or veto to the proposed concentration.

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[255] Airtours v Commission, Court of First Instance, judgment of 6.06.2002 in case T-342/49
[256] *Ibid*., para 36.
[257] CFI Press Release (CJE/06/60) dated 13th of July 2006, para 5.

3.3.3. Welcoming the new Assessment Technique: The SLC Test

As stated before, one of the most important aspects of the reform was whether to replace the existing "creation or strengthening of a dominant position" test with the "significant lessening of competition" test. Until the new ECMR came into force, the Commission evaluated the notified mergers according to the provisions of Article 2 of the old ECMR that includes a substantive test characterized by a simple dominance test. During the reform process, the Commission made clear that it was holding the view that the dominance test had to be subject to a re-evaluation to bring it more into line with other jurisdictions world-wide, such as the US, Canada and Australia, which use the significant lessening of competition test. The Commission thus demonstrates an ability to draw lessons.

Such a harmonization would definitely lead to a better assessment of large transactions needing many notifications in different jurisdictions. However, it had to be taken into account that this re-alignment would also cause uncertainties in the EU, because of the fact that the majority of the Member States had aligned their merger control regimes with dominance test approach of the EC. A radical move to the SLC test would cause further uncertainties since merger case-law was based on the dominance test.

There were two main arguments expressed in the discussions on the substantive test. First, the pro-SLC side argued that there were still uncertainties on the efficiency of the dominance test in some particular situations of oligopoly. Such situations arise where the merging firms are in a position to raise prices, and thus exercise market power, without coordination and without holding the largest market share in the market. The change to SLC test was supported because of how clear the test would be in these cases. Second, the Commission received many comments from those who wished to keep the dominance test stating that it is an instrument that can be adapted to a wide variety of situations where market power exists. An example of this may be the clear-cut view expressed by the European Roundtable of Industrialists (ERT) which claimed that the ERT could not

> "support the move towards introducing the SLC test reflected in the Commission proposals. The dominance test –if properly applied and tied to an economically realistic finding of dominance, by which effective competition would be significantly impeded- offers clear advantages over the SLC test in terms of clarity of interpretation and application as well as having a long-standing history in case law. For these reasons, and to ensure that predictability is preserved and not further undermined, ERT strongly advocated that the dominance test is retained"[258].

Another voice speaking against the SLC test was that of the *Bundeskartellamt*, the German competition authority, based on the argument that there were no differences between the two tests[259]. In this context, Wish stated that past experience showed that the dominance test is being applied by the Commission without resulting in serious concerns and that the focus should not be on the test but on the application of any of them:

> "It is clear that many – probably most – mergers giving rise to competition concerns will be capable of substantive control whichever standard is applied: it is important not to exaggerate the differences between the dominance and the SLC tests. Many years of decision-making under the ECMR have shown that there is a high degree of agreement between the Commission and the competition authorities in other jurisdictions – in particular with the DoJ and the FTC in the US – in the overwhelming majority of cases. The different tests do not, themselves, give rise to serious friction. It is also clear that there will always be some cases where different authorities reach different conclusions – whether they are applying different tests or the same one- for the simple reason that a particular transaction may have a quite different impact from one state or region to another" [260].

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[258] The European Roundtable of Industrialists (ERT). European Commission Proposals for Reform of EU Merger Control (December 2002). 23 June 2003, p.2

[259] Dr. Ulf Boege, President of the Bundeskartellamt stated:

> "Our examinations focused on the question of whether there is a difference between the criterion of substantial lessening of competition (SLC) and the market dominance test. I would like to come straight to the point and tell you that the Bundeskartellamt's conclusion is as follows: We do not perceive any significant difference, neither in theory nor in the practical application of the tests. What is of particular importance to me is that we must not reach differing results in the merger control practice of different countries due to the test method applied. After all this is the decisive point.... The Bundeskartellamt has applied the dominance test since merger control was introduced in 1973. We have since then examined more than 30,000 merger projects on the basis of this test. And we have always been able to make a decision in the interest of competition. Theoretical considerations as well as practical experience, which is of even greater significance for an authority, show that competition can indeed be ensured by means of the dominance test. Furthermore, as I already mentioned, both tests apply the same criteria. But even if we apply the same test in merger control world-wide, this will not and cannot ensure uniform results in the examination of merger projects by different authorities.".

See the International Competition Network First Annual Conference Naples, September 28, Speech by, Dr Ulf Boege, President of the Bundeskartellamt (Federal Cartel Office).

[260] Whish, R. Analytical Framework of Merger Review: Substantial Lessening of Competition/Creation or Strengthening of Competition. International Competition Network, First Annual Conference, 2002, Naples.

Based on the comments it received, the Commission concluded that to increase legal certainty on the scope of EC merger control regime, the ECMR had to be made clearer. The Commission thus proposed putting a new Article 2 (2) into the ECMR, which aims to make the concept of dominance under the ECMR clearer. The proposed new Article 2 (2) reads as follows:

> "For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition."

According to the Commission, its approach in Article 2 (2) "has the additional advantage of not linking the definition of dominance under the ECMR to any future interpretations given by the ECJ to the concept of dominance under Article 82 of the Treaty"[261].

However, the final text introduced in the new ECMR is different from that contained in the legal proposal. The text of the proposed regulation stressed that both unilateral and coordinated effects could lead to a dominant position and presented a detailed, but non-exclusive list of market parameters that would show dominance, thus in fact, expanding the scope of the concept of dominance and that of the dominance test in a way that would include the essence of the SLC test as well. It looked like a step backwards from the Green Paper, in the sense that dominance still seemed to stay as the essence of the substantive test. The text adopted by the Council of Ministers instead relied on the operational words of "effective competition" and thus marked a clearer move from the dominance test to the SLC test. The Ministers had felt the need to simplify the final text and thus give the Commission more discretion; because the more detailed a text was, the less were the chances of defense and referral in mergers. The final text of the Article is as follows:

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[261] Explanatory Note to the proposed new EC Merger Regulation, para 57.

> "A concentration which would significantly impede effective competition, in the common market or 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".

In order to make clearer and outline the efficiency of the SLC test on some specific oligopolistic markets, the Commission provides a framework in the Recital 25 and 29 of the new Regulation[262]. Recital 25 refers to the SLC test, while the Recital 29 makes explicit reference to efficiency gains as a factor in assessing the dominant position. The 25th Recital reminds us that, in view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Therefore, the dominance test is replaced by the SLC test which, it is considered, would capture transactions that take place in oligopolistic markets and do not create or strengthen a dominant position, but still create an impediment to competition.

The Commission is of the opinion that many oligopolistic markets show a healthy degree of competition. However:

> "Under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition"[263].

The old ECMR did not allow concentrations leading to such non-coordinated effects to be declared incompatible with the common market. The new ECMR, on the other hand, is designed to allow effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. Accordingly, the idea of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as going beyond the concept of dominance.

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[262] Further guidance on how the Commission proposes to apply the Merger Regulation to oligopolistic markets is contained in the Horizontal Merger Guidelines, of more below.

[263] Merger Regulation, Recital 25

3.3.4. The Contemporary Assessment of Concentrations

With the introduction of the SLC test, the creation and strengthening of a dominant position is no longer a prerequisite for prohibiting the transactions as long as a healthy post-merger competitive environment exists. In order to assess whether or not a healthy competitive environment exists or will exist after the concentration, in the first stage, it is assessed whether or not the entity to be formed as a result of concentration shall be able to impede effective competition in the common market. Creation or strengthening of a dominant position is cited as a major factor causing such an effect[264]. Accordingly, it can be taken from this that dominance will keep on being a major factor in assessing mergers.

Article 2 of the ECMR sets forth the basic rule that mergers with a Community dimension will be allowed unless they significantly impede competition. In deciding whether or not a dominant position exists, the Commission is required to look at a wide range of factors referred to in Article 2(1), subsections (a) and (b):

> "[T]he need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community", "[T]he market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate customers, and the development of technical and economic progress provided that it is to customers' advantage and does not form an obstacle to competition"[265].

[264] See supra. Section 3.3.1. and 3.3.2.
[265] Article 2(l)(b), Merger Regulation.

From that wording, the Commission, when assessing whether a concentration significantly impedes competition looks at the structures of all related markets[266], other actual and potential competitors domiciled in or outside the Community[267], market shares of undertakings party to the concentration operation[268] and their economic and financial power, convenience of access to market and inputs by these undertakings, availability of product/service alternatives to the product/services of the undertakings who are part of the concentration[269], supply and demand trends related to these products/services, legal or other barriers to entrance to the market, benefits to intermediaries and consumers and finally contribution to economic and technical development.

To sum up, the merger control techniques discussed so far, in order to assess the compatibility of a transaction with the common market first of all the jurisdictional tests are carried out, i.e. it is decided whether or not the transaction is actually a concentration and, if it is so, whether it has a Community dimension or not, the latter task including the defining of the relevant markets. Afterwards, the substantial evaluation that is made up of assessing the pros and cons of the merger in terms of effective competition follows. The many and several of types of mergers as well as the factors that have to be taken into taken into consideration in this latter assessment require separate examination.

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[266] This term refers to the markets outside the community as well as the markets in the community.

[267] For example, in Case IV/M. 009, *Fiat Geotech/Ford New Holland*, EC Commission Decision of 8 February 1991, OJ [1991] L 118, Commission approved the concentration on the basis that, despite the fact that companies party to concentration were already leader companies in common market, there were worldwide more powerful companies outside the community.

[268] The market shares of the principal companies that have decisive influence on the company to be established after concentration is found by adding their market shares. According to Merger Regulation, the companies that have less than 25% percent share in the market are deemed not preventing effective competition.

[269] This condition suggests the inclusion of alternative products in addition to substitution products to the market definition for the purpose of grading the market powers of the companies party to concentration particularly in markets defined very narrowly. For example, in Case no IV/M.072, *Sanofi/Sterling Drug*, Commission Decision of 10 June 1991, OJ [1991] L 156) has minimised the market power of Sterling Drug in a sense by accepting that natural drugs are to a certain extent an alternative to Medical drugs.

3.3.4.1. Horizontal Mergers

Horizontal mergers are the most important transactions due to their consequences. The idea that mergers can raise competitive concerns, even without creating a single market leader had been clear for some time[270]. However the *Airtours/First Choice* prohibition of 1999, and the extensive use by the Commission of the concept of "collective dominance" to condemn certain mergers in concentrated markets[271] after that created a strong need for clarification on the scope of "dominance", the analytical framework being used by the Commission, and the nature of the evidence upon which the Commission will rely in such cases.

The Commission response to requests for more detailed guidance as to the analytical framework to be used in the assessment of notified horizontal mergers came as a part of the reform package of December 2002 that included a draft Commission Notice on the appraisal of horizontal mergers. The final version of the Notice adopted in December 2003 was called Guidelines on the assessment of horizontal mergers (Horizontal Guidelines)[272]. The original text was extensively amended, taking into consideration the contributions given as a response to the invitation for comments in the Notice[273], as well as the introduction of the new substantive test in the new ECMR.

The Horizontal Guidelines set out a general guidance on the way in which the Commission will assess concentrations where the undertakings concerned are actual or potential competitors on the same market[274]. The notice therefore focuses on how the removal of an actual or potential competitor may affect competition in the relevant market, looking at the four countervailing factors that are taken into consideration in the relevant

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[270] See Case no IV/M.190, Nestle/Perrier, EC Commission Decision of 22 July 1992, OJ [1992] L 356/1, Case no IV/M.619, *Gencor/Lonrho,* EC Commission Decision of 24 April 1996, OJ [1997] L 11/30 and Case no IV/M .1016, Price Waterhouse/Coopers & Lybrand, EC Commission Decision of 20 May 1998, OJ [1999] L 50/27.

[271] See Cases no IV/M. 1852, Time Warner/EMI, EC Commission Decision of 15 October 2000 and Alcan/Pechiney.

[272] OJ [2004] C 31/5. The Guidelines was published after the formal adoption of the New Merger Regulation by the Council.

[273] For the contributions see: http://ec.europa.eu/comm/competition/mergers/review/contributions.html.

[274] Horizontal Guidelines, para. 5.

sections below: buyer power, new entry, efficiencies and the failing firm defense. The Horizontal Guidelines are of non-binding nature.

The Guideline has also an important feature in its enhancing more economics-based standards in merger control. Still, there is a risk that reliance on theoretical economics may lead to wrong decisions in individual cases unless great care is taken to make sure that all parts of the theory reflect factual reality in the exact circumstances of the case. This concern goes beyond to merger control by the Commission itself: the Commission's guidelines may be adopted or followed by a large number of other authorities in Europe and elsewhere, many of which will not be as experienced as the Commission in the practical application of economic theory.

The inclusion in the guidelines of a declaration that economic theories and models will be carefully applied to reflect the facts of each case should be the result of the strong effect created by the famous CFI prohibition decisions. The guidelines should explain clearly that economic theory provides no more than a working tool that may help it better to understand observations of how particular markets work in practice. It is not a substitute for the facts. Otherwise an economic approach by itself would only create less legal certainty, more complication of decision-making and greater administrative burden. A broader perception of economic analysis that takes into account institutional implications would be beneficial for overcoming these problems[275].

It also seems necessary to clarify the standard of proof on which merger review decisions are based. In this respect, the burden should be on the Commission to provide evidence as to why possible anti-competitive effects will arise in any given merger. The Sony/BMG decision is a good example to show that either a clearance or a prohibition decision, economic evidence is a central issue in the decisive path.

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[275] Christiansen, A. The "more economic approach" in EU merger control – A critical assesstment. *Deutsche Bank Research Working Paper Series Research Note* 21, 2005. Available from the WWW: <http://www.dbresearch.com>.

3.3.4.1.1. Market Shares and Concentration Levels

According to the Horizontal Guidelines the first useful indications about the merging and competing parties are their market shares[276]. They will be less important in bidding markets where factors such as a win/loss analysis will be more relevant. Some factors such as new entry or exit in the near future can make current shares less important. Instability in historic market shares also provides useful information on the conditions of competition and possible developments in the market.

The Commission follows the case-law and accepts that a very large market share, i.e. one greater of 50% may be an indication of a dominant market position by itself. However other factors such as the number of competitors can lead to the evaluation that combined shares of 40-50% or even below will create a dominant position. Combined market shares below 25% are not liable to impede effective competition provided that competitors' products are close enough substitutes.

Another tool used by the Commission in the assessment of horizontal mergers is the HHI. If the post-merger HHI concentration is below 1000, between 1000-2000 with a change less than 250 or over 2000 with a change less than 150, a merger would not be a source of competition concerns[277] subject to the condition that special circumstances do not exist in the latter two cases. The special circumstances may arise in the following cases: when a merger involves a potential or a recent entrant that holds a small market share, when one or more merging parties are important innovators and this property is not reflected in the market shares, when there are major cross-shareholding between the

[276] Horizontal Guidelines, para. 14.

[277] Footnote 29 in the Horizontal Guidelines is giving a brief explanation on this issue: The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30% and 15% respectively would increase the HHI by 900 (30×15×2 = 900). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)2 + (b)2$. After the merger, the contribution is the square of their sum: $(a + b)2$, which equals $(a)2 + (b)2 + 2ab$. The increase in the HHI is therefore represented by $2ab$.

market participants, when one of the merging parties is likely to disrupt coordination in the market, when coordination or facilitation practices are likely to exist and when one of the merging firms has a market share of 50% or more[278].

3.3.4.1.2. Possible Anti-Competitive Effects

According to the Commission, horizontal mergers may impede effective competition through non-coordinated or coordinated effects or through both together.

In the former situation the merger removes some of the competitive constraints on one or more firms who get their market power increased as a result. This leads to an increase in prices or other forms of 'competitive harm'. Non-coordinated effects can be a result of both the creation or strengthening of a single firm's dominant position or the removal of competitive effects in an oligopolistic market (even when there is little or no likelihood of coordination among the oligopolists).

The appearance of non-coordinated effects are encouraged in the following cases: when the merging firms have large market shares, when they are close competitors, when customers have limited possibility to change suppliers, when the competitors are unlikely to increase supply if prices increase, when the merged entity is able to hinder the expansion of its competitors and when it eliminates an important competitive force.

Therefore the assessment of a merged company's economic power will depend in practice on such factors as economies of scale, vertical integration or other control of the supply stream[279], the inability of others to reproduce a developed sales or distribution network[280]; special access to technologies[281] or capital inputs[282] (in particular financial

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[278] Horizontal Guidelines, para. 20.

[279] See for example Case T-102/96, Endemol/Commission, [1999] II-753, paragraph 167.

[280] The Commission states three examples for distribution network. First, a firm having its own dense outlet network: Case T-22/97, Kesko/Commission, [1999], ECR II-3775, paragraphs 141 et seq.; Second, a firm which established distribution logistics: Case COMP/M.2097, SCA/Metsa Tissue, EC Commission Decision of 31 January 2001, OJ [2002] L 057/1 paragraph 147; Third, a firm with wide geographic coverage: Case no COMP/M.2033, *Metso/Svedala*, EC Commission Decision of 24 January 2001, OJ [2004] L 088/1, paragraph 195.

strength), and strategic factors such as the importance of brand and reputation[283]. The existence of any of these factors may limit existing competition or prevent new entry and so reduce the competitive constraints on the merged firm.

The Commission will also look at how far the merger will remove direct competitive constraints existing before the merger between the two parties, for example, inter-brand competition. In such circumstances, the removal of even a small competitor could be important, particularly in a concentrated market.

Mergers in oligopolistic markets may also damage competition through the creation or facilitation of coordination among firms aimed at selling under competitively harmful conditions without the need for concerted practice. This may include price fixing, limiting production or capacity, dividing markets or sharing bids. There are three "classical" conditions for such coordination to happen: the possibility of monitoring compliance, the existence of a deterrence mechanism to be used in the case of deviation and the pointlessness of outside reactions to endanger the effects of the coordination.

As a result, the assessment of the Commission covers whether it would be possible to reach such coordination in the post-merger market environment. Both structural and historic behavioral factors are looked at. The fewer the number of companies in the oligopoly, the greater the chances that an increased risk of coordination will be established.

The emphasis given to coordinated effects in the Guidelines is a consequence of the CFI's judgment on *Airtours*. Following this judgment, the Commission seems to be formally welcome the pre-existing economic wisdom on the analysis of tacit coordination in oligopolistic markets. In fact, the conceptual treatment of coordinated behavior (reference to market transparency, the need to establish the credibility of a punishment

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[281] Case no IV/M. 603, *Crown Cork & Seal/Carnaud/MetalBox*, EC Commission Decision of 14 November 1995, OJ [1996] L 75/38, paragraphs 66 et seq.
[282] Case T-156/98, RJB Mining v Commission, [2001] ECR II-337.
[283] See for example Case IV/M. 623, *Kimberly-Clark/Scott*, EC Commission Decision of 16 January 1996, OJ [1996] L 183/1.

mechanism, etc.) is in line with modern economic thinking. As also stated above, the Horizontal Guidelines are less helpful in explaining how specific empirical evidence will be used (or even, which specific collection of data shall be subject) to assess whether a merger will increase opportunities for coordinated behavior.

The Horizontal Guidelines give attention to two special cases where possible anti-competitive effects may occur. The first is a merger with a potential competitor. Such mergers can have effects similar to those between actively competing firms when the potential competitor constrains the behavior of existing ones and where it can grow into an important one.

The other special case is mergers that strengthen buyer power in an upstream market. These can impede competition particularly when the upstream market is fragmented. Of course, such buyer power can benefit downstream consumers. The Commission therefore makes a through analysis of the competitive conditions in upstream markets.

3.3.4.1.3. Buyer Power and New Entries

With the existence of buyer power, companies cannot act independently of their customers[284]. Therefore, even those with a large market share face competitive constraints. Buyer power may prevent in this way a negative finding under the ECMR.

Buyers exercise power when, in the event that they are no longer happy with their current supplier, they are able to turn to credible alternatives within a reasonable time

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[284] See for example Case IV/M.1882 Pirelli/BICC, para. 95:

"In the present case, the Commission has found no conclusive evidence that the merger would create or strengthen a dominant position of Pirelli/ BICC or a position of oligopolistic dominance for Pirelli/BICC together with Alcatel in the markets for LV/MV and HV/EHV power cables in the Community, as a result of which competition would be significantly impeded in the common market. After the proposed transaction, there would appear to be a sufficient number of credible European bidders left to maintain prices at competitive levels. Demand is characterised by large sophisticated customers with substantial buyer power, which enables them to encourage further market entry through strategic contract allocation, if necessary."

frame[285]. Large and sophisticated customers may be thought of as possessing buyer power. However, it is necessary to look at whether they have good reasons to use it. The Commission must also be happy that any existing buyer power will be unaffected after the merger.

If the barriers for new entrants into a market are low then this may act as a competitive constraint to stop the merging parties from exercising market power[286]. Entry must be likely, timely (quick and lasting) and sufficient in its size and scope (i.e. not just into a market niche) to be a sufficient constraint. The Commission will look at the possible barriers to new entry (legal, technical or strategic) and whether incumbents in the market have advantages over any potential new entrant. For entry to be likely it must be sufficiently profitable, taking into account responses from the incumbents (the ability for incumbents to monitor the market may be relevant). The future growth of the market will be relevant, as will examples of frequent and successful new entry in the past. New entry will be particularly likely if suppliers in other markets can move around existing production facilities to enter the market.

What is of essence here is the recognition in the Horizontal Guidelines that both buyer power and market entry can, in principle, be important enough to provide enough of a counterweight to merger incentives to raise prices. In practice, however, the discussion is briefer than it should be in both cases, and there is relatively little indication of how the assessment will be carried out in practice. Buyer power and new entry are of increasing

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[285] Case No IV/M.1225, *Enso/Stora*, EC Commission Decision of 25 November 1998, OJ [1999] L 254/9, para. 91: *"Tetra Pak, on the other hand, buys such volumes of liquid packaging board that it would have the option of developing new capacity with other existing or new suppliers, should the parties attempt to exercise market power"*.

[286] According to Werden and Froeb, from a US perspective, "[t]he merger case law appears to presume that entry, or the threat of it normally will cure or prevent anticompetitive effects from mergers". Werden and Froeb also denotes that "US courts have rejected several merger challenges on the grounds that actual or threatened entry would reverse or prevent any significant anticompetitive effects. One [court] held [in United States v. Baker Hughes Inc., 908 F 2d 981, 987 (D.C. Cir. 1990]: 'In the absence of significant barriers [to entry], a company probably cannot maintain supra-competitive pricing for any length of time'. Another held [in United States v. Syufy Enterprises, 903 F 2d 659, 664 (9th Cir. 1990)]: 'If there are no significant barriers to entry... eliminating competitors will not enable the survivors to reap a monopoly profit: any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less.'" Werden, G. J. & Froeb, L. M. The Entry-inducing Effects of Horizontal Mergers: An Exploratory Analysis. *The Journal of Industrial Economics* XLVI (4), 1998, pp. 525-543.

importance in the business environment and fuller coverage of these two aspects seems necessary.

3.3.4.1.4. Efficiencies

An area of major interest for business and advisors has been how the Commission would change its approach to the assessment of merger efficiencies[287]. The Commission's past reluctance to give explicit weight to efficiency arguments has led to an unfortunate general perception that such arguments tend to go against a merger.

Based on the Horizontal Guidelines[288] the Commission looks at any backed up efficiency claim in the overall assessment of the merger. If the Commission is given enough evidence to conclude that the efficiencies created by the merger are likely to improve the merged entities' incentives to act pro-competitively for the benefit of consumers[289], then this may allow the Commission to decide that the merger does not have the negative effect on competition that it might otherwise have.

Efficiencies are most likely to make a difference in cases where the possible anti-competitive effects are small but the efficiencies are substantial. If the anti-competitive effects are more significant then the more substantial the efficiencies must be. The Commission will need to be sure that the efficiencies are likely and of direct benefit to the consumer. In a monopoly situation, it is very unlikely that efficiencies could justify a finding that a merger is compatible with the common market.

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[287] Economists distinguish between three types of efficiencies: allocative, productive and dynamic. What is taken into consideration here is dynamic (or demand-side) efficiency, a concept used in antitrust economics to evaluate whether there is enough incentive and ability to innovate and increase productivity over time. See Piaskoski, M. & Finkelstein, N. Do Merger Efficiencies Receive 'Superior' Treatment in Canada? Some Legal, Policy and Practical Observations Arising from the Canadian Superior Propane Case. *World Competition* 27 (2), 2004, p. 271.

[288] Also see the further elaboration of the Commission's approach by a DG ECFIN economist: Garnier, G. "Efficiency defense" in merger control. *Mergers and Acquisitions Note* No. 2, 2004, pp. 10-20.

[289] See also Article 2(1)(b) of the ECMR.

There are various types of efficiency gains associated with mergers. Efficiencies must directly benefit consumers, i.e. by leading to new or improved services or price reductions. Cost efficiencies leading to reductions in variable or marginal costs are more likely to be relevant than reductions in fixed costs. The efficiencies must be a direct consequence of the merger. The Commission will look at realistic and achievable alternatives and consider established industry practices and the merging parties' capabilities. Cost reductions resulting from anti-competitive restrictions in output will not be efficiencies. Efficiencies must be verifiable and where possible should be quantified.

It is for the parties to provide all necessary information and evidence in due time to show that the efficiencies are merger specific, substantial, timely and verifiable. The parties must show why the efficiencies counteract any negative effects on competition otherwise resulting from the merger and so directly benefit consumers.

The Commission explicitly states that it is interested in seeing estimates of how marginal/variable costs will be reduced by the merger coming from the prediction that such costs are likely to be passed on to consumers, while reductions in fixed costs -overheads, HQ costs, etc.- are more likely to be kept by the firm as additional profits.

A very important point can be that demonstrating in practice that efficiencies will be of direct benefit to customers will be difficult. It is also very difficult to get reliable measures of the true economic marginal cost from accounting data. As a practical first step, the Commission should be willing to focus explicitly on the existing plans for proposed reorganizations after the merger, and use these to evaluate at the very least the question of whether it is credible that efficiencies are motivating the merger (in which case it is simply less likely that anti-competitive effects are the driving force for the concentration).

Finally, it would be helpful to clarify the definition of "consumers" (buyers on the relevant market? in downstream markets? the ultimate end-users?) and whether the efficiencies must be passed on to all consumers, however defined, or if it is sufficient that one group of consumers receive all the benefits of the efficiencies. For example, what if

all efficiencies were passed along to large purchasers? Alternatively, if only a group of consumers were actually harmed by the merger, could the efficiencies be passed along only to those consumers?

3.3.4.1.5. Failing Firm Defense

The Commission's consideration of failing firm defense, which had not been explicitly covered before by European legislation, as it is in the 1992 United States Horizontal Merger Guidelines, is a further improvement of EU merger control regime.

For the failing firm defense, to justify a finding that a merger is compatible with the common market, the worsening of the competitive structure that follows the merger must not be caused by the merger. The parties must show that three conditions are satisfied: (i) the acquired undertaking would in the near future be forced out the market because of financial difficulties if not taken over; (ii) there is no less anti-competitive alternative purchaser; (iii) if it were not for the concentration, the assets of the failing firm would inevitably exit the market. Once the failing firm defense is accepted, the chain of causality between the concentration and the two objective merger controls is broken since the same or even worse results are to occur when the failing firm exists the market. Social consequences such as employment or regional welfare can also be taken into account[290]

Unlike the US Merger Guidelines, there is no explicit reference to the failing firm defense in the ECMR. For the first time in *Kali&Salz*,[291] the Commission went through the

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[290] Alpay, M. O. *Birleşme ve Devralmalarda Batan Teşebbüs Savunması*. Ankara, Rekabet Kurumu, 2004, pp. 22-32.

[291] The case was concerned with the acquisition of MdK by Kali and Salz. Although the merged entity would have a market share of 98% of the potash market in Germany, the Commission cleared the transaction by accepting the parties' suggestion that in the absence of the transaction MdK would exit the market. (Case IV/M 308 [1994] OJ L 186/30, [1994] 4 CMLR 526; on appeal Cases C-68/94 and C-30/95, France v. Commission , Société Commerciale des Potasses et de L'Azote (SCPA) v. Commission [1998] ECR I-1375, [1998] 4 CMLR 829).

issue[292] and decided in favor of an existence of such a consideration, and this decision was sanctioned by the ECJ. It was held that in order to accept such a defense, three conditions mentioned above had to be met and should also be proved by the parties. It was argued that the ECJ reached that conclusion without any difficulty in the present case since the acquiring undertaking was already dominant in the market. In the case of a change from non-dominant to a dominant position as a result of an acquisition of a failing firm, the situation would be more complex[293]. The ECJ rejected the French Government's submission that the Commission failed to coincide with the requirements in relation to failing firm defense recognized under US law. The ECJ stated that the conditions set by the Commission were only the requirements essential for breaking the chain of causation.

3.3.4.2. Non-Horizontal Mergers

Combined under the category of non-horizontal mergers, vertical and conglomeral mergers are destined to be assessed by the Commission under the consolidated principles within a "guideline on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings" standing in its draft form to be enacted[294]. Since a descriptive economic approach to the types of mergers contain the basic effects of both vertical and conglomeral mergers, we will try to elaborate, herewith, on which assessment criteria the Commission shall evaluate such transactions. The guideline contains detailed principles developed by the Commission which provides an insight look for the assessment of vertical merger and conglomerate merger.

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[292] However, prior to the Kali and Salz case, the Commission faced this issue in Aérospatiale-Alenia/de Havilland and rejected the parties' arguments that, in the absence of the transaction, de Havilland would go into liquidation. (Case IV/M 53, Aérospatiale-Alenia/de Havilland, EC Commission Decision of 2 October 1991, OJ [1991] L 334/42, [1992] 4 CMLR M2).

[293] Monti G. & Rousseva E. Failing Firms In the Framework of the EC Merger Control Regulation. *European Law Review* 24 (1), 1999, pp. 38-55.

[294] Draft Commission Guidelines on the assessment of non-horizontal mergers, 13.02.2007

3.3.4.2.1. Vertical Mergers

Even though vertical concentrations do not change the structure of the relevant markets they still require attention. They have both pro-competitive and anti-competitive effects that do not allow for either a lenient or a strict approach to their examination. Possible anti-competitive effects of vertical mergers include the vertical foreclosure effect[295], increase in entry barriers, removal of a potential rival, the putting into practice of discriminatory measures, avoidance of regulations and coordinated behavior[296]. In the case of *Skanska/Scancem*[297], a merger among three vertical markets, namely production and distribution of building materials and construction of buildings, the Commission decided that the overall activity of the merged entity would not only create a dominant position in certain products such as cement in some northern Member States, but also serve as an entry barrier to newcomers. Certainly, the Commission's role is to compare the competitive conditions that resulted from post-merger and would have prevailed in pre-merger period. In doing so, to be fair and concrete, the Commission takes into account the future changes to the market if merged, plus the probability of entry and exit of firms if merger did not take place, as well as the future market developments that result from expected regulatory adjustments. In its assessment process, the Commission identifies and compares the anti-competitive effects and pro-competitive effects of a merger, then examines chains of causes and effects then ascertaining which of them is more likely: "the more overall anti-competitive effect of a merger, the more likely the Commission is to raise competition concerns"[298]. Vertical mergers are classified within two broad outcomes that they may trigger: *non-coordinated effects* (foreclosure) and *coordinated effects*.

Under *non-coordinated effects*, there are two major categories of foreclosure: *input foreclosure* and *customer foreclosure*.

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[295] Ekdi, *op cit*., Karakurt, *op cit*.
[296] Çınaroğlu, *op cit*., pp. 28-46.
[297] Skanska/Scanem, M.1157, OJ [1999] L183/1.
[298] Draft Guidelines, No. 21, p. 6.

Input foreclosure is the key issue in that Commission takes into serious consideration when dealing with merged entity that has or potentially has aim to profit from the increases in prices charged to consumers. This may be through restricting access to the products or services that would exist in pre-merger market situation and raise the cost of the downstream rival's cost.

Commission assesses these anti-competitive input foreclosure scenarios taking into account three critical factors. The first factor is the *ability* to foreclose access to inputs. Input foreclosure raises competition problems when it concerns the downstream products by several means it could negatively affect the overall availability of inputs for the downstream market in terms of price and quality. Commission's decisions on such cases are based on whether there are effective and counter strategies or the possibility of changing production process that the rival firms might adopt. Ability to foreclose usually occurs in cases where the merged entity has a considerable market power in the upstream market and where the input is of an essential importance for the competitors in the downstream market.

Second factor is the *incentive* to foreclose access to inputs. The incentive to foreclose largely depends on the degree of trade-off profitability (by calculating the margins) between the profit loss in the upstream market due to reduction of input sales to rivals and the profit gain from expanding sales downstream by being able to raise price in that market. The incentives to foreclose and to raise rival's cost depends on the extent to which shares can be captured once downstream demand diverts from foreclosed rivals as well as benefiting from the higher price levels as a result of a strategy when rivals' costs are raised. Commission's assessment takes into account the structure of merged entity, their documented business plan and type of strategies adopted on the market previously. The Commission also examines both the incentives to adopt such a conduct or even eliminate those incentives if conduct is unlawful.

The third factor is the *likely impact on effective competition*. Vertical mergers raise competition concerns only if it impedes the effective competition in the downstream market by increasing the cost of downstream rivals, putting pressures on sales prices, and

by raising barriers to entry to potential competitors when merged entity would likely not to supply to potential downstream infants. However, within this context, the assessment of Commission should appraise in presence of factors and evidence that create pro-competitiveness, the efficiencies that mainly benefits consumers[299]. Such efficiencies arise in the case of vertical mergers when it allow firms to expand output on the downstream market, allow parties to better coordinate the production and distribution and save on inventories costs.

The second sub-category under non-coordination effects deals with the *customer foreclosure* which may occur when a supplier integrates with an important customer in the downstream market. Similar to the input foreclosure, the Commission also uses the same three criteria for its assessment procedure.

First, the Commission takes into account the *ability* of the merged entity to foreclose access to downstream markets. *"A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base"*[300]. Customer foreclosure renders entry costly for potential competitors by reducing the revenue prospects of such potential entrants, and therefore resulting in an upward pressure on the prices they charge to their customers who are operating in the downstream market. Furthermore, it can have primary impact on the revenue streams of upstream rivals and reduce their ability and incentive to invest in research and development, cost reducing, and product quality. As a whole, it may reduce the competitiveness in the long run and eventually cause their exit from the market. When assessing the merged entities, similar to the input foreclosure, the Commission takes into account the evidence, counter-strategies prospects and the existence of different market corresponds to different uses for the inputs.

[299] When assessing efficiencies in the context of non-horizontal mergers, the Commission applies the principles set out in Section VII of Notice on Horizontal Mergers.
[300] Draft Guidelines, No. 59, p. 15.

Second is the *incentive* of merged entity to foreclose access to downstream markets where it mainly focuses the profit by comparing the trade-off between costs associated with not procuring products from upstream rivals and possible gains from doing so. The incentives stress upon the possibility of benefiting from higher price level in the upstream market and an increasing of market shares of merged entity's downstream operations.

The foreclosure effect is the most important risk resulting from by a vertical merger. The *AOL/Time Warner* decision of 2000[301] is a major case study. In this case, the anti-competitive effect of the merger was caused by the links between AOL and the German company Bertelsmann that had extensive rights over internet content. The merger would result in the formatting of Bertelsmann's and Time Warner's files such that they could only be played by AOL software. Because other internet content could be played with any software including AOL's, the merger in question would create a dominant position in internet music delivery. The merger was only cleared following the ending of ties between AOL and Bertelsmann.

Likewise of input foreclosure, customer foreclosure put rival downstream in a competitive disadvantage, impeding competition, reduce overall output on downstream market, reducing incentives to invest in cost reduction and harm consumers. Additionally, the concern of raising barriers to entry of potential competitors also has large impact on the effectiveness of competition on the upstream market.

Coordinated effects should also be expected under vertical mergers where firms previously not coordinating could, in the post-merger market situation, more likely to coordinate when they reach a common understanding, pursuing common objectives, and avoiding competitive pressure by a coherent system of implicit threats. Since according to free market mechanism theory each firm constantly has an incentive to compete, coordination can only be sustainable if the following three conditions are met.

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[301] AOL/Time Warner, M.1845, OJ [2001] L268/28.

Firstly, "coordinating firms must be able to *monitor* to a sufficient degree whether the terms of coordination are being adhered to"[302]. Vertical merger has made it easier for upstream and downstream firm to reach a common understanding as vertical mergers result in reducing a number of competitors in the market and make coordination among the remaining players easier. Moreover, vertical mergers also increase the symmetry between firms; it increases the level of market transparency as well as eliminating the existence of mavericks in the market. Secondly, "disciplines require that there is some from of credible *deterrent mechanism* that can be activated if deviation is detected"[303]. With the presence of market transparency within firms, concerns may arise if the level of transparency is higher in downstream than upstream or vice versa. Last but not least is the *prevention of the market entry*. Vertical mergers leading to coordinated effects also have the capacity of increasing barriers to entry, limiting the ability to compete on the part of outsiders.

3.3.4.2.2. Conglomerate Mergers

Conglomerate mergers occur among firms that are active in closely related markets and in specific cases it might entail harm to competition. According to the definitions adopted by OECD *"a conglomerate merger is defined as one in which the parties to the merger '...are not actual or potential competitors and the parties do not have an actual or potential customer-supplier relationship'."*[304] Under the context of conglomerate mergers, similar to the case of vertical mergers, two anti-competitive impetuses exist: *non-coordination effects* (foreclosure) and *coordination effects.*

Conglomerate mergers, under certain circumstances, can impede competition through the process of coordination. Coordination is more likely to take place where it is easy to identify the term of coordination and where there is a possibility to achieve

[302] Draft Guidelines, No. 80, p. 18.
[303] Draft Guidelines, No. 80, p. 18.
[304] OECD, *Portfolio Effects in Conglomerate Mergers*, p.21 (24.01.2002). <www.oecd.org/dataoecd/39/3/1818237.pdf>

sustainability. Coordination under the concept of conglomerate merger can reduce the number of effective competitors; and if the rivals are not eliminated from the market, they might find themselves in a vulnerable situation. Therefore, foreclosed rival may chose not to coordinate but prefer facing the increase in price level. To other extent, conglomerate mergers may increase the importance of multi market competition thereby increase the effectiveness of disciplining mechanisms adhered to the terms of coordination.

The main concern of non-coordination effects is the phenomenon of foreclosure. Through the practice of tying and bundling (or other exclusionary practices), the merged entity may create incentive to leverage a strong market position, increase price level as well as reducing its rivals' abilities and incentives to compete.

In its assessment, Commission first examine the *ability* that merged firm might have to foreclose its rivals. One of the most effective ways to strengthen its market power and foreclose its competitors is through bundling and tying. Note that foreclosure effects of bundling and tying are more prominent in large economic scale industries where dynamic implications exist. For foreclosure to be concerned, first, the effects of tying and bundling should be substantial when "at least one of the merging parties' products are viewed by many customers as of particular importance and that there are few other alternative choices for that product"[305]. Second, concerns are raised if there is a large common pool of customers for the tied/complementary products. In such occurrences the Commission's judgment is shaped by evaluating the effectiveness and timely counter-strategies that rival firms may deploy.

Second, Commission's assessment is based on the *incentive* of the merged entity to foreclose its competitors. Obviously, the incentive largely depends on the profit level obtained by facing a trade-off between the costs associated with bundling and tying (since pure bundling and tying entail losses for the merged companies if there are large groups of customers who do not interest in buying the bundles), the possible gains of expanding its

[305] Draft Guidelines, No. 98, p. 21

market shares and the ability to raise price (by increasing its power in the tied goods market), directly increasing its revenues.

In conclusion, bundling or tying allow merged entity to acquire/maintain its market power that can lead to significant reduction of sales prospects faced by single-component rival, reducing their ability and incentive to compete in the market. Foreclosure may also deter the entry of potential rivals and hamper infant industries. The case attracts more concerns if the products are complementary since "deterring entry in one market through bundling or tying may also allow the merged entity to deter entry in another market if the bundling forces potential competitors to enter both products markets at the same time…"[306]. Many of the efficiencies identified in the context of vertical merger may also apply for the conglomerate mergers relating with complementary characteristic of products. The Commission's assessment on the effective competition appraise in the beam of measuring the efficiencies and harms towards consumers in particular, and the market as a whole.

3.3.4.3. Joint Ventures

Joint venture is a form of an agreement of trust which benefits the parties entering into the agreement, in terms of transaction and organization costs. Compared with a merger, a joint venture is easier and less costly to arrange. Furthermore, a joint venture agreement can be ended much more easily than a merged entity. These and other aspects of joint ventures are appreciated by the business community and strengthened an increase in the number of these types of collaboration agreements over the years.

Joint ventures might have important pro-competitive benefits both for the collaborating firms and consumers. Lower costs of production, an increase in production

[306] Draft Guidelines, No. 110, p. 23.

capacity, bringing together of research and development resources such as complementary skills, technology and assets, making use of economies of scale and scope, commercialization of new products, entry into new markets, spreading of risks and reduction of duplicative costs are only some of the benefits which can be gained through the formation of joint ventures. These efficiency gains in turn would reflect upon consumers as lower prices, new and innovative products and improved quality.

On the other hand, anti-competitive concerns may arise through the formation of joint ventures. Collaborating parties can use a joint venture as a platform to make collusion easier. A joint venture would be suitable for this purpose because it helps the parties to easily discover and punish deviations that would undermine the collusion. Governments have adopted certain legislation to overcome these types of effects distorting competition, but it never was easy to apply these laws well enough in practice, due to the complex nature of joint venture agreements. There had been a long running debate as to whether joint ventures should "be treated by analogy with cartels, and be regarded as a "behavioral problem to be dealt with under Article 81, or as a "structural" problem, to be dealt with under the ECMR[307].

From an antitrust point of view, it is easy to define mergers as concentration operations. The real difficulty arises in defining the joint ventures; because a joint venture company may operate in a new economic sector as well as serve the objective of harmonizing policies for the purpose of cooperation and limiting the competition of the parent companies.

According to one classification, there are six major types of joint ventures, varying in terms of the level of integration: fully-integrated, research and development, production, marketing, purchasing, and network joint ventures[308]. Production joint

[307] Craig, P. & de Burca, G. *EU Law: Text, Cases and Materials, Third Edition*. Oxford, Oxford University Press, 2002.
[308] Joint Ventures: Antitrust Analysis of Collaborations Among Competitor, p. 7

ventures involve agreements between the parties to jointly produce a product and mostly seen as pro-competitive since it allows the collaborating parties to provide consumers with cheaper goods or services of a higher quality. Similarly, research and development joint ventures do not raise antitrust concerns when formed to improve innovation in opposition to impeding innovation by creating R&D monopolies. Because the main focus of antitrust law is on the relation between price and output, "a joint venture's potential to cause anti-competitive harm increases as the joint venture's conduct becomes closer to the ultimate consumer"[309]. Therefore joint ventures in marketing where the parties are involved in agreements to jointly sell, distribute or promote goods and services are the most suspicious ones for the antitrust authorities. During their activity, the parties can easily discuss pricing and output strategies or can share customers. Unless the parties come up with strong arguments for critical efficiency gains through forming the joint venture, antitrust clearance of these types of joint ventures is relatively harder.

It has not been easy to define a joint venture as concentrative or cooperative at first look; so it was very important, and also controversial to a certain degree, to separate these two types of joint ventures which have different effects in terms of competition law and ensure of different competition rules are applied to each[310]. Generally, a joint venture which will be able to perform the functions of an independent economic unit in the long term was thought to be concentrative. Similarly, if the formation objective or the evident influence of the establishment of a joint venture is to coordinate the competition policies of the independent parent companies in the market, this joint venture was considered as cooperative joint venture. In the *Varta/Bosch*[311] and *Ericsson/Kolbe*[312] cases, the Commission listed the conditions needed for a joint venture to meet to qualify as independent. According to these conditions, it is required that the joint venture (i) must take its place in the market as an independent seller or buyer, (ii) have the material and human resources needed to guarantee it a long-term existence and independence and (iii) put into practice its own commercial policy. The Commission also took into consideration

[309] *Ibid.* p. 7
[310] See also Varona, Galarza, Crespo & Alonso, *op cit*., pp. 38-40.
[311] Case no IV/M.12, *Varta/Bosch*, EC Commission Decision of 12 April 1991, OJ [1991] L 320/26.
[312] Case No IV/M.133, *Ericsson/Kolbe*, EC Commission Decision of 22 January 1992, OJ [1992] C 27

(i) whether two or more of the parent companies keep their activities in the same or a similar market at a significant level, (ii) whether or not the cooperation between the parent companies coming from the establishment of the joint venture allows these companies to remove competition in this market in determining whether a joint venture is a cooperative joint venture or not. The Brussels-based agency also allowed certain flexibility in the application by offering rather narrow market definitions for joint ventures and putting in place *de minimis* rules.

However the remaining difficulty of finding the difference between concentrative and cooperative joint ventures in the end led to the termination of the categorization in the 1997 amendment. Council Regulation (EC) No 1310/97, besides changing the threshold mechanism, introduced the concept of full-functional joint ventures[313]. From then on all structural joint ventures with a Community dimension came under the ECMR, whether or not they have the object or effect of coordinating competitive behavior. Other types of collaboration would be subject to Article 81 of the Treaty.

As a result, it became necessary to notify all joint venture agreements for the foundation of a full-functional joint venture at the Community level to the Commission. However if it becomes clear as a result of the examination of the notification that the objective of the joint venture is to provide coordination between the parent companies - in other words if the operation is, referring to the old terminology, a cooperative joint venture - the provisions of Article 81 are applied; but the procedure and periods are adjusted *inter alia*[314]. Accordingly, structural cooperative joint ventures will not only be subject to the dominance test, but their cooperative aspects will also be assessed under the criteria of Article 81(1) and (3). ECMR suggests that the Commission is to look particularly at the activities of the parents, implying that relations between the joint venture and its parent(s) are not to be subject to this Article 81 analysis.

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[313] This results from amendments to Article 3(2) of Regulation No. 4064/89 and from the insertion of a new paragraph 4 in Article 2 which states that full-function joint ventures which have as their object or effect the coordination of the competitive behavior of the parent companies constitute concentrations within the meaning of Article 3.

[314] Notice on the Concept of Full-function Joint Ventures, OJ [1998] C 66/01.

Cases concerning the application of Article 81(1) and (3) of the Treaty are referred in Article 2(4) of the ECMR:

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

Article 2(5) further sets the criteria for the purpose of assessing the degree of coordination and its effects under Article 81(1) and (3):

> "In making this appraisal, the Commission shall take into account in particular whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market; and whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of elimination competition in respect of a substantial part of the products or services in question."

These developments have blurred the line between the merger control aspects and the coordination aspects of a full-function joint venture. Because the focus of ECMR is on significant impediments to competition, both the concentrative and cooperative aspects of full-function joint ventures are covered. Furthermore, efficiency benefits as a positive factor in merger assessment will be looked at formally by the Commission, as efficiencies have always been a key part of Article 81(3) analysis[315].

The notification Form CO[316] gives insights into the assessment criteria of the Commission about the risk of coordination resulting from a joint venture. Section 10 named "Cooperative effects of a joint venture" asks if "two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is

[315] Van Bael & Bellis, *op cit*., p. 832.
[316] Form CO Relating to the Notification of a Concentration Pursuant to Regulation (EC) No 139/2004**.**

upstream or downstream from that of the joint venture or in a neighboring market closely related to this market?" If the answer is yes, each of the notifying parties must reveal the turnover of each parent company in the preceding financial year; the economic importance of the activities of the joint venture in relation to this turnover; the market share of each parent. The Commission realizes there is a higher risk of coordination where at least two of the parent companies have similar activities to the joint venture[317]. On the other hand, coordination between one parent company and the joint venture is seen as a less serious risk. Similarly, in practice, the Commission considers *de minimis* rule, and is not harsh on the joint venture where the combined market shares of the parties is not more than 5 to 10 %[318].

In order to evaluate the pro-competitive efficiency gains resulting from the joint venture, the Commission asks the parties about these possible efficiency gains. The coordination will not be problematic if the operation (i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress; (ii) allows consumers a fair share of the resulting benefit; (iii) does not place on the undertakings concerned restrictions which are not absolutely necessary to the attainment of these objectives; and (iv) does not allow such undertakings the possibility of eliminating competition in respect of a large part of the products in question.

Three possible scenarios may arise during the assessment of full-function joint ventures.[319] The first scenario refers to joint ventures under the ECMR but no coordination of competitive behavior. This type of joint venture is subject to the test of dominance and is declared compatible with the common market if the joint venture in question does not create or strengthen a dominant position. In the second scenario, the Commission might look at joint ventures under the ECMR but which practice coordination of competitive behavior. This type of joint ventures will be subject to Article 81 EC because of Article 2(4) of the ECMR. In this case, the Commission first conducts the test of dominance and

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[317] Van Bael & Bellis, *op cit*., p. 834.
[318] See for example *Hitachi/Nec-Dram/JV*, Case No. M. 1834, 2000.
[319] Competition Issues in Joint Ventures, 09.02.2001

if the joint venture is found to be compatible with the common market it then assesses anti-competitive effects that might result from coordinative behavior of the parties. And lastly, the third scenario covers joint ventures which are full function but do not have a Community dimension. These type of joint ventures are not evaluated under the ECMR, but are assessed under Article 81.

On the other hand, as mentioned before, non-full-function joint ventures are subject to the rules of the EC competition law, but certain non-full-function joint ventures can benefit from block exemption regulations such as Regulation on R&D Agreements, Regulation on Specialisation Agreements, or Regulation on Technology Transfer Agreements.

Different legal treatments of full-function joint ventures and non-full-function joint ventures have led to some worries about the possible changes that might happen in the future concerning the structural dynamics of certain industries. The main worry is that, to get around the bulky Article 81 and to fall within the much quicker assessment of the ECMR, in certain situations parties would choose to create a full-function joint venture or a merger instead of partial collaborations on specific areas. This in turn would mean substantial costs for the parties compared to the much appropriate partial collaboration in cost-benefit terms. This and other issues should be looked at through the evaluation of joint venture cases and antitrust approach should be sensitive in order not to attack efficiency enhancing collaborations.

3.3.4.4. Ancillary Restrictions

The successful putting into practice of a concentration usually requires the undertakings concerned to accept certain restrictions on their freedom of action in the market. Articles 6(l)(b) and 8 (2) of the ECMR provides that a decision of the Commission declaring a concentration compatible with the common market must clear such restrictions

in so far as they are directly related and necessary to the putting into practice of the concentration[320].

Certain ancillary agreements may be entered into by the parties to a merger as part of the overall transaction, such as restrictive covenants, purchase and supply arrangements and intellectual property licenses. To the extent that such restrictions are directly related and necessary to the implementation of a concentration, they will be characterized as ancillary restrictions.

The Commission totally changed its policy on ancillary restraints by bringing in a new Notice in 2001[321], replacing the previous 1990 Notice. It no longer assesses in its merger decisions whether the restrictions entered into by the parties are of ancillary nature. Accordingly, undertakings will have to carry out a self-assessment as to whether restrictive clauses can be thought of as ancillary and can be covered by the merger decision or a relevant block exemption or be justified under Article 81 of the EC Treaty. The new Notice gives guidance as to whether this will be the case and any conflicts between the parties will have to be settled in national courts. It is also to be noted that clauses which cannot be considered as ancillary are not illegal *per se*; nevertheless they are not automatically covered by the merger decision.

To be treated as ancillary, restrictions must first of all be of less importance than the main object of the concentration and must not be substantial restrictions wholly different in nature from those which result from the transaction itself. Also, restrictions having a direct link to the establishment of the concentration are also accepted as ancillary.

Agreements must be necessary to the putting into practice of the concentration, which means that in the absence of those agreements, the concentration could not be put into practice or could only be put into practice under more uncertain conditions, at much

[320] Verloop, *op cit.,* p. 8.
[321] OJ [2001] C 188/5

higher cost, over a much longer period or with much greater difficulty[322]. Agreements aimed at protecting the value transferred[323], continuing supply after the break-up of a former economic entity[324], or allowing the start-up of a new entity[325] usually meet these criteria[326]. Accordingly, the restrictions also have to be in proportion, so that how long they last, their subject matter, and geographical area of application are not greater than what the putting into practice of the concentration reasonably requires.

In deciding whether a restriction is necessary, it is not appropriate to only look at its nature. It should also be ensured that how long it lasts, its subject matter and geographical area of application area not greater than the implementation of the concentration reasonably requires. If equally effective alternatives are available for achieving the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition[327].

Ancillary restrictions are different from the contractual arrangements which form the concentration itself (such as provisions relating to the transfer of shares), and which are the subject of the Commission's analysis under the ECMR. The 2001 Notice accepts the following issues as ancillary where the concentration involves the acquisition of sole control: non-compete obligations, non-solicitation and confidentiality clauses, licensing of property rights and know-how, purchase and supply agreements and service and distribution agreements.

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[322] Case no COMP/M.1863, *Vodafone/BT/Airtel JV*, Commission Decision of 18 December 2000, OJ [2001] C 42/11.
[323] Case no IV/M.1245, *Valeo/ITT Industries*, Commission Decision of 30 July 1998, OJ [1998] C 288/5.
[324] Case no COMP/M.1841, *Celestica/IBM*, Commission Decision of 25 February 2000, OJ [2000] C 341/2.
[325] Case no IV/JV.15, *BT/AT & T,* Commission Decision of 30 March 1999

[326] Commission Notice on restrictions directly related and necessary to concentrations OJ [2001] C 188/3, para. 8.

[327] *Ibid.*, para. 9.

3.3.4.4.1. Non-compete Obligations

The previous Notice of 1990 on restrictions directly related and necessary to concentrations was allowing a non-compete clause in a merger agreement last for a period of five years where it was involving goodwill and know-how and a period of two years when it included only the transfer of goodwill. The 2001 Notice, however, draws on the Commission's past experience and practice and states that, where the transfer includes both goodwill and know-how, the non-compete clause is allowed only for a period of up to three years and up to two years if the transfer of goodwill only is involved. Longer running non-compete clauses may still be justified in a limited range of circumstances, for example, where it can be shown that customer loyalty to the seller will last for more than two years, or where the scope or nature of the know-how transferred justifies an additional period of protection[328]. The new Notice is also different from the old one in that geographical scope should "normally", not "must" be limited to the area where the vendor had established the products or services before the transfer. Furthermore, the presumption in the new Notice that the acquirer does not need to be protected against competition in territories in which the vendor was previously not active can be overturned if it is shown that such protection is needed because of the particular circumstances of the case, for example, for territories the vendor was planning to enter at the time of the transaction, provided that the vendor had already invested in such a move[329].

Non-compete obligations must only be used for products and services which make up the main activity of the transferred business. They may tie only the seller, its subsidiaries and agents. The Commission does not consider as ancillary those non-compete obligations placed on others, for example resellers[330].

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[328] *Ibid.* para. 15.
[329] *Ibid.* para. 16.
[330] *Ibid.* para. 17.

Further, the new Notice states that clauses which limit the seller's right to purchase or hold shares in a company competing with the business transferred shall be thought of as directly related and necessary to the putting into practice of the concentration under the same conditions as for non-compete clauses, unless they stop the seller from purchasing or holding shares for investment purposes only, where such a share holding does not grant, directly or indirectly, management functions or material influence in the competing company[331].

3.3.4.4.2. Non-Solicitation and Confidentiality Clauses

Non-solicitation and confidentiality clauses are to be evaluated in the same way as non-competition clauses. The Notice states that the scope of these clauses may be narrower than that of non-competition clauses, but that they are more likely to be found to be directly related or necessary. Moreover, the Commission states that confidentiality clauses can, in particular circumstances, be accepted for a period of over three years[332].

3.3.4.4.3. License Agreements

The Commission considers that licenses of patents, know-how and other intellectual property rights may be ancillary if they relate to the existing activities of the business or company being acquired[333]. However, licenses that cover territorial restrictions, for example, those limiting the use of a manufacturing process to the areas of activity of the transferred business or company will not generally be regarded as ancillary. Licenses need not be limited in time and may be granted as long as intellectual property right concerned lasts, or in the case of know-how, for the length of its economic life.

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[331] *Ibid.* para. 19.
[332] *Ibid.* para. 20.
[333] *Ibid.* para. 28.

3.3.4.4.5. Purchase and Supply Obligations

The Commission has recognized as ancillary purchase and supply agreements between the acquirer and the seller. These may be needed to ensure the continuity of supply of products necessary to the activities that may be kept by the seller or taken over by the acquirer, or the continuity of outlets for one of the two parties. The length of any such purchase and supply obligations must be limited to a period needed for the replacement of the relationship of dependency by independence in the market. However, exclusivity provisions contained in such purchase and supply agreements will not be viewed as ancillary [334].

3.3.4.4.6. Service and Distribution Agreements

The Commission Notice on restrictions directly related and necessary to concentrations states that service and distribution agreements will be assessed in a similar way to supply agreements. Where the concentration involves the acquisition of joint control, obligations on the joint buyers not to make competing offers is generally considered as ancillary. Similarly, as long as there is no coordination of future conduct between them, sharing out of production facilities, distribution networks and trade marks among the joint acquirers and finally arrangements relating to the methods of putting into practice a break-up of the acquired business or company are also considered ancillary[335].

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[334] *Ibid.* paras. 25-31.

[335] These principles also apply in relation to joint ventures, subject to certain differences in their application.

3.3.5. The Newly Born Baby of the SLC Test: *The Tele-ring Case*

Never a concentration was being baptized by the name of the target company until the acquisition by T-Mobile Austria of Tele-ring. The outstanding fame of the case came from fact that it was the first catch by the new ECMR of a transaction whereby the SLC Test was being tested. Therefore, *T-Mobile Austria/Tele-ring* case[336] where the Commission cleared the acquisition subject to certain conditions merits further examination[337].

3.3.5.1. The Parties and Market Characteristics

The case was about the takeover of Tele-ring, the fourth largest operator in the Austrian mobile phone market by the second largest, T-Mobile Austria. The latter undertaking is a 100 % subsidiary of Deutsche Telekom, an international player of the telecommunications industry. Tele-ring was controlled by a US company named Western Wireless Corporation. Even though the transaction was related with the Austrian mobile phone market it was notified to the Commission on 21st of September 2005 since (i) the parties had an aggregate worldwide turnover of more than EUR 5 million and (ii) Deutsche Telekom and Tele-ring each had an aggregate Community-wide turnover of more than EUR 250 million, but neither of them generates more than two thirds of their aggregate Community-wide turnover within one and the same Member State[338].

Both parties hold licenses from the Austrian telecommunications regulator to operate a 2G/GSM network, a 3G/UMTS network and a fixed telephony network.

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[336] Case No Comp/M.3916, 26.04.2006.

[337] Competition Commissioner Neelie Kroes commented the importance of this case as follows: "This takeover is in a strategically important sector for the EU economy. Market liberalization in the telecommunication sector produced good results giving consumers innovative services and lower prices. It is crucial that these benefits are preserved". See: Commission Press Release (IP/05/1417).

[338] EC Decision: T-Mobile Austria/Telering, COMP/M.3916, 26.04.2006, (EC Decision) p. 3

However, the Commission evaluated that the merger would have no effect on the fixed telephony services and assessed the case on the basis of a single market for the provision of mobile telephony services to final consumers. There are three other mobile network operators in Austria: Mobilkom and ONE operating on the basis of GSM and UMTS technologies and H3G using only UMTS technology. Since the UMTS network covers only 50 % of the Austrian population H3G buys airtime access to Mobilkom's GSM network in areas where the networks are not covered by H3G's own network. Table 2 below presents market shares of the operators in terms of percentages of total turnover and number of customers in recent years up to the decision. As it can be seen it was clear that the merged entity would remain the second player in the market after Mobilkom.

Table 2

Operators' Market Shares in Austrian Mobile Phone Market

Operator	**1st half of 2005**		**2004**		**2003**		**2002**	
	Turnover	**Customers**	**Turnover**	**Customers**	**Turnover**	**Customers**	**Turnover**	**Customers**
Mobilkom	[35-45]%	[35-45]%	[35-45]%	[35-45]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
T-Mobile	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[25-35]%
T-Mobile / Tele-ring combined	***[30-40]%***	***[30-40]%***	***[30-40]%***	***[30-40]%***	***[30-40]%***	***[30-40]%***	***[30-40] %***	***[30-40] %***
ONE	[15-25]%	[15-25]%	[15-25]%	[15-25]%	[15-25]%	[15-25]%	[15-25]%	[15-25]%
Tele-ring	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[5-15]%	[5-15]%	[5-15]%	[<5]%
H3G	[<5]%	[<5]%	[<5]%	[<5]%	[<5]%	[<5]%	0%	0%

Source: *T-Mobile Austria/Tele-ring*.

The Commission assessed that the service providers and resellers had a marginal role in the market since their total market share was less than 5 %. CRA International, that provided economic advice to T-Mobile throughout the case, argued contrariwise: "If the wholesale market is competitive and leads to good deals for resellers, these developments

limit the possibilities of network operators to raise prices in the retail market"[339]. The consultancy further stated that the enlarged capacity is an increasing incentive for network operators to open the network to resellers, which position themselves in segments of the market not fully covered by the network operator itself[340].

Although T-Mobile thus claimed that service providers could be expected to provide additional competition in future, pointing in particular to developments in other mobile telephone markets such as Germany and Britain, the Commission found no concrete evidence that the role of service providers in the Austrian market will change in the foreseeable future. Schwarzfunk and eTel, which resell SIM cards, have a few thousand customers at most while Tele2 has a bigger customer base, but has not significantly boosted competition since it entered the market in 2003. The Commission therefore concluded that the service providers/resellers do not exert strong competitive pressure in the market, particularly compared with the network operators[341].

3.3.5.2. Non-Coordinated Effects

T-Mobile was going to remain as the second player in the market following its acquisition of Tele-ring. Therefore this merger would strongly be expected to being cleared under the old dominance test. However the new SLC test allowed for an effects-based approach that focuses on market outcomes instead of market structure and thus avoided the so-called enforcement gap of the previous approach that appeared in cases when the merged entity was not going to be the market leader, but creating impediment on competition existed. The Commission thus unofficially dubbed *T-Mobile Austria/Tele-ring* as the "first gap case". The merger was subject to seven months long proceeding that resulted with a clearance subject to certain conditions and obligations given on the 26th of September 2006.

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[339] CRA International Competition Memo. August 2006 T-Mobile/Tele-ring: analysing mavericks and efficiencies in "the first gap case", 2006, p. 1.
[340] *Ibid.* p. 2.
[341] EC Decision, *op.cit.* p. 27

According to the assessment of the Commission, Tele-ring played a special role in the market that could be described as the "maverick" since the undertaking followed a strategy of aggressive competition. More specifically Tele-ring was a "price maverick" that had offered the best prices for consumers in recent years and thus exerted considerable competitive pressure on the other players of the mobile market, namely Mobilkom and T-Mobile Austria, as price comparisons and an analysis of the switching behavior of customers in the market that resulted in an increase of the market share of Tele-ring in the recent years demonstrated. The elimination of such a player from the market could have resulted in price increases and possible non-coordinated effects. Accordingly, the Commission regarded the proposed acquisition as an elimination of the operator offering the most advantageous prices on the Austrian mobile telephony market. Furthermore, with the proposed merger T-Mobile would approach to the market shares of Mobilkom. These two companies would play on the same level, while other network providers, like ONE and H3G trail far behind. Currently ONE has a market share of approximately [15-25] %. H3G on the other hand has a market share of not even [5] %.[342]

The Commission concluded in its market investigation that a large proportion of customers who have left T-Mobile and Mobilkom have become customers of Tele-ring on the basis of the data of number portability collected by the Austrian telecoms regulator. T-Mobile rejected the validity of this approach in its reply to the Statement of Objections: "The data revealed only some of the customers who had switched provider within a given period of time and gave a distorted picture of customers' switching behavior, as only Tele-ring and H3G provided compensation for the number portability costs of EUR 19."[343] However, the Commission rejected these arguments and stated that the number portability data also includes customers who switched from Tele-ring and took their numbers with them. Concerning the switching fees, the Commission stated that customers who switch to Mobilkom, T-Mobile or even ONE on quality grounds are likely to tolerate paying even a small fee in exchange for remaining reachable. Furthermore, the Commission concluded that compensation for the switching fee must be considered in the context of the full offer

[342] EC Decision, *op.cit.* p. 10
[343] CRA International report.

to customers wishing to switch. In this view the Commission found out that while Tele-ring provide compensation for the EUR 19, T-Mobile in contrast offers new customers a tariff discount of EUR 50. Consequently the Commission concluded that the data on switching behavior based on number portability relates to a representative section of the market[344].

Commission's study of the price developments also showed the importance of the role played by Tele-ring in the market. Tele-ring has offered its services since the third quarter of 2002 at significantly lower prices per minute than the other three network operators and since the first quarter of 2002 at lower prices per minute than the market average. Only H3G's average per-minute prices are quite close to those charged by Tele-ring, without undercutting them. Prices had constantly fall in the period 2001-2005. This price analysis were confirmed by the tariff calculator of the Austrian Chamber of Labour ("AK Wien") based on standard user profiles. T-Mobile again objected by stating that the situation had changed meanwhile and that Tele-ring no longer occupied the first place[345]. The Commission therefore conducted another analysis using AK Wien's tariff comparison in March 2006. It looked respectively at three call volumes for "new users" (30-90 minutes), "families" (60-180 minutes) and "young people" (60-180 minutes). For post-paid tariffs, of particular importance to Tele-ring customers, Tele-ring was first in 55% of cases, followed by H3G in 33% of cases. Taking all tariff categories together, Tele-ring was first in 22% of cases, a new YESSS! tariff (the discount brand of the network operator ONE) in 55% and the standard YESSS! tariff in 22% of cases. The final conclusion was that:

> "During the period from 2002 to 2005, Tele-ring was the most active player in the market, and that it exerts considerable competitive pressure on T-Mobile and Mobilkom in particular and plays a crucial role in restricting their freedom on pricing. The price analysis therefore suggests that Tele-ring's role in the market has been that of a maverick."[346]

[344] EC Decision, *op.cit.* p. 13
[345] EC Decision, *op.cit.* p. 14
[346] EC Decision, *op.cit.* p. 14

In its decision the Commission alleged that the mobile telephone industry is characterized by high investment costs in building up a network to cover 98% of the population (a regulatory requirement for 2G services). Therefore, the Commission estimated that it is very important for a network operator to attract new customers by adopting an aggressive pricing policy, as they do not have a secure and adequate customer base.

This explains the actions of Tele-ring and H3G, which first had to build up their customer base and must continue to do so. In the period from 2002 to 2005, Tele-ring not only considerably increased its customer numbers but, despite tariff reductions, also significantly boosted its turnover and improved its profitability.

The Commission's market investigation suggests that, Tele-ring has attracted new customers by its aggressive pricing policy more than offset any price cuts offered to existing customers. However, such lower tariffs for new customers always have medium-term implications for the customer base as existing customers will not tolerate discrimination over a longer period and might therefore go elsewhere. Therefore the bigger the customer base, the less likely the operator aims at attracting new customers with low prices.

The Commission has therefore concluded that Tele-ring's incentive to charge very competitive prices is a consequence of the number of its existing customers. T-Mobile has not pursued such a strategy to date. Also, the planned merger of T-Mobile and Tele-ring will have even less incentive to do so in future.[347]

Pricing by mobile telephone operators is also affected by network structure and coverage. Customers want to be able to use their mobile phones all over the relevant geographical market and to have as few problems as possible with the quality of the signal. The market investigation of the Commission estimates that network coverage covering as much of Austria as possible is a crucial factor in attracting customers. An own network

[347] EC Decision, *op.cit.* p. 18 - 19

entails high investment costs during the start-up phase. These operating costs depend largely on the network structure rather than the actual number of minutes transmitted. If an operator does not have its own national network, it can secure nationwide coverage by purchasing airtime from other network operators. The cost of purchasing mobile telephone capacity wholesale under a national roaming agreement is calculated largely according to the number of minutes taken up. In using national roaming, the mobile operator cannot achieve economies of scale comparable with those that can be achieved in a dedicated network, as the more airtime it sells to its customers, the higher the cost of purchasing that airtime under its supply contract. Investments and network operating costs do not constitute variable costs for a network operator and therefore have no direct bearing on the price of airtime sold to customers. With regard to these costs, the network operator has in particular an incentive to achieve economies of scale (within the network capacity available), as the costs incurred in building up and operating the network are largely independent of the airtime used.

Mobilkom, T-Mobile, ONE and Tele-ring have GSM networks with nationwide coverage of at least 98% and, at least in the normal course of events, do not have to resort to other networks in order to serve their customers in Austria. By contrast H3G's network covers around 50% of the Austrian population. H3G purchases airtime under a national roaming agreement with Mobilkom to cover the rest of the population. Therefore, H3G has variable costs for each minute used by its customers outside its own network, and this has implications for its pricing. H3G's incentives are also fundamentally different here as it cannot achieve economies of scale for that airtime comparable with those of a network operator[348].

Furthermore, the Commission's investigation has suggested that a sufficient network capacity is an absolute condition for supplying services to existing customers and also an incentive to attract new customers.

[348] EC Decision, *op.cit.* p. 20

The Commission's analysis on the effect of the on network capacity was as follows:

> "Internal documents and statements by T-Mobile show that, once the planned merger has been completed, T-Mobile plans […]*. To this end, T-Mobile plans to take over […]* sites and to increase the number of carriers at […]* of its existing sites. These measures should ensure that T-Mobile can carry the increased traffic from Tele-ring's customers on its network. In view of the limited number of sites at which carriers will be increased, it can be assumed that T-Mobile will not extend its network much further than coverage of the increased traffic resulting from the larger combined customer base will require.
>
> After completion of the proposed merger, not only will the Tele-ring network be eliminated, but, presumably, the T-Mobile network will be used to full capacity to a far greater extent than currently. The proposed merger would therefore lead to a situation where, instead of there being three operators with spare capacity, only ONE will have significant spare capacity for new customers, taking Mobilkom's network as a point of reference, even if in some areas the market investigation showed that an improvement in network coverage is possible. In general, it can be concluded that the considerable reduction in spare capacity will also reduce the incentives for network operators to attract new customers by offering low prices in order to use up significant spare capacity."[349]

Therefore, the Commission rejected the argument by T-Mobile, that if, after the proposed merger, the remaining competitors were to have in their networks an absorption capacity totaling 10 % of T-Mobile and Tele-ring customers, this would be enough to make any price increase unprofitable for T-Mobile. Thereafter, the Commission investigated whether H3G and YESSS! might in future play a role in the market similar to that of Tele-ring. The Commission arrived to the conclusion that H3G has played only a limited role in the market. Its market share increased significantly only since the end of 2004. Now it lies at around [<5]*% of customers and [<5]*% of turnover. H3G could not be fully regarded as a network operator up to now, as its network covers only 50% of the Austrian population and around [2-8]*% of Austrian territory. As described above H3G depends on a national roaming agreement with Mobilkom to cover the remaining areas. This entails substantial variable costs for H3G per minute, which has a direct impact on the cost of making airtime available to final consumers and the price it charges them. The agreement also means that, compared with other network operators, H3G has very different incentives when it comes to adopting an aggressive pricing strategy and attracting

[349] EC Decision, *op.cit.* p. 23

customers even in areas where it does not have its own network. Moreover, the regulatory requirement under Austrian law, to conclude a domestic roaming agreement in H3G's favor extends only up to 2007. After that date H3G therefore faces considerable uncertainty as to how far and at what cost it can conclude with its rival network operators a suitable roaming agreement covering the whole of Austria.[350]

It can be assumed that H3G will expand its own network coverage in future. For the time being, however, it is under no regulatory obligation to do so: its network coverage of 50% of the population meets all the requirements of the Austrian regulator as regards UMTS up to the end of 2005. Moreover, such a development will take considerable time and is subject to major uncertainties. The Commission estimated in this section of its market investigation:

> "Although H3G has hitherto already adopted an aggressive, low-price strategy in the market, its dependence on the national roaming agreement means it cannot play a role similar to Tele-ring in exerting competitive pressure. Moreover, H3G's role in the market depends on further network expansion, which implies a great deal of time and uncertainty and is made even harder by its small frequency allocation; at the same time it will incur much more expenditure than its competitors. So, in view of its existing capacity limitations, it is doubtful whether H3G will have the incentive to continue to act as an inexpensive provider in the market and attract a large number of new customers."[351]

YESSS!, ONE's discount brand, offers only pre-paid cards and only a few services. YESSS! is consequently totally different as the ONE brand. Thus, it cannot be assumed that the services offered by YESSS! represent a direct market alternative for Tele-ring customers and YESSS! cannot therefore be regarded as a disciplining force for the other mobile communications operators to the same extent as Tele-ring. The Commission concluded that, because YESSS! is dependent on ONE, it is doubtful whether ONE will continue this strategy once Tele-ring, the most active force for price competition, disappears and ONE no longer needs to compensate for the loss of customers from its

[350] EC Decision, *op.cit.* p. 23
[351] EC Decision, *op.cit.* p. 26

quality brand ONE. Also the market investigation has revealed no evidence that YESSS! will offer a post-paid service.[352]

Thus, the Commission arrived to the conclusion that:

> "It seems unlikely that H3G or ONE/YESSS! will occupy a place in the market comparable with Tele-ring once the proposed transaction is completed or that they will be able to discipline the competitive behavior of T-Mobile and Mobilkom in particular. Similarly, it cannot be assumed that service providers would be able to assume such a role."[353]

The Commission further estimated that there are no indices that a network operator would be willing to enter the Austrian market. Presently, there are no frequencies available and also there is no evidence that a network operator would be willing to sell frequencies. But, for all that the high costs of building up new mobile communications network will also hinder a new entry in the market.[354]

T-Mobile and Tele-ring both stated that Tele-ring would no longer be able to pursue the aggressive price strategy it had adopted in the past. They argued that the growth of Tele-ring's customer base had reduced Tele-ring's incentive to pursue an aggressive pricing policy. Further T-Mobile and Tele-ring alleged that Tele-ring was able to fund its aggressive pricing policy only because its termination fees were higher than the other operators. Also the parties explained that Tele-ring would have to invest substantially in 3G infrastructure in the immediate future. But the Commission rejected these arguments in the light of Tele-ring's internal plans, which expect its growth to level out considerably in the next few years and customer numbers to increase in 2006-2009.

As consequences of non-coordinated effects the Commission reached the conclusion that with the elimination of the maverick in the market and the simultaneous creation of a market structure with two leading, symmetrical network operators, it is likely that the planned transaction will produce non-coordinated effects and significantly impede

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[352] EC Decision, *op.cit.* p. 26
[353] EC Decision, *op.cit.* p. 28
[354] EC Decision, *op.cit.* pp. 27 – 28

effective competition in a substantial part of the common market. The Commission stated this finding as follows:

> "It is therefore probable that the proposed merger will have a tangible effect on prices in the Austrian end-customer market for mobile telephony services. Even if prices do not rise in the short term, the weakening of competitive pressure as a result of Tele-ring's elimination from the market makes it unlikely that prices will continue to fall significantly as in the past."[355]

The Commissions market investigation concluded that the Austrian market for mobile telecommunications for end customers is highly concentrated and Tele-ring, as a maverick, has a much greater influence on the competitive process in this market than its market share would suggest.[356]

Informally, the Commission explained that this was the first potential 'gap' case decided under the new EC Merger Regulation 139/2004/EC. This meant it was the first case where the Commission threatened to block a merger based on competition concerns (non-coordinated effects) which would not have enabled the Commission to prohibit the merger (or make its clearance dependent on remedies) under the old Merger Regulation.

3.3.5.3. Efficiency Claims Overruled

One of the most important arguments put forward by T-Mobile was that the proposed merger would generate efficiencies through the network integration. The better capacity utilization would allow the company to achieve increased fixed-cost degression as compared with the pre-merger situation. T-Mobile stated that:

> "The better frequency spectrum allocation post-merger will mean that building up its own network will generate lower costs for T-Mobile than with a smaller frequency allocation, that the merger will reduce the costs of the necessary renewal and improvement of the infrastructure, that the number of cells can be reduced and the quality of service improved and that the merger will reduce costs per customer for customer service and administration."[357]

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[355] EC Decision, *op.cit.* pp. 28 – 29
[356] EC Decision, *op.cit.* p. 30
[357] CRA International report submitted by T-Mobile in its reply to the Statement of Objections (CRA International report)

However, the Commission concluded according to the Horizontal Guidelines that efficiencies put forward by the parties must have a direct benefit to consumers, which is more likely in the case of variable or marginal costs than in the case of fixed costs. The Commission stated in its decision that:

> "The reduction in costs referred to by T-Mobile relates to fixed costs, in particular for building up and maintaining the network. It cannot be assumed that this kind of cost saving will be passed on to consumers by the notifying party. Moreover, the increase in customer numbers, on which T-Mobile bases the reduction in fixed costs per customer, goes hand in hand precisely with a reduction in the incentives for T-Mobile to attract new customers by way of an aggressive pricing strategy. This is because, at least in the medium term, low prices would have to be offered to the entire customer base, which would reduce the profitability to T-Mobile of the customer base as a whole. It therefore appears unlikely that the proposed merger will generate efficiencies within the meaning of the Merger Regulation"[358, 359]

3.3.5.4. Commitments attached to the Decision

The merging parties committed to divest UMTS frequencies and mobile telephony sites of Tele-ring to operators with lower market shares than T-Mobile Austria in order to remedy the competition concerns of the Commission. The Commission had to be convinced that the remedies would create a player which would be likely to play a similar role to that of Tele-ring's current one and thus create a similar competitive constraint on the other two leading mobile telephony providers. In other words a new "maverick" was needed. As a result, T-Mobile committed to sell two packages of UMTS-frequencies, which were then licensed to Tele-ring, to H3G and another competitor with smaller market

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[358] EC Decision, *op.cit.* p. 12

[359] It is to be considered that the current US approach places a high importance to efficiencies. The Antitrust Modernization Commission's Report and Recommendations issued in the USA in April 2007 states that:

> "The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices".

This approach is not followed by the Commission in its assessment of efficiencies in the Tele-ring decision, a transaction taking place, as explained by the above report, "in a dynamic, innovation-driven industry where marginal costs are low relative to typical prices".

share. A very large number of the mobile telephony sites operated by Tele-ring were also divested to smaller competitors, mainly H3G. As a result, H3G was able to expand its network all over Austria and thereby compete without being dependent on its current national roaming agreement with Mobilkom. The Commission found that H3G has sufficient incentives to continuously offer low tariffs in order to gain additional customers and thereby increase its network utilization and realize economies of scale. The Commission's decision to approve the proposed concentration is conditional upon the full respect of the commitments.[360] The Austrian Telecommunications Act (TKG) allows frequency usage rights to be transferred. If no contract of sale is concluded for one or both of the frequency packages before the end of the sell-off period, T-Mobile undertakes to hand the unsold frequency packages back to the Republic of Austria. The Commission estimated its decision in its press release as follows:

> "The European Commission has cleared under the EU Merger Regulation the proposed acquisition of the Austrian mobile phone operator Tele-ring by T-Mobile Austria, subject to conditions and obligations. The Commission's in-depth investigation showed that the concentration, as initially notified, would have led to a substantial impediment of effective competition on the Austrian market for the provision of mobile telephony services to final consumers. However, in the light of the commitment by the merging parties to divest UMTS frequencies and mobile telephony sites of Tele-ring to operators with lower market shares than T-Mobile Austria, the Commission has now concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or a significant part of it."[361]

The two aspects of the commitments are intended to improve the network resources of the smaller network operators in the Austrian mobile communications market, in particular the recent market entrant H3G, in structural terms so that they can play a full part in competition. The commitments are designed to allow H3G to extend its network throughout Austria very rapidly and so to become independent of the national roaming agreement with Mobilkom. It is therefore to be expected that, even after the notified merger and fulfillment of the commitments, four fully fledged mobile communications network operators will be active in Austria.

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[360] EC Decision, *op.cit.* pp. 35 – 37

[361] Commission's Press Release (IP/06/535) dated 26th April 2006

The Commission has subjected the commitments to a market test and considers that:

> "The commitments given are capable of eliminating the risk that the merger in its original form would significantly impede effective competition in the Austrian mobile communications market. In particular, sufficient guarantees have been given that the commitments will be effectively implemented and these commitments create the necessary conditions for H3G to exert, through a nationwide mobile communications network, competitive pressure in the end-customer market for mobile telephony comparable to that previously exerted by Tele-ring."[362]

With respect to the commitments H3G will have a complete mobile communications network in Austria once it has taken over the infrastructure. Building up its own network will make H3G independent of the national roaming agreement with Mobilkom and allow it to reduce its variable costs substantially. Firstly, this has a direct impact on H3G's pricing and, secondly, H3G cannot achieve any significant economies of scale in respect of this airtime, unlike the pure network operators. This agreement structure also has an impact on H3G's incentive to win over new customers. The Commission considers it likely that H3G will pass on these lower costs to customers in the form of even cheaper tariffs, thereby ensuring intense price pressure in the Austrian mobile communications market.

The Commission therefore takes the view that the commitments eliminate the risk of a significant impediment to effective competition in the Austrian mobile communications market as regards both coordinated and non-coordinated effects[363].

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[362] EC Decision, *op.cit.* p. 35.

[363] Competition Commissioner Neelie Kroes stated related to the commitments as follows:

> "The Commission is determined to ensure that ongoing consolidation in the mobile telephony industry does not harm consumers' interests. In this particular case I am satisfied that the remedies we have obtained will allow Austrian consumers to continue to benefit from favourable mobile telephony offers."

See: Commission's Press Release, *op.cit.*

3.4. Institutional and Procedural Issues

3.4.1. Commission's Organization

The Commission has exclusive competence in the field of protection of competition in the common market. The Commission, as the guardian of the Treaties, has therefore sole competence in the application of competition rules. It is the one-stop-shop for concentrations with a Community dimension with the referral mechanisms providing exceptions.

The Commission is organized into Directorate-Generals with either horizontal or vertical areas of responsibility. Competition law and policy matters are dealt within DG COMP politically supervised by a member of the College of Commissioners, referred to as Commissioner for Competition Policy or simply as Competition Commissioner. DG COMP has a number of Directorates including Strategic Planning and Resources and Policy Development and Coordination Directorates also found in other DGs. In the past mergers cases were handled by the Merger Task Force while these two horizontal directorates respectively provided support services and general policy-making inputs. DG COMP also has four sectoral directorates and two units for State aid control.

The process of adoption of the new ECMR was coupled by a reorganization of the DG COMP in order to achieve a more effective assessment of the cases. In 2002 the post of Chief Competition Economist was created following the CFI's rulings that criticized the Commission for not thoroughly supporting the economic claims put forward in its decisions. The Chief Competition Economist, who has his own staff and is directly linked to the Director General, is responsible for providing independent opinions on whether or not economic grounds the decisions are based on are appropriately chosen or supported[364]. The peer review system used in Phase II investigations (of more below) was also

[364] European Union Directorate-General for Competition. XXXIInd Report on Competition Policy, Brussels, 2002, p. 67.

strengthened that year. Further change came the following year when the Merger Task Force was "demerged" and its staff and resources were progressively distributed to the sectoral directorates. This step, it is suggested, would create a synergy between sectoral knowledge and experience and the art of merger control thus providing benefits to both antitrust and merger assessment.

3.4.2. Notification of a Concentration

While in certain jurisdictions there is no official form for notification of mergers the Commission has developed an extensive document for this purpose, known as the Form CO. Form CO is annexed to the Commission Regulation (EC) No. 802/2004[365] implementing the ECMR. It should be completed and given to the Commission either before the conclusion of a binding agreement between the parties or following such an agreement provided that it is not affected until the decision of the Commission[366]. The one week deadline under the old ECMR has been abolished. Pre-notification consultations with the Commission are available and are encouraged.

The information inserted to the Form CO must be correct and complete. If a change occurs following the notification the new information should be communicated to the Commission as soon as possible. The Commission verifies the information notified under Article 11 of the ECMR.

Failure of notification as well as providing incorrect or misleading information in the Form CO is a major felony. The maximum fine is 1 % of the aggregate turnover of the undertakings concerned. Carrying out a concentration with a Community dimension that as not been notified can lead to an additional fine up to 10 % of the combined turnover.

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[365] OJ [2004] L 133/1.

[366] Under exceptional circumstances such as increased financial risk if the concentration is unlikely to be prohibited the Commission might allow the transaction to be carried out before its decision possibly subject to certain conditions.

3.4.3. Review of a Concentration

Commission's review of a transaction consists of two phases. All transactions go through Phase I while only those operations that are deemed to raise serious concerns for competition in the common market are made subject to the Phase II.

3.4.3.1. Phase I Investigations

During Phase I, which should take 25 working days following the effective date of the notification if referral mechanisms are not put on the agenda, the Commission determines, first of all, whether or not the transaction falls within its jurisdiction. If it does not the finding is reported by means of a decision under Article 6 (1) (a) of the ECMR. This finding is without prejudice to the national merger control regimes of the Member States. Where the concentration falls within the scope of the ECMR, but does not raise serious concerns for competition it is declared compatible with the common market under Article 6 (1) (b), such decision also covering ancillary restraints.

In other cases there are three options for the undertaking concerned. They can either abandon the transaction, undertake commitments to make it compatible to the satisfaction of the Commission by virtue of Article 6 (2) or subject themselves to the second phase which involves in-depth proceedings.

The Commission can request information under Article 11 and carry out inspections under Article 13 of the ECMR or ask the national authorities to carry out such inspections under Article 12. The same provisions are also used for Phase II proceedings. The time periods are suspended during the application of Article 11 to 13.

3.4.3.2. Phase II Investigations

Phase II should be completed in 90 working days following its initiation. If the parties offer undertakings after 55 days then this period can be extended for a further 15 days and for a further 20 days if the parties of the transaction demand so in complicated concentrations.

There are four types of decision that can be taken in the second phase. First of all, under Article 8 (1), the concentration can be declared compatible with the common market following further scrutiny. The Commission can accept the undertaking offered by the parties under Article 8 (2) or prohibit the merger under Article 8 (3). If the transaction has already been carried out the restoration of effective competition can be ordered under Article 8 (4). Interim measures with the same purpose can be taken according to the fifth paragraph of the same Article.

Phase II proceedings are not only more thorough; they are also subject to a stricter formality and deeper scrutiny within the Commission in order to ensure that freedom of enterprise is not obstructed. The Commission has to inform the relevant parties about its findings by a letter called Statement of Objections before taking any final decision other than one under Article 8 (1). The information contained in these documents vary according to the specifics of the concentration; but in principle they should contain all the information the parties need to defend themselves as well as the justification of the Commission's proposed decision. As the judgment in *Schneider/Legrand* case emphasizes the Commission cannot base its final judgment on arguments not contained in the Statement of Objections; because the undertaking concerned did not have the chance to respond. Such response arrives in the form of reply letters. The parties have the right to access file after receiving the Statement of Objections. Those parties who are not directly involved in the transaction, but nevertheless receive a copy of the Statement of Objections because of their legitimate interest in the case have a limited right to access file. Usually

an oral hearing is organized following the replies where the parties have the opportunity to reflect their positions and engage in dialogue[367].

The Commission prepares a draft decision and submits it to the peer review panel and the Advisory Committee on Concentrations. The peer review mechanism was strengthened in 2002 in order to increase the quality of Phase II decisions. A peer review panel consists of experienced officials from the Commission who can supervise the work undertaken with pair of fresh eyes at critical points, not only when the draft decision is submitted. Officials are chosen throughout DG COMP; officials from other departments of the Commission are also invited to participate in the discussions[368]. Policy Development and Coordination Directorate provides the support services that ensure the effective operation of these panels. The Advisory Committee on Concentrations, that operates according to Council Decision No. 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission[369] which is the legal basis of the committee system designed to check the Commission by the Member States, consists of national representatives. The input of the Advisory Committee is not as professional as those of the peer review panels and sometimes distorted by of national interests. However the Commission is not bound by the opinion of the Advisory Committee, if it issues one; but it does have inform the Committee about how it made use of the opinion.

The final draft of the decision is prepared following these consultations and submitted to the College of Commissioners that takes a decision with a simple majority. The decisions are then published in the OJ; but business secrets are taken out. Table 3 on the next page presents the statistics on the major types of decisions taken up to date under the ECMR.

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[367] See: Giannakopoulos, T. The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures. *World Competition* 24 (4), 2001, pp. 541-569.

[368] European Union Directorate-General for Competition, *op cit.,* p. 67.

[369] For the consolidated version see: OJ [2006] C 255/4.

Table 3

Decisions Taken Under the ECMR

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	Total
Notifications	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	313	356	3266
Art. 6 (1) (a)	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	52
Art. 6 (1) (b)	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	2797
Art. 6 (1) (b), (2)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	140
Art. 8 (1)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	32
Art. 8 (2)	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	79
Art. 8 (3)	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	19
Art. 8 (4)	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	4

Source: <http://ec.europa.eu/comm/competition/mergers/statistics.pdf>.

3.4.4. Commitments

Undertakings might offer commitments or remedies in order to obtain a compatible decision for their transaction in both Phase I or Phase II. Commission Notice on remedies acceptable under the Merger Regulation[370] was prepared in order to provide guidance to the undertakings about this issue.

The Remedies Notice differentiates between structural and behavioral commitments. Those commitments that involve divesting businesses or selling shares are the structural ones. Modification is commercial strategies, for example terminating exclusive agreements or granting competitors access to infrastructure, form behavioral commitments. Previously most commitments consisted of divestitures while the Commission became more acceptant of behavioral remedies in recent years, especially when they are included in packages that also involve some structural remedies[371].

3.4.5. Judicial Review

Acts of the Commission, including merger control decisions, are subject to judicial review under the EC Treaty provided that they are final acts. Article 230 of the Treaty covers actions for annulment and Article 231 those for failure, that are rare in the context of merger control. CFI has the competence to review actions brought by private litigants. Its decisions can be appealed at the ECJ. If the applicant is a Member State or the Commission CFI can decline jurisdiction. In that case there would be no opportunity for appeal.

Decisions under Article 8 (3), that is prohibition of mergers, are those that are appealed most commonly even though other decisions are also taken to the European

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[370] OJ [2001] C68/3.
[371] Van Bael & Bellis, *op cit*., p. 888.

Courts. For example in *Unicredito*[372] judicial review of a decision under Article 6 (1) was accepted by the CFI since the decision made the transaction subject to an Article 81 proceeding that has completely different legal consequences.

It is straightforward for the merging parties to bring a case before the CFI; but the standing of third parties is subject to proof of direct and individual concern. Direct concern is created by the effect, the application of the decision exposes the relevant party to, without the intervention of any other intermediate rules. Individual concern is created by the specific attributes of the parties or the circumstances that distinguish the relevant parties. The *Babyliss* case[373] provided that the competitors of the merging parties had direct concern. In *Air France*[374] it was ruled that participation to the proceedings resulted in the creation of individual concern.

Major judgments of the European Courts have been examined in conjunction with the relevant jurisdictional and substantial issues. Therefore it is suffice here to say that the general grounds for review for the merger control decisions, as laid down by Article 230 of the Treaty, are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any related rule of law or misuse of powers.

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372 Assicurazioni Generali SpA and Unicredito SpA v. Commision, 1999 ECR II-203.
373 Babyliss v. Commission [2003] ECR II-1279.
374 Air France v. Commission, 1994 ECR II-323.

4. MERGERS AND ACQUISITIONS IN TURKEY

4.1. Economic and Legal Background of Competition Law in Turkey

Compared to the United States and advanced economies in the European Union, application of competition law in Turkey is very recent. Law No. 4054 on the Protection of Competition was enacted in 1994[375] and its execution effectively began in late 1997. However it is also arguable that the necessary legal grounds for the establishment of a national competition policy from both economic and legal perspectives existed well before the enactment of the Law.

The fact Turkey had choose a capitalist system for ensuring its socio-economic development in the early days of its foundation[376] created the necessary (but obviously not sufficient) economic ground for a competition policy. Though the capitalist system is an efficient system, as anticipated by the Neo-Classic School, the Chicago School and the Competitive-Market School, its consequence may not be acceptable, in social respect. In this case, it is a prior requirement for such country as Turkey, to ensure the functioning of the free market economy. It is the competition acts, to achieve this goal.[377]

However, Turkish economy lacked a genuine competitive environment until 1980s. Instead it was characterized by a mixed economy of large and inefficient state economic enterprises, private enterprises patronized by the governments and restrictive factor market regulations. The causes of such a scene were the *étatist* heritage of the Republic which was a development strategy based on import substituting industrialization, and also political economic considerations of successive governments[378].

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[375] Official Journal no. 22140 of 13th of December 1994.

[376] Kepenek, Y. & N. Yentürk. *Türkiye Ekonomisi*. İstanbul, Remzi Kitabevi, 2004: pp. 32-36.

[377] Katırcıoğlu, E. Bir Pazar Ekonomisi Kurumu Olarak Rekabet Hukuku. In: İnan, N. (ed.) *Rekabetin Korunması Hakkında Kanunun Küçük ve Orta Ölçekli İşletmelere Etkisi*. Ankara, Tes-Ar Yayınları, 1996, p. 4, Aslan, Y. Türkiye İçin Rekabet Kanunu Önerisi. p. 14 *et seq*.

[378] Keyder, Ç. *Türkiye'de Devlet ve Sınıflar*. İstanbul, İletişim Yayınları, 1999, pp. 195-223.

Following the 1980 military intervention, the transition to liberal economic policies that were supported by structural adjustment programs under Turgut Özal's first technocratic, later political leadership[379] strengthened the economic necessity in question. As in the other developing countries a competition policy was required to cope with the market dynamics following privatization and deregulation as well as inflows of foreign direct investment[380]. Moreover it was well known that free markets, the new prescription for the economic ills of the country, do not create the competitive conditions which would entail the optimal distribution of resources that would maximize social welfare just by themselves, and require carefully designed regulations[381]. Protection of competition would also serve as a promoter of competition in a country with little experience of free markets.

The necessary legal grounds for a competition law existed within the 1982 Constitution of the Republic of Turkey. The first paragraph of Article 167 of the Constitution titled "Supervision of Markets and Regulation of Foreign Trade" reads: "The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets."[382] This provision explicitly calls for a competition policy[383] by turning its adoption and application into a

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[379] Kepenek, *op cit.,* pp. 196-208.

[380] Aktaş, C. *Gelişmekte Olan Ülkelerde Rekabet Politikası: Bir Çerçeve Çalışması*. Ankara, Rekabet Kurumu, 2003: pp. 46-51; Singh, A. Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions. *G-24 Discussion Paper Series* No. 18. Geneva, United Nations Conference on Trade and Development, 2003: pp. 8-9.

[381] Atiyas, İ. Rekabet Politikasının İktisadi Temelleri Üzerine Düşünceler. *Rekabet Dergisi* 1, 2000: pp. 24-45.

[382] Official translation. Available from the Internet: http://www.tbmm.gov.tr/english/constitution.htm [10.08.2006]. The reasoning of the Article lays down the justification in political terms: *"The prevention of monopolies and monopoly like groupings both in consumption and services sectors and breaking out dominations are indispensable conditions for a sound society and a sound democracy"*. The Constitution thus establishes a curiously liberal linkage between competitive markets and democracy given the semi-authoritarian nature of its unamended version. However as Akıncı argues, since competition law protects the weak against the strong and enables the resolution of cleavages between the consumers and producers in a democratic setting, it is indeed the corner stone of the economic public order of a democratic regime. See: Akıncı, M. Ekonomik Kamu Düzeni ve Rekabet Kurumu. *Rekabet Dergisi* 5, 2001: pp. 2-5.

[383] The article calls for a policy but not necessarily a Competition Authority. Article 167 lays down a functional obligation, not an institutional one. Therefore the political authority is free to decide on the organizational means for the achievement of the constitutional objective. See: Ulusoy, A. Türk İdare Sistemi İçerisinde Rekabet Kurumu'nun Yeri. In: *Perşembe Konferansları 2*. Ankara, Rekabet Kurumu, 1999: p. 10.

constitutional obligation. Article 167 can also be said to be a sufficient ground for a merger control even though it does not explicitly refer to it. The reference in the Article for the prevention of the formation by agreement of cartels in the markets can be interpreted as the necessity of a tool to control mergers that may restrict competition. A similar reasoning is also established between the EC Treaty that does not mention mergers and acquisitions and the Community merger control regime.

Sanlı argues that Article 167 of the Constitution represents a stricter approach to the protection of competition than Law No. 4054 since it embraces factor markets and not just those for goods and services. Furthermore, the Article asks for the prevention of monopolies while the Law foresees the prevention of abuse of dominant positions and not necessarily monopolies themselves[384]. Nevertheless, Article 167 lays down the basic duty for the creation of the necessary tools to prevent anti-competitive market practices in general, without using a contemporary competition law vocabulary. Yılmaz[385], though, impliedly creates this link by mentioning the Article 167 of the 1982 Constitution and presumes the accomplishment of this duty by the enactment of the Law No. 4054. She also refers to the Law No 4046 on Privatization and its Article 2 (d) which calls for the avoidance of the creation of monopolistic structures through privatization. In case of stricter interpretation of the Constitution's wording, one could also easily argue that while the Constitution orders the prevention of monopolies, this should also include the cases where a company gains a monopolistic market power by way of its internal dynamics, a situation which is clearly permitted by the Law[386].

Other than the explicit provision in the Article 167 the Constitution also includes an implicit provision for the protection of competition, Article 48. This Article titled "Freedom to Work and Conclude Contract" obliges the State to ensure the freedom of contract and freedom of enterprise. Since the existence of anti-competitive behavior in

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[384] Sanlı, K. C. *Rekabetin Korunması Hakkındaki Kanun`da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği*. Ankara, Rekabet Kurumu, 2000: p. 19.

[385] Yılmaz, L. Türk ve AT Rekabet Hukukunda Teşebbüslerin ve Bankaların Birleşmeleri ve Devralınmaları. In: Sumer, H. & Pernsteiner, H. (ed.). *Şirket Birleşmeleri*. İstanbul, Alfa Yayınları, 2004, pp: 139-140.

[386] The reasoning of Article 7 states: "The point to be noted here is the fact that growth of undertakings outside of their own internal dynamics has been placed under control".

markets limits these freedoms a competition law is also functional for the achievement this constitutional obligation[387]. However, the existence of a competition regime is also considered as contrary to the freedom granted with Article 48. This intentional argument was raised against the 1993 Proposal for a Competition Law prepared by the Ministry of Industry and Trade by the Confederation of Employers' Syndicates. Aslan notes that this argument of the Confederation is the only opposition against the Ministry's Proposal[388].

Turkish Competition Authority also adds that its ultimate aim is the achievement of efficient markets and thus consumer welfare. According to the Authority this approach is also consistent with Article 172 of the Constitution[389] titled "Protection of Consumers" which states that the "state shall take measures to protect and inform consumers" [390]. This official argument deserves further interest as it indicates that the Authority has adopted a consumer surplus standard instead of an aggregate welfare standard as the operating principle, or in other words is biased in favor of the consumers, as also observed in the US and, to a certain extent, the EU[391]. More so given the fact that the Authority's approach ignores Article 5 of the Constitution which states that one of the "fundamental aims and duties of the state" is "to ensure the welfare, peace, and happiness of the individual and society" and thus provides a basis for an aggregate welfare standard as well as the general grounds of Law No. 4054 that gives equivalent weight to both point of views by stating the following in paragraph 16: "The protection of the competitive process (…) will result in the increase of the welfare levels of consumers and the entire society"[392].

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[387] Sanlı, *op cit*., p. 19.

[388] Letter of Confederation of Employers' Syndicates to the Ministry of Industry and Trade dated 26.10.1992 with reference HK/3622. See: Aslan, Y. Rekabet Hukuku Türkiye'de Rekabet Kanunu Çalışmaları ve Bir Kanun Önerisi. Ekin Kitabevi, İstanbul, 1993, p. 10.

[389] OECD. Competition Law and Policy in Turkey. Paris, 2005: pp. 11-12.

[390] Official translation. Available from the Internet: http://www.tbmm.gov.tr/english/constitution.htm [10.08.2006].

[391] Neven, D. J. & Röller, H-L. Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control. *WZB Dicsussion Papers* 00-15, 2000. Dalkır reminds that the results of the adoption of the consumer surplus standard would be similar to those that would be obtained under the alternative standard when the producer surplus that generates from the concentrations is used by the undertakings for purposes such as the protection of their dominance, guarantee of political support etc. See: Dalkır, S. "Sunuş". In: Rekabet Politikası ve Yoğunlaşmaların (Birleşme/Devralmaların) Kontrolü Sempozyumu. Ankara, Rekabet Kurumu, :2003 pp. 68-69.

[392] Official translation. Available from the World Wide Web: http://www.rekabet.gov.tr [10.08.2006].

The linkage between the related articles of the Constitution and the State's duty of establishment of a competition policy is a frequent reference in the majority of Turkish competition law literature. However, Aslan's quotation of Fikentscher's analogy is noteworthy: "competition laws are seen as the constitutions of the economy"[393].

The general grounds of Law No. 4054 requires further consideration; because it enumerates several other merits of the competitive process such as the protection of small enterprises, encouragement of fairness in commercial life, promotion of entrepreneurship and even fight against inflation. Reference to such a large set of objectives suggests that the approach of Turkish competition law to the vital question of purpose is incongruous with either Chicago or Harvard schools of competition and closer to the school that believes competition policy should also take into consideration values not captured by economic models[394].

Ardiyok, in its turn, with a more technical approach relates the issue to a whole package of economic efficiencies by stating that the liberal economic system is based on free competition. Free competition is required because it provides efficient usage of resources, decrease in prices, savings that aim to lower the costs, invention of new technologies and utilization of such inventions in production. These imply the three components, of economic efficiency, indicating the social welfare increase, which are: efficiency in resource distribution, efficiency in production and efficiency in innovation.[395] When total efficiency is increased, both the economic progress shall be provided, and consumers, comprised of the society, who will benefit from such progress. This opinion is a pure Chicago School approach to competition policy.

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[393] Aslan, *op cit*., p.:3.

[394] Gürkaynak, G. Rekabet Hukukunda Yoğunlaşmaların Kontrolü: 'Neden ve Nasıl' Üzerine Düşünceler. In Rekabet Politikası ve Yoğunlaşmaların (Birleşme/Devralmaların) Kontrolü Sempozyumu. Ankara, Rekabet Kurumu, 2003: pp. 17-19.

[395] Ardıyok, Ş. *Doğal Tekeller ve Düzenleyici Kurumlar: Türkiye İçin Düzenleyici Kurum Modeli.* Ankara, Rekabet Kurumu, 2002, p. 10.

Aslan, in its focus into the role of the legal order summarizes that the essential duty of a modern state is rendering the society, which it serves, into an economically and socially advanced condition. Economically, this duty is concretized through maximization of the social welfare by utilizing the scarce resources in the most efficient way. Rules of the law are the most important mechanisms that are benefited to achieve this goal[396].

The above-explained economic and legal grounds did not lead to the creation of a competition policy in Turkey until mid-1990s. The basic reason for this is the lack of a continuous political stability that made the legislative efforts for the enactment of a competition law to remain unfruitful[397]. In late 1990 Turkey was left as the sole Organization for Economic Co-operation and Development (OECD) member without a competition law in place[398]. It is unfortunate that the strong will expressed for the liberalization of the economy was not set in motion for the formation of the institutional structure that would ensure its sound operation.

4.2. Genesis of the Turkish Merger Control Regime

4.2.1. EC-Turkey Association and the Competition Law Concerns

Unable to establish a competition policy until 1994, Turkey found a new impetus, a magic way to adopt policies in many areas including the competition: The EU's set of criteria for full membership. This is a magic tool since it was much efficient and fast in terms of adoption of laws, which were prescribed and shaped by the EU, securing a minimum of social and institutional reaction.

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[396] Aslan, *op cit*., p.:3.

[397] The Ministry of Trade prepared the "Law on the Regulation of Internal and External Trade" (1978); the "Law on the Protection of Fairness in Trade" and the "Law on the Regulation of Trade and Protection of Consumers".

[398] Müftüoğlu, T. Rekabet Kanunu ve İki Yıllık Uygulaması. *Rekabet Dergisi* 1, 2000: p. 5. Italy had enacted a national competition law on the 10th of October 1990. However it should be noted that Italian companies were already subject to the Community competition policy within the limits of its jurisdiction.

The official relations between the EU and Turkey had started in 1959 with Turkey's application to the Community. This led to the signing of a series of agreements over a period of more than 40 years which was mainly shaped by the political cycles of Turkey. First, the Agreement establishing an association between the European Economic Community and Turkey is signed in 1963[399] in Ankara, and then the Additional Protocol was signed on 23 December 1970 in Brussels aiming at the gradual implementation of the customs union among the parties within a period of maximum 22 years. In December 1992 EC-Turkey Association Council gave the decision that the technical negotiations for the transition to the final phase of the association could begin and the Decision No. 1/95 of the EC-Turkey Association Council on implementing the final phase of the customs union[400] was signed on the 6th of March 1995, ratified on the 22nd of December 1995 and came into force on the 1st of January 1996.

All of the three major legal documents of EC-Turkey association partnership, the Ankara Agreement, the Additional Protocol and the Decision No. 1/95 of the EC-Turkey Association Council, include provisions on approximation of the competition regulations of Turkey to those of the Community. Ankara Agreement states in Article 16 that "the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable" in the association partnership[401].

Unlike the Ankara Agreement, which lays down basic principles with large provisions, the Additional Protocol lays down rules that are more detailed for the transitional stage of the association. An entire title, Title I (Competition, Taxation and Approximation of Laws) of Part III (Approximation of Economic Policies), comprising Articles 43 to 48 is devoted for the principles mentioned in Article 16 of the Ankara Agreement. According to the first paragraph of Article 43 the Association Council should determine the conditions and the procedures for the application of the principles contained

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399 OJ [1964] L 217/3687.

400 OJ [1996] L 35/1.

401 In the consolidated version of the Treaty as last amended by the Nice Treaty these provisions are placed under Title VI (Common Rules on Competition, Taxation and Approximation of Laws) of Part III (Community Policies).

in Articles 81, 82, 86 and 87 of the Agreement within six years following the entry into force of the Protocol. Since the Additional Protocol came into force in 1973, the Association Council should have determined the terms of Turkey's adoption of Community's competition principles by January 1979. However no such decision was given despite the fact the body reached a number of agreements on trade-related provisions of the Additional Protocol throughout 1970s and in the following years[402]. This failure can be explained by the lack of direct applicability of the competition provisions as opposed to those related to the implementation of the customs union. For the sake of the very subject of this thesis, the question of mergers and acquisitions is mentioned neither in the Ankara Agreement nor in the Additional Protocol.

4.2.2. Competition Law Rules of the EC-Turkey Customs Union

The lax provisions on competition contained in the first two stages of the Customs Union were replaced by a strong competition regime by the Decision No. 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union. During the negotiations for the final stage EC asked Turkey to adopt new rules or modernize existing legislation for approximation of laws in a number of fields[403] to be covered by the decision being drafted in order to ensure the sound operation of the Customs Union[404]. Since the Association Council decisions does not have direct applicability it seems that the EC had wanted to ensure that the terms of fair trade among the parties and a fair competitive environment in the Turkish market were in place beforehand.

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[402] See: Devlet Planlama Teşkilatı. Türkiye-Avrupa Topluluğu Ortaklık Konseyi Kararları 1964-2000 Cilt I. Ankara, 2001: pp. 47-176.

[403] The corresponding provisions of the Decision No. 1/95 of the EC-Turkey Association Council on the protection of intellectual, industrial and commercial property rights, competition rules, trade defense instruments, government procurement, direct taxation and indirect taxation, are included in Part IV titled "Approximation of Laws".

[404] Özen, Ç. *Türkiye-Avrupa Topluluğu Gümrük Birliği ve Tam Üyelik Süreci Üzerine Etkileri*. İzmir, Ceylan Kitabevi, 2002: pp. 90-91.

Title II of Part IV on competition comprising Articles 32 to 43 of the Decision No. 1/95 is very detailed compared to other areas of approximation. Another important difference is that the competition title is divided into two sections regulating the competition rules of the customs union and approximation of legislation[405]. The former section first duplicates the Article 81, 82 and 87 of the EC Treaty in Articles 32 to 34 with the sole exception that it is destined to be used within with the customs union between EC and Turkey and not the common market that requires prohibition of certain practices. Furthermore, Article 35 provides that the necessary assessments will be carried out according to the Community legislation. According to the first paragraph of Article 37 of the Decision should adopt the implementation rules of the section yet again "based upon those already existing in the Community" and also "*inter alia* specify the role of each competition authority" within two years following the entry into force of the Decision, that is until 1st of January 1998. No such decision that would serve as a bridging legislation among the jurisdictions[406] has been adopted yet; so the competence for assessing the admissibility of practices according to Articles 32 and 33 of the Decision remains within the competition authorities of the parties according to the second paragraph of Article 37. However the non-existence in practice of a competition jurisdiction covering both EC and Turkey is not a hindrance for the enforcement of competition law in the Customs Union since both parties have effective systems of domestic enforcement. Furthermore the principle of extra-territorial application ensures adequate protection and does not make perfect harmonization a necessity[407].

Accordingly, the Customs Union Agreement requires first, the establishment of a mechanism limited to the competition issues having effect on both parties economies, and second, a legislative harmonization by Turkey to ensure the existence and effective application of competition rules compatible with those of the EC with "a view to achieving the economic integration sought by the Customs Union" before the entry into force of Decision No. 1/95. Turkey's specific obligations listed in section B also includes the application of block exemption regulations and EC case law, the establishment of a

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[405] Sanlı, *op cit.,* p. 20.

[406] Ülgen, S. In: *AB Rekabet Hukukunda Son Gelişmeler ve Türk Rekabet Hukukuna Muhtemel Yansımaları.* Ankara, 2000: pp. 31-32.

[407] Kabaalioğlu, H. *A'dan Z'ye Gümrük Birliği*. İstanbul, Toprakbank, 1996: p. 110.

competition authority, adoption of aid schemes to Community rules under Articles 87 and 88 of the EC Treaty and ensure that the public undertakings with special or exclusive rights and State monopolies operate according to Article 86. However, there still is no specific clause on mergers and acquisitions. However, this is not a lack in the legal texts but issues left to the interpretation of these texts that should automatically cover a module that is aimed to control concentration that may lead create threat for the competitive environment.

4.2.3. Enactment of the Competition Law

Turkey's performance of its obligations on competition rules under the Decision No. 1/95 has been a partial success. Partial since there was no progress whatsoever in the field of State aids.[408] However an effective legislative and application regime was formed for preventing uncompetitive practices of enterprises by Law No. 4054 on the Protection of Competition. It is not surprising that the efforts for the preparation of a competition law that led to the enactment of Law No. 4054 were resurrected in 1992[409], same year when the negotiations for the final phase of customs union took off. However, despite the criticism above, the enactment of Law No. 4054 cannot be explained by the EC conditionality alone since, as efforts for the preparation of a national competition regulation date back to late 1970s. The EC's external pressure was functional in modifying the domestic actors' preferences so as to bring these efforts to a conclusion[410]. The fact that the Competition Law and Policy Special Expertise Commission, that was founded during the preparation of Seventh Five Year Development Plan and included many stake-holders, called for the rapid adoption of a competition law[411] supports this view.

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[408] Progress in State aid control appears to be limited. The precondition for future progress is the establishment of a control authority to ensure an effective application and enforcement of the State aid rules under the Customs Union Decision. V: Commission of the European Communities. COM(2006) 649 Final. Commission Staff Working Document: Turkey 2006 Progress Report: pp. 39-40.

[409] Devlet Planlama Teşkilatı., *op cit.,* p. 11.

[410] For a theoretical framework see: Akman Akman, S. Turkey-EU Relations in the Enlargement Process: Rational Choice Approach to Interests and Participation in Turkey. *Collegium* 31, 2005, p. 55.

[411] Devlet Planlama Teşkilatı., *op cit.*

Law on the Protection of Competition was adopted by the Turkish Grand National Assembly on the 7th of December 1994 and was published in the Official Journal on the 13th of December 1994[412]. The substantial clauses of the Law are taken from the corresponding EC provisions[413]. According to Article 7, "Mergers or Acquisitions"[414] of undertakings aimed at creating or strengthening a dominant position which would significantly decrease competition in a market within the whole or a part of the country by any means that confer the party taking over managerial rights is illegal and prohibited. The Law also provides for the power of the Board to issue communiqués in order to declare the types of mergers and acquisitions that need to be notified for clearance. Article 10 lays down the procedure applicable to mergers and acquisitions notified to the Competition Board while the following article deals with the consequences of the failure of notification.

4.2.4. The Establishment of the Competition Authority

Despite the obligation laid down in Article 39 of the Decision No. 1/95 of the EC-Turkey Association Council that a competition authority should be established before its entry into force, the Turkish Council of Ministers appointed the first Competition Board by the Decree No. 97/9090 dated 27th of February 1997, 27 months after the publication of Law No.4054 on the Protection of Competition[415]. After taking an oath in the presence of

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412 The Law has since been amended three times respectively by Law No. 4971 of 1st of August 2003 published in the Official Journal no. 25200 of 15th of August 2003, Law No. 5234 of 17th of September 2004 published in the Official Journal no. 25590 of 21st of September 2004 and Law No 5388 of 2nd of July 2005 published in the Official Journal no. 25874 of 13th of July 2005. While Laws No. 4971 and 5234 bring amendments of financial nature to several laws the latter is specifically drafted in order to amend the rules governing the structure and operation of the Competition Authority.

413 Kaya, Y. Rekabet Politikası. In: *Gümrük Birliği Rehberi*. Ankara, Emlak Bankası Eğitim Müdürlüğü Yayınları, 1996: pp. 113-118.

414 According to Aslan Article 7 is badly drafted from both linguistic and legal perspectives. Aslan, Y. *Rekabet Hukuku: Teori – Uygulama – Mevzuat*. Bursa, Ekin Kitabevi, 2005: pp. 254-255.

415 However a new General Directorate of Consumer and Competition Protection with a mandate including competition law was established within the Ministry of Industry and Trade by Statutory Decree No. 494 of 10th of August 1993 amending Law No. 3143 on the Organization and Tasks of the Ministry. Therefore the obligation in question was formally performed since the Decision No. 1/95 does not specify the organization of the competition authority. The General Directorate of Consumer and Competition Protection assisted the organization of the Competition Authority and orientated its efforts solely to consumer affairs following its establishment.

the High Court of Appeals Council of Presidency in March 1997 the Competition Board completed the organization of the Competition Authority in a period of eight months and announced the arbitrariness by Communiqué No. 1997/5[416] according to Temporary Article 2 of Law No. 4054.

In its Regular Report on the Progress of Turkey towards the full membership of the EU, the EU welcomes this legislative adoption and, in a way, confirms the completion of the requirement. The Report states that

> "[I]n the context of the implementation of the customs union, Turkey has already complied with some of its obligations as regards ensuring the compliance of its competition rules with Community law. In December 1994, it adopted a Competition Act that complied with Community legislation and incorporated the EU's anti-trust provisions. In March 1997, it set up a competition authority to be responsible for enforcing the Competition Act."[417]

4.2.5. Judicial Review of the Competition Authority Decisions

The Competition Authority is no law court. Yılmaz believes that the Authority is a court in the wide sense of the concept like the High Council for Elections[418]; but the Competition Board does not consist of judges even though its members have guarantees similar to those granted to judges[419]. It is an administrative authority applying an administrative procedure whose decisions are subject to administrative judicial review. This duality clearly shows that describing the Authority as some sort of court has no legal value[420]. Its status as an independent regulatory authority has no impact whatsoever here since these authorities and other administrative organs are subject to the same procedures and treatment in essence of their decisions regarding judicial review. Indeed, even though the Turkish case-law on the activities of independent regulatory agencies is still in its

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[416] Official Journal no. 23160 of 4th of November 1997.
[417] 1998 Regular Report from the Commission on Turkey's Progress Towards Accession, p. 33 para 3..
[418] Yılmaz, E. Rekabet Kanunu Uygulamasında Usul ve İspat Sorunları. In: *Perşembe Konferansları 2*. Ankara, Rekabet Kurumu, 1999: p. 112.
[419] Öztürk, *op cit.*, p. 32.
[420] Eğerci, *op cit.,* p. 233.

infancy state, the supreme judicial courts have not come to a judgment that diverges from this general view by emphasizing the specificity of these authorities[421]. On the contrary, the Court of Jurisdictional Disputes has explicitly described the Capital Markets Board, one of the nine independent regulatory authorities, as a public authority[422]. Consequently, all decisions and activities of independent regulatory authorities, including those of the Competition Authority, are simply administrative operations. Some authors do not categorize non-executive operations (internal operations, opinions and preparatory operations) of the Authority as administrative[423]; but this categorization is not having an important effect as it has no impact on the question of judicial review.

As an exceptional case, Law No. 4054 has determined the competent administrative court for the review of the operations of the Competition Authority. According to 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"*. Therefore the Council of State has a special duty and is the court of first instance for these decisions of the Authority[424]. The Council is also the competent court for reviewing the legality of the secondary legislation, i.e. communiqués

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[421] Eğerci, *ibid*., pp. 287-289.

[422] Öztürk, *op cit.,* p. 26.

[423] Bolatoğlu, H. Rekabet Kurulu Kararlarının Yargısal Denetimi. Ankara, Rekabet Kurumu, 1999, p. 12.

[424] The Council of State has applied to the Constitutional Court for the annulment of the provision based on the argument that acting as the court of first instance would damage its status as a court producing case law. However as Article 155 of the Turkish Constitution states that the Council is to act as the court of first or last instance in certain cases determined by the law, the Constitutional Court declined the request for annulment. See: Eğerci, *op cit*., p. 250. Of course this verdict is not sufficient by itself to assess whether or not the Council of State is an appropriate body for the review of competition decisions. The ground for Article 55 states that "As their administrative nature is more dominant, the Council of State is provided to be the resort to jurisdiction for Board decisions. As Board decisions essentially have economic nature at the same time, the fact that the Council of State, which could have members graduated from departments apart from Faculty of Law, has an institutional structure suitable for evaluating Board decisions better, might be counted as another reason for choosing the Council of State as the resort to jurisdiction.". However both of these justifications also hold for provincial and regional administrative courts. More suitable justifications would have been the sensitivity of competition for the economic public order, the necessity of reaching verdicts rapidly and the fact that competition law requires a degree of expertise. The expertise of the Court of State in competition law is somewhat questionable. Some authors argue that a special chamber should be established within the Council for competition cases instead of forwarding these to the catch-all 10th Chamber. See: İnan, N. Rekabet Hukuku Uygulamasında Adliye Mahkemelerinin Rolü. In: Ankara Barosu. Uluslararası Hukuk Kurultayı Cilt I. Ankara, 2002, p. 19. An intermediate solution has been reached by Law No. 5183 amending the Law on the Council of State (Official Journal no. 25487 of 9th of June 2004) that established a new 13th Chamber responsible for the review of the administrative operations of all the independent regulatory agencies.

adopted by the Authority and the regulations adopted by the Council of Ministers under Law No. 4054 according to its own law[425]. Article 55 counts four types of decisions[426] while the Authority carries out several other administrative operations. These operations are subject to the review of administrative courts with a general duty (versus the special duty assigned to the Council of State)[427]. The judicial status of intermediary decisions such as the decision to carry out a preliminary examination or open an investigation is subject to a controversy. According to those who support that these decisions are chain operations and it is not possible to file a separate lawsuit for their annulments while those who support that they are separable operations argue contrariwise[428]. However, whether or not an administrative decision is a chain or a separable operation, it should be carried out according to law and in case of a conflict the legality of an operation can only be determined by a court. Assume that the Competition Authority, based on a complaint lodged to it, is informed of an acquisition by way of inheritance which is normally not notified, since the Article 7 excludes such acquisitions, and decides to investigate the transaction. Assume also that, the motive of the complaint is based on the fact that although the acquisition is by way of inheritance, the inheriting party is active in the same market and that the transaction, while creating a change of control, is caught by the thresholds set by the Law. It should be possible to review the legality of such a decision before the final decision to determine whether the Authority surpasses its powers. Moreover, certain intermediary decisions of the Authority are likely to incur considerable costs on the parties due to the need to acquire additional consultancy and representation services as well as the costs associated with the delay of the intended operation[429]. Therefore despite the established administrative law doctrine, such interim decisions

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[425] Katırcıoğlu, E. Rekabet Kurulu'nun Yapısı ve Yetkileri. *İktisadi Kalkınma Vakfı Dergisi* 132, 1996**,** p. 45.

[426] The Article is badly drafted in the sense that the concept of final decision is not defined and thus creates an ambiguity. Accepting all decisions of the Board that closes a dossier as final decisions is a plausible solution that also accommodates the case law of the Council of State. However then the definition of final decision in Article 48 of the Law is surpassed. See: Bolatoğlu, *op cit*., p. 10; Eğerci, *op cit*., pp. 243-244. Since Article 55 does not define the concept itself it is clear that the drafters were referring to this previous Article; so Article 55 should be amended to create legal certainity.

[427] Bolatoğlu, *ibid*., pp. 13-15.

[428] Bolatoğlu, *ibid*., p. 11.

[429] In the EU for example, the CFI's decision overturning the Commission's prohibition decision in Schneider/Legrand transaction has led Schneider Electric SA to seek for damages incurred by the decision of the Commission. However it is to be noted that what Schneider brought before the court was the final decision of the Commission.

should be open to review. More so given that the Competition Authority has the competence to take temporary measures[430]. It is also possible to obtain judicial and administrative economy by the timely appeal of an interim decision that infringes the relevant legal basis. Thus interim decisions should also be subject to administrative legal review, at least conditionally[431].

Administrative operations are subject to two types of judicial review: procedural and essential review. The former, sometimes named as external review, determines whether or not the operation is carried out according to the procedural conditions laid down in the corresponding legislation. Procedural review also tests the competence of the organ that has carried out the operation. The latter, or internal review, seeks to evaluate the appropriateness of the operation regarding the subject, objective and justification. The decisions of the Competition Authority have been reviewed from both perspectives. In procedural review certain deficiencies of the procedure are found to be secondary and so not salient enough to annul the administrative operation. However Law No. 4054 and the Regulation on the Procedures and Principles of Working[432] of the Competition Authority lay down the investigation procedures in a very detailed manner. As a result, especially in the early days of its operation, some decisions of the Competition Board were annulled because of its failure to follow the procedure[433]. Essential review of the decisions have been somewhat controversial because of the debates on the convenience of the Court of State as the competent court and the related question of the very appropriateness of the essential treatment of authorities that have such expertise and that utilize a contentious method for decision-making: Dinçer argues that the boundaries of classical judicial review should be re-defined and kept at a minimum level for these authorities[434]. However, the limitation of essential review would damage the integrity of judicial review in general and

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[430] Yılmaz, E. In: AB Rekabet Hukukunda Son Gelişmeler ve Türk Rekabet Hukukuna Muhtemel Yansımaları. Ankara, Rekabet Kurulu, 2000, p. 40.

[431] The fact that the competent courts in intermediary and final decisions are separate would therefore cause a complication where a legal action is taken against the final decision before the verdict regarding the intermediate one is delivered. This can be solved by the unification of lawsuits at the Court of State. The Court would then first review the intermediary decision. However the optimal solution is the amendment of Article 55 by striking out the word "final".

[432] Official Journal no. 23026 of 21st of June 1997.

[433] Eğerci, *op cit*., pp. 289-291.

[434] Dinçer, G. Hukuk Devletinin Yargı ve Yasama Boyutu. In: *Perşembe Konferansları 10*. Ankara, Rekabet Kurumu, 2000, p. 18.

as stated above Turkish supreme judicial courts do not provide independent regulatory authorities a privileged treatment. On the contrary, in some cases, the Court of State has reviewed the decisions of the Competition Authority thoroughly, evaluating their appropriateness from several dimensions[435]. Anyway in the case of lack of necessary expertise, the Court of State can make use of the expert witnesses under the provisions of the Law on the Procedure of Administrative Proceedings just as all other courts can under their procedural legislations[436].

It should be emphasized that according to Article 125 of the Turkish Constitution that prohibits any judicial ruling "which has the quality of an administrative action and act" if the Court of State would ever decide to annul such an administrative operation, the effect of this decision would be limited with the operation itself and would not *ipso facto* have consequences on the permissibility of the merger or acquisition that constitutes the subject of the case[437].

4.3. Legislation Governing Mergers in Turkey

The Board, right after it took duty, prepared and adopted the initial secondary legislation necessary for the application of the Law within the same period[438]. There are two pieces of secondary legislation adopted by the Competition Board related to mergers and acquisitions: Communiqué No. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board[439], amended four times[440] (the Merger Communiqué) and Communiqué No. 1998/4 on the Procedures and Principles to be

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435 Öztürk, *op cit.,* p. 26.
436 Eğerci, *op cit.,* pp. 289-291.
437 Bolatoğlu, *op cit.,* p. 42.
438 Eğerci, A. *Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi*. Ankara, Rekabet Kurumu, 2004, pp. 80-81.
439 Official Journal no. 23078 of 12th of August 1997.
440 Respectively by Communiqué No. 1998/2 published in the Official Journal no. 23298 of 26th of March 1998, Communiqué No. 1998/6 1998/6 published in the Official Journal no. 23527 of 18th of Novermber 1998, Communiqué No. 2000/2 published in the Official Journal no. 24147 of 21st of August 2000 and Communiqué No. 2006/2 published in the Official Journal no. 26103 of 9th of March 2006.

Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid[441], amended once[442] (the Acquisition via Privatization Communiqué). Contrary to EU and US practice no explanatory guidelines whatsoever was ever prepared[443]. Article 7 of the Law No. 4054 and the related Communiqués constituted a merger control regime that is compatible with ECMR that was in force as demanded by the EU[444].

4.3.1. Application of the Mergers and Acquisitions Regime in Turkey

Though the Competition Authority was lately established in the end of 1997, the delay did not prevent the Authority to become a successful mechanism which is also approved in the International arena. Within the framework of the merger practice, immediately after its establishment, the Board has started to evaluate the applications received. Since then, until the beginning of 2007, the Board issued 895 decisions on mergers and acquisitions. However, classified statistics of 1999-2005 indicate that out of 755 applications during this six year period, only three of them were prohibited, 16 of them were subjected to the authorization conditions laid down by the board, 469 were authorized, and there are 267 out-of-scope applications. In order to better assess the performance of the Competition Authority, the following tables provide further detailed information.

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[441] Official Journal no. 23461 of 12th of September 1998.

[442] By Communiqué No. 1998/5 published in the Official Journal no. 23527 of 18th of November 1998.

[443] Several authors recommend the Competition Authority to prepare such documents in order to clarify the complicated issues as well as its positions. See for instance: Gülergün, E. C. Türkiye için Yoğunlaşma Kontrolü Önerisi: Rekabet Testi. In: *Rekabet Politikası ve Yoğunlaşmaların (Birleşme/Devralmaların) Kontrolü Sempozyumu*. Ankara, Rekabet Kurumu, 2003: p. 188.

[444] Develleves, Y. Türkiye Cumhuriyeti Rekabet Politikasının Uygulanmasına Avrupa'nın Bakışı. In: *Türk Rekabet Hukuku ve Rekabet Kurumu'nun AB ve AB'ne Üye Ülkelerle Mukayesesi Toplantı ve Paneli*. Ankara, Rekabet Kurumu, 1998: pp. 17-18.

Table 4

Number of merger and acquisitions files concluded (1999-2005)

	1999	2000	2001	2002	2003	2004	2005
Merger	5	13	6	14	7	7	5
Acquisition	56	70	73	83	76	88	122
Joint Venture	5	11	7	6	9	8	8
Privatization	2	6	0	0	14	19	35
TOTAL	68	100	86	103	106	122	170

Source: Competition Authority, Annual Report 2005.

To be more specific about the Turkish Competition Authority decisions regarding the authorization of those transactions and its applications, it worth taking a look at the following table where clearly provided data of 1999-2005 depict the numbers of transactions which were authorized, conditionally authorized, rejected and out of scope, below the threshold level.

Table 5

Results of Mergers and acquisitions resolved (1999-2005)

Year	Authorization	Conditional Authorization	Rejection	Out of Scope / Below Threshold
1999	23	1	0	44
2000	49	2	2	47
2001	39	2	0	45
2002	65	0	0	38
2003	77	2	0	27
2004	86	3	0	33
2005	130	6	1	33
TOTAL	469	16	3	267

Source: Competition Authority, Annual Report 2005.

The fact that half of the total number of applications were found "out of scope" of the Competition Law demonstrate that the relevant circles including the lawyers and business environment were considerably unaware of the concept of "competition" defined in the legislation, save the fact that a number of notifications which are found not to fall within the jurisdiction are notified purposely in order to get legal certainty.

It is significantly important to note that some mergers and acquisitions cases were part of the international mergers and acquisition transactions. Therefore it is also subject to the permission of other jurisdictions' authorities. Yet, it is interesting to look at the statistics concerning the distribution of mergers and acquisitions showing the shares of transactions involving domestics and foreign parties.

Table 6

Distribution of Mergers / Acquisitions by Their Origin (1999 -2004)

	1999	2000	2001	2002	2003	2004	99-04	% (99-04)
Foreign – Foreign	10	24	20	31	34	54	173	49,28
Domestic – Foreign	9	12	16	15	25	17	94	26,78
Domestic – Domestic	5	17	5	19	20	18	84	23,93
TOTAL	24	53	41	65	79	89	351	

Source: Competition Authority, Annual Report 2005.

One remarkable point of merger application that can be observed from the above table is that the transaction of foreign-foreign has reached almost half of all of the transactions between 1999 2004. Surprisingly, there are only approximately 24% of the mergers and acquisitions applications that are between domestic-domestic parties.

Applications of mergers and acquisitions are diversified in many economic sectors. The below table indicates that most mergers and acquisitions transactions takes place within chemical products, petrochemicals, petroleum products and fertilizers sector with 89 applications from year 1999-2004 (and an additional of 17 applications in 2005 not indicated in this table). On the other hand, there were not many applications in the sector of metals, clay and ceramics, agricultural and livestock breeding, forest products, medical instruments, optical instruments, tourism and tobacco products.

Table 7

Distribution of Mergers/Acquisitions by Sectors (1999 -2004)[445]

Industries	1999	2000	2001	2002	2003	2004
Printing & Publishing, Records reproduction, Cassettes& Similar Media	0	1	2	1	1	4
Furniture, White Goods, Toys, Sports Equip., Musical Instruments., Jewelry	1	0	0	2	1	1
Office Equipment and Computer	0	2	0	6	3	1
Glass	0	1	1	0	1	0
Iron and Steel	0	1	1	2	0	4
Metal (Except Iron)	0	0	0	0	1	0
Electricity/Electronics	0	0	4	4	5	5
Electricity/Gas/Water	0	1	1	2	5	6
Financial Services	2	2	1	6	1	3
Food Products and Beverages	6	7	1	9	10	5
Cement, Construction Equipment	0	4	4	1	5	0
Pulp, Paper and Paper Products	0	1	0	2	8	2
Land Vehicles, Aircraft, Sea Vessels and Railway Carriers	4	5	6	4	2	5
Chemical Products, Petrochemicals, Petroleum Products, Fertilizers	3	19	10	11	19	27
Mine and Mining	0	0	0	1	3	6
Machinery and Equipment Manufacturing	1	2	4	2	5	5
Clay and Ceramics	0	0	0	0	0	0
Plastic and Rubber Products	0	0	0	2	1	1
Health, Education, Sport, and Self-Employment Activities	0	0	0	2	1	0
Agricultural and Livestock Breeding, Forest Products	0	0	0	0	1	0
Textiles and Ready Made Clothes	3	1	2	1	0	2
Telecommunications	1	2	2	3	4	0
Medical Instruments, Optical Instruments	1	0	0	0	1	0
Tourism	0	0	0	0	0	0
Tobacco Products	1	0	0	0	1	0
Transportations	0	2	2	3	1	5
Others	1	2	0	2	2	7

Source: Competition Authority, Annual Report 2005.

[445] Applications considered as under the thresholds and out of scope have not been included.

4.3.2. The Future of the Turkish Merger Legislation

Competition Authority has enforced the Competition Law since 05.11.1997. In 2003, the Authority launched an open discussion by claiming that the practices and experiences obtained since 1997 revealed the outstanding need for revision of, and amendment to a series of provisions that put back the practice from being more functional due to the wording of Law.

In this regard, a Discussion Text was prepared by the Authority to create an environment intended to find out the Law amendments required, taking into consideration especially the developments that take place in the Community's competition law, which constitutes the origin of substantive provisions of Law No. 4054, along with experiences gained by practice. At this rate, experts of the subject and academicians, at the outset, are called to exchange their opinions about the text prepared, whereby the text will have its final form in light of the opinions, suggestions and evaluations.

Prepared by taking into consideration the opinions and suggestions received, the final draft text is submitted to discretion of Competition Board for discussion and determination thereon. Finally, the final proposal text which was designed to create a more effective and functional act, which will remedy the problems that may arise in practice, and which will reflect the Authority's and the involved people's experiences on the "musts" of the matter is published in 19.04.2005 at the Authority’s web site and is still pending.

The proposed amendments are more like a complete package of legislative amendment proposals covering many different aspects of the competition regime; and they are not specifically concentrated on rules governing merger and acquisitions. However, while referring and handling the Authority’s proposal we will normally restrict our concerns with proposals concerning merger control. First of all, we have decorticated the proposed text under jurisdictional, substantial and procedural issues. The following table demonstrates the proposed new and consolidated Article 7 of the Competition Law. In order to facilitate the topical analysis, we have displayed the article under three typical

heading, being substantial, jurisdictional and procedural, and further named, in the first column, each relevant legislative arrangement with its concerned subject. Thus, while the second column reflects the exact text of the proposed legislation, the first column is of demonstrative purpose.

Table 8

Article 7-Control of Concentration Transactions

SUBSTANTIAL ISSUES	
SLC Test	Concentration transactions, such as merger, acquisition or joint venture which will result significant lessening of competition in a market of goods or services, are prohibited.
JURISDICTIONAL ISSUES	
Announcement of the Secondary Legislation	The Board shall issue communiqués to announce which transactions are concentration transactions, which transactions require permission by prior notification to the Board, and the procedure and substance of the notification.
PROCEDURAL ISSUES	
Notification Timing and Completeness Condition	Notification shall be deemed to have been made on the date when the information and documentation, required in form to be prepared by the Authority, are fully and completely submitted to the Authority's records.
Notifying Party	Notification made by one of the parties to a merger or a joint venture is sufficient, on condition that information and documentation regarding other parties were provided fully. As for acquisition transactions, the acquiring party shall be responsible from notification.
Phase I Decision [Permission/Prohibition/Condition/Final Investigation] in 30 Days	The Board can grant permission for, prohibit the transaction, grant permission for the same providing that certain conditions shall be met or certain obligations shall be performed, or refer the transaction to the final investigation pursuant to the preliminary investigation to be conducted within 30 business days from the notification.
Phase II Decision [Permission/Prohibition/Condition] in 3 Months	By the end of the final investigation, which shall not last longer than three months, the Board may grant permission for, prohibit the transaction, or grant permission for the same providing that certain conditions shall be met or certain obligations shall be performed.
Performance of the Conditions	Transaction shall be deemed invalid in case of failure to meet the conditions or perform the obligations within the time limitation set by the Board.

Table 8 (cont.)

Hearing Session	It is required to hear the parties' opinions on the matter before making a decision of prohibition or conditional permission.
Stop-the-Clock Provision	In this instance, the process of time limitations, set forth in paragraphs three and four, shall stop.
Implied Acceptance	In case the Board does not respond to and make any proceeding for an application regarding concentration transactions, within the time limitation, then the transaction shall be deemed to have been permitted by the end of 30 days from the notification date.
Prohibition of Closing without Permission	Concentration transactions subject to permission cannot be put into effect unless permitted by the Board.
Fines and Phase II Investigation for Closing without Permission	In case the Board is informed, in any way, of a concentration transaction, which is subject to permission, put into effect without permission, then it shall directly handle the transaction in final investigation and relevant parties shall be imposed the fine, set forth in first paragraph of Article 16.
Phase II Decision for Closing without Permission [Permission/De-Merger/Condition]	As conclusion of final investigation, the Board can grant unconditional permission for or prohibit the resumption of the transaction or grant permission to the same provided that certain conditions shall be met or certain obligations shall be performed.
De-Merger Procedure	In case of prohibiting the transaction, the Board shall rule, in addition to the fine specified in second paragraph of Article 16, termination of concentration transaction, elimination of any actual conditions created illegally, return of any share or assets obtained illegally, in a way, whose conditions and time limitation shall be set by the Board, to the former owners if possible, if not, then to assign and transfer the same to third parties, prohibiting the acquiring persons from attending, in any way, to management of the undertakings acquired until the mentioned shares and assets are transferred to former owner or third parties, and any other measure the Board finds necessary to be taken.

When compared to the extensive coverage of the EU Merger Reform and the discussion process that took place during two years before its implementation, the Competition Authority's amendment proposals on merger issues represent a more compact structure. Although containing the major aspects of the EU reform such as the switch to the

SLC Test, the proposal is mostly tackling the problems originating from the wording of the Law[446]. We have mentioned it as wording problems, rather than different interpretation, since, during the application of the current legislation, in many controversial instances we observed that the Authority's practice reflected how the purpose of the legislative text should be read (or as applied in the EU) but not what should be applied by the way it is put into words in the Law.

The proposal also introduces a faster review procedure incorporating a sounder system for remedies and also making possible the contact of the parties with the Authority through hearing sessions.

Account taken from the fact that a motivation or a campaign of necessity for a merger reform in Turkey, like the Merger Reform in EU, is out of question, presently. Accordingly, the proposal of the Competition Authority should not be perceived as fully concentrating on merger issues. Nonetheless, the most concrete, prepared source that we can benefit in making a suggestion for legislation appears to be the draft proposal by the Competition Authority. We will handle its deficiencies in the policy proposal part of this study.

[446] Discussions on whether the Act provides for the prohibition of the creation of a collective dominance through a merger, the application of fines in late notifications and the provisions of conditional clearance are excellent examples for such wording/interpretation confusions.

5. DISSENTING VOTE ANALYSIS

5.1. The Rationale behind the Dissenting Vote Analysis

We have discussed above that as part of the direct policy transfer, Turkey implemented a competition regime which reflects the genetics of the EU system. Furthermore, as confirming the magnitude of this similitude, Turkey not only accepted the jurisprudence of the EU Commission and the European Court decisions, but has seen its Competition Authority referring to this case-law in its decisions where necessary. Thus, departing from the idea that a theoretical presentation of the Turkish merger control rules followed by the analysis of relevant cases would not only go beyond reciting the EU principles but would also restrict a more creative study as well[447], we have designed a study with such a structure that would give us the opportunity to refer to both the EU and Turkish regimes and implement a thesis question therein: *Does Turkey call for a merger reform?*

In the beginning of the fourth section consisting of Turkey, we have tried to picture the sources of the Turkish competition law from its labor pains to its toddles, -exactly where it is right now- by referring to its history and politics behind. Since the very purpose of the study is devoted to finding out whether there is a need in substance for adopting the EU's 2004 Merger Reform into the Turkish system, we will try to present the Turkish merger control regime from a different perspective by the use of classified data. What we mean by classified data is the use of sets of quantifiable facts that are expected to provide with results having a minimum of deviation for our analysis. However, when it comes to the application of law, the most quantitative data consist of simple classifications and

[447] However, when analyzing the Turkish cases, for the sake of the clarification of the issues at hand, we did not deprive ourselves from displaying the theory behind the Turkish merger regime, nothwithstanding the fact that it shows a certain degree of similarity with that of the EU.

statistics that put forward numbers of cases approved, rejection decisions, conditional clearances etc. but, normally, not much further.

In our turn, we have tried to classify merger decisions of the Competition Authority taken between its establishment until the end of the year 2006 and tried to come to conclusions on how many of them contain dissenting votes, whether an administrative fine is requested and applied or not, whether they are caught by exceeding the market share or turnover thresholds or both, in how many instances the Opinion of the Reporters differs from the final decision of the Board, and a few other constraints on whether they are horizontal, vertical or conglomeral and whether they are mergers, acquisitions, joint ventures or privatizations.

However, while working on this huge classification we end up concluding that a very valuable date is hidden in the decisions containing dissenting votes of the Competition Board members.

"*I know you won't believe me, but the highest form of human excellence is to question oneself and others*" says Socrates in valuing the examination of a person's own beliefs and the validity of such beliefs. Therefore, in implementing this analysis –baptized as the *Dissenting Vote Analysis*- we are motivated from the general assumption that *questioning* and *disagreement* -motivations behind *self-criticism*- are the major deriving forces for determining the issues that may possibly require further attention within a decision taking body. Accordingly, we have decided to make use of the dissenting votes attached to the decisions of the Competition Board to set out the positive externalities that may exert.

Since 1998, the Competition Board has been reviewing merger and acquisition transactions that exceed certain thresholds and that cannot enter into force without obtaining the Board's permission in light of the principles imposed by the legislation. It

renders its decisions[448] with reasoning for each transaction and shares such decisions with public domain in a transparent manner. Decisions can be given in unanimity, whereas, in many cases minority votes disagreeing with the majority decision are announced as part of the final decisions as reasoning for Dissenting Votes by Competition Board members.

Dissenting votes may have many reasons, for sure. One should not necessarily expect them to be knitted with knowledge of competition law. It is not to be forgotten that the presence of dissenting votes in a decision also means that the majority decided otherwise. The study aims to analyze, through these dissenting votes, whether the same needs, which triggered EU reform process, have arisen in merger or acquisition transactions in Turkey, and whether the Board members set them out directly or indirectly. Thus, assuming that the reform process in EU is based on elimination of legislative hitches, one should expect same hitches arise in Turkey, as well. Consequently, a thorough classification of the dissenting votes is necessary for an unbiased conclusion of how and on which points they handle issues calling for what is thought to be missed by the majority.

At this stage, one can argue that the European Merger Reform was not triggered by the Commission itself; it was the later decisions of the CFI annulling the Commission decisions which brought into light the major problem areas. Although we do not refer to the issue whether Turkey has to adopt the EU legislation automatically, we explained above the legislative harmonization process and the motives of Turkey. Correspondingly,

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[448] The principles that govern the Board meetings and decision quorum of the Competition Board are stated in Article 51 of the Act No 4054 on the Protection of Competition. It should be taken into due regard that the decisions taken after 02.07.2005 are subject to a modified quorum through Act No 5388 Article 5 that reduced the number of Board members from 11 to seven. Article 51 reads as follows:

> "Article 51- In its final decisions, the Board convenes with the participation of at least a total of five [previously 8] members including the Chairman or the Deputy Chairman, and it decides via the parallel votes of at least four [previously 6] members.
>
> Where the necessary quorum for the decision cannot be attained in the first meeting, the Chairman ensures that all members participate in the second meeting. However, if not possible, the decision is made via the absolute majority of the participants in the meeting. In this case, the quorum for the meeting may also not be less than the one mentioned in the first paragraph. In case of a tie vote in the second meeting, the vote of the side of the Chairman is deemed preponderant.
>
> For decisions except the final decision, and particularly for decisions and transactions having the nature of measures and recommendations, it is required that at least one third of the members of the Board convenes and that the absolute majority of the participants in the meeting makes a decision."

we defend our analysis with the counter-argument that the Turkish Competition Authority is highly motivated to follow the footsteps of the EU practice with a careful interpretation of the legislative changes and their possible effects on national markets. Accordingly, we assume that the institutional blindness will not occur in the Competition Authority through the learning process from the EU and also with the fact that Turkey is actually negotiating for full membership.

One can also question the use of the decisions with dissenting votes alone but not the decisions taken with unanimity. Although the cases decided with unanimity should also be examined in order to come to a correct picture, taking into account the fact that the Board Members raised their objections in every possible instance, we assume that unanimous decisions do not raise serious competition concerns. A supporting fact for this assumption is that, as we will analyze below, the decisions containing dissenting votes are –almost without exception- the ones that involve market situations and players that reflect sensitive post-merger formations likely to happen in privatizations, bidding sales and transactions containing restrictive conditions between the parties.

Accordingly, we have decided to focus on jurisdictional, procedural but mostly on substantial issues[449] contained within the dissenting votes to Board decisions concerning the past transactions notified to the Competition Authority and to see whether they call for an urge to adopt an EU like assessment criteria in order to establish a more competitive national market integrated with the global economy. After all, we expected this analysis to provide us a unique playing field to comment whether the Competition Board itself raises self-criticism that may be considered as explicit or implicit calls for a better application of the merger control regime or not.

[449] Nevertheless, although not concentrated, this study does not undervalue the procedural issues. As a matter of fact, it is structured on the use of the hints provided by a procedural requirement set by the Article 52 of the Law which states that a final decision should also involve the dissenting votes in writing.

5.2. The Methodology of the Dissenting Vote Analysis

In order to implement further the reasoning behind the dissenting votes, let us design the following playing field:

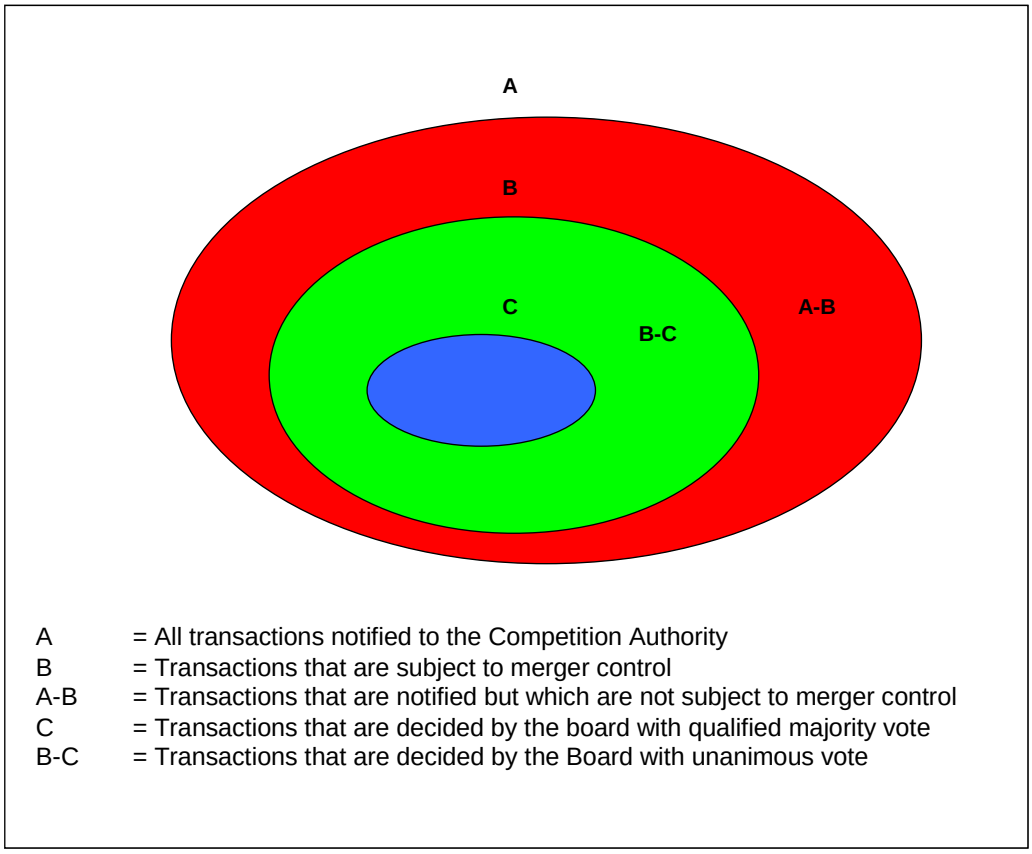


Figure 1. The Universe of Transactions Examined by the Competition Authority

We observe that, since the implementation of the Law until the end of the year 2006, a total number of 941[450] decisions have been taken by the Competition Board. This constitutes the entire space of decisions (A). Since the area (B) with 623 decisions represents transactions that are subject to merger control and decided either with unanimity or absolute majority, the area (A-B) with 318 decisions represents the transactions which

[450] The statistics on the decisions of the Competition Board are available from the World Wide Web: <http://www.rekabet.gov.tr/istatistikturkce/index.htm>.

are not caught by the legislation but notified anyway[451] by the parties because of either lack of knowledge or to obtain a sort of negative clearance which may serve as a legal security[452].

Unanimous vote, as the word itself puts it explicitly, means that all of the members of the Competition Board present at the time of the voting session are in absolute consensus on the decision and no objection is raised on either jurisdictional, substantial or procedural grounds whatsoever (B-C). In our analysis we disregard such decisions since they face no controversy, meaning that the decision taking body of the Authority is totally confident with its decision. Among those decisions with unanimity, we also automatically disregard the decisions (if there exist any) in which all of the present board members are unanimously taking an erroneous decision. However, we see the possibility for this as very weak since, as we also expressed it above, the members raised their rejections in many of the cases where they think it was deemed necessary. Accordingly, we will base our analysis to decisions with dissenting votes (C). We assume that a decision with dissenting vote is a clear sign of disagreement within the decision taking body. Of course the rejection's concern is the point of reference in our analysis.

Finally, we have determined a total of 102 Board decisions[453] containing one or more dissenting votes in merger decisions concerning transactions reviewed under merger control rules. We also selected 18[454] decisions for which the Board decided that the

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[451] Tuncay SONGÖR, the Vice President of the Competition Board evaluated the situation in its speech during the Symposium held for the 10th Anniversary of the Competition Board on 13.04.2007 as a lack of legislative knowledge of the parties to such transactions and criticized this situation as an increase of the workload of the Competition Authority. Such decisions represent 34 % of all transactions notified.

[452] Except of few decisions in which the consideration of the Board not to review those transactions are put at stake in terms of allegedly erroneous calculation of thresholds or alleged mistakes in the interpretation of major concepts such as the existence of change of control and the definition of undertaking, the out-of-scope cases shall not be taken into account in this analysis.

[453] We observed that throughout the year 1998, the Board Decisions were not subject to a uniform format. Accordingly most of them were lacking important information that should be contained within a final decision as ordered by the Article 52 of the Law. Accordingly, we have decided to disregard three decisions with dissenting votes raised in 1998. For the mentioned three decisions although the dissenting votes are not attached to the final decisions, we understand their existence since the decisions are taken by absolute majority. The complete list of the decisions subject to the empirical study are classified as APPENDIX .

[454] Decision No 01-37/365-97 dated 31.07.2001; Decision No 02-18/207-88 dated 02.04.2002; Decision No 02-28/313-128 dated 14.05.2002; Decision No 02-32/366-152 dated 28.05.2002; Decision No 02-43/503-208 dated 11.07.2002; Decision No 02-47/588-241 dated 08.08.2002; Decision No 02-74/872-356 dated

transaction does not fall within the definition of mergers and acquisitions as laid down in the Law No 4054. We included such decisions for the simple reason that they contained dissenting votes that question main problem areas of the merger regime.

5.2.1. Dissenting Votes by Members

As a starting point, we classified the number of the dissenting votes based on the Board members who raised them. The results are presented in Table 9 below. It is to be noted that the total number of 213 dissenting votes does not reflect the number of signed "Grounded Dissenting Vote", but different rejection areas which may be signed within the same vote. This was certainly necessary since we differentiated the types of the votes subject to their main groups, namely jurisdictional, substantial and procedural.

Although it would be a good study to correlate the backgrounds of the members and the type of the dissenting vote they raised, we thought such a classification would be irrelevant since, for the meaning of our analysis, we mainly focused on the theoretical grounds and subject matter of the dissenting votes and not their relation with the background who raised them. After all, we also observed that all of the dissenting votes are written with the basic purpose of creating a competitive market through the best use of the Board's powers. However, to give a basic idea we will refer to the Article 22 of the Law which sets forth the composition of the Board:

> "Organization of the Board-Article 22- (Amended Article: 02.07.2005-5388/Article 3) The Competition Board is composed of a total of 7 members, one being the Chairman and the other being the Deputy Chairman".

25.11.2002; Decision No 03-11/124-58 dated 20.02.2003; Decision No 03-58/674-307 dated 21.08.2003; Decision No 04-23/253-56 dated 01.04.2004; Decision No 04-31/364-90 dated 03.05.2004; Decision No 04-34/382-96 dated 13.05.2004; Decision No 04-38/427-107 dated 26.05.2004; Decision No 05-12/144-51 dated 03.03.2005; Decision No 05-28/320-82 dated 25.04.2005; Decision No 05-40/559-138 dated 17.06.2005; Decision No 06-13/154-38 dated 16.02.2006; Decision No 06-79/1018-294 dated 02.11.2006.

Table 9

Dissenting Votes by Members

Name of the Board Member	Number of Dissenting Votes
ÇAKIN	30
GENCER	28
ÜNAL	25
SONGÖR	24
AYTAÇ	18
KALDIRIMCI	18
SONBAY	18
KARACEHENNEM	9
ASLAN	8
EROL	8
ERSİN	8
ATASAYAR	5
PARLAK	5
GÖKMEN	4
BENGÜ	1
CANTÜRK	1
ELÇİ	1
MÜFTÜOĞLU	1
UZUN	1
Total	**213**

The Council of Ministers elects and appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: two members from the Competition Board, one member from the Ministry of Industry and Trade, one member from the Ministry of State with which the Undersecretariat of State Planning Organization is affiliated, and one member apiece from the Supreme Court of Appeal, Council of State, and Turkish Union of Chambers and Commodity Exchanges.

5.2.2. Dissenting Votes by Main Types

We also classified the 213 dissenting votes based on their character of being related to jurisdictional, substantial or procedural issues.

Note that what is described by jurisdictional is whether the transaction in question falls within the reach of the merger control regime. This consist of basic requirements such that the transaction have to occur between undertakings, conform with the definition of mergers and acquisition, it has to be subject to a change of control and finally the transaction has to pass the threshold test set by the legislation.

What is meant by substantial, on the other hand, is the assessment technique adopted by the law: creation or strengthening of a dominant position which may significantly lessen competition. This consists of different components such as the definition of the relevant product and geographical market, analysis of dominant position, evaluation of ancillary restraints and efficiencies.

And finally, what is meant by procedure is the review practice of the Authority in conjunction with its *modus operandi*. This consists of the internal rules, use of investigation powers, timings and related requirements. Table 10 below shows the breakdown of the main types of the dissenting votes.

Table 10

Dissenting Votes by Types

Main Types	Total	%
Procedural Issues (P)	86	40
Substantial Issues (S)	74	35
Jurisdictional Issues (J)	53	25
Total	**213**	**100**

We observed that there is an almost equal distribution among the main types. To go further, we combined the main types of the dissenting votes with the Board Members which are holding them. This time we did not include the three decisions in 1998 in which the dissenting votes does not exist. The results are presented in Table 11 below.

Table 11

Types of Dissenting Votes by Members

Name of the Board Member	J	S	P	Total
ÇAKIN	4	5	21	30
GENCER	11	14	3	28
ÜNAL	8	11	6	25
SONGÖR	1	1	22	24
AYTAÇ	3	11	4	18
KALDIRIMCI	2	13	3	18
SONBAY	6	2	10	18
KARACEHENNEM	4	4	1	9
ASLAN	3	2	3	8
EROL	2	2	4	8
ERSİN	1	5	2	8
ATASAYAR	1		4	5
PARLAK	3		2	5
GÖKMEN	3		1	4
BENGÜ		1		1
CANTÜRK		1		1
ELÇİ		1		1
MÜFTÜOĞLU	1			1
UZUN		1		1
Total	53	74	86	213

Furthermore we also composed a table of comparison based on the period of duty of the Board Members with the number of dissenting vote they raised in order to come to a performance table. However, taking into account the fact that what constitutes the basis for our analysis is the content, but not the frequency of the dissenting votes per members, we strongly believe that this performance table has no representative value.

Table 12

Frequency of Dissenting Votes Board Members

NAME OF THE BOARD MEMBER	ORIGIN INSTITUTION	STATUS	DUTY STARTS	DUTY ENDS	DAYS ON DUTY DURING THE DVA	# OF DISSENTING VOTES	DAY FREQUENCY OF DISSENTING VOTES
Süreyya ÇAKIN	Council Of State	Board Member	14.05.2003	31.12.2006	1.307	30	44
Tuncay SONGÖR	Court Of Appeals	Board Member, Vice President	27.03.2003	31.12.2006	1.354	24	56
M. Akif ERSİN	Ministry Of Industry And Trade	Board Member	16.05.2005	31.12.2006	585	8	73
Prof. Dr. Nurettin KALDIRIMCI	Competition Board	Board Member	27.03.2003	31.12.2006	1.354	18	75
Ş. Murat GENCER	Ministry Of Industry And Trade	Board Member	07.05.1999	07.05.2005	2.160	28	77
Rıfkı ÜNAL	State Planning Organization	Board Member	04.06.1999	31.12.2006	2.727	25	109
R. Müfit SONBAY	Competition Board	Board Member	26.04.1999	26.04.2005	2.160	18	120
Prof. Dr. Zühtü AYTAÇ	Intercollegiate Board	Board Member	04.06.1999	31.12.2006	2.727	18	152
M. Sıraç ASLAN	The Union Of Chambers And Commodity Exchanges Of Turkey	Board Member	27.03.2003	31.12.2006	1.354	8	169
Nejdet KARACEHENNEM	The Union Of Chambers And Commodity Exchanges Of Turkey	Board Member	05.03.1997	05.03.2003	2.160	9	240
Dr. Kemal EROL	Court Of Appeals	Board Member, Vice President	05.03.1997	05.03.2003	2.160	8	270
Kubilay ATASAYAR	Competition Board	Board Member	26.04.1999	01.01.2004	1.685	5	337
A. Ersan GÖKMEN	Competition Board	Board Member	26.04.1999	26.04.2005	2.160	4	540

Table 12 (cont.)

Mustafa PARLAK	Competition Board	Board Member, President	11.11.1997	31.12.2006	3.290	5	658
Bahaddin ELÇİ	Competition Board (Prime Ministry)	Board Member	05.03.1997	05.03.1999	720	1	720
Mehmet Zeki UZUN	Competition Board (Prime Ministry)	Board Member	05.03.1997	05.03.1999	720	1	720
Salih Zeki BENGÜ	Competition Board (Ministry Of Industry And Trade)	Board Member	05.03.1997	05.03.1999	720	1	720
İsmet CANTÜRK	Council Of State	Board Member	05.03.1997	04.10.2002	2.009	1	2.009
Prof. Dr. M. Tamer MÜFTÜOĞLU	Ministry Of Industry And Trade	Board Member, Vice President, President	23.07.1997	05.03.2003	2.022	1	2.022

5.2.3. Dissenting Votes by Years

Classifying the dissenting votes by years as in the Table 13 below should definitely give an idea on the application of the merger control legislation based on either the learning curve or on special circumstances which are consistently brought into agenda by one or more members during the decision taking process. Such special circumstances are mostly due to legislative changes affecting procedural issues. They are also due to inconsistencies in the application of an assessment rule and insistently taken parallel decisions for similar types of transactions that may be considered erroneous by one or more members.

Table 13

Dissenting Votes by Years

Main Type	1999	2000	2001	2002	2003	2004	2005	2006	Total
J			3	17	4	10	15	4	**53**
P	5		6	8	5	5	50	7	**86**
S	4	1	7	2	5	11	33	11	**74**
Total	**9**	**1**	**16**	**27**	**14**	**26**	**98**	**22**	**213**

At a first glance, the year 2005 is striking with the increase of dissenting votes in procedural and substantial issues. Exactly 46 % of all of the dissenting votes are attached to the final decisions on mergers in 2005. Accordingly the year 2005 deserves a detailed analysis to discover the reasons of such a boom. Same goes for the increase in 2002 for jurisdiction based dissenting votes. Leaving aside the exceptional boom years, we can say that there is a saturated level of 20 to 30 dissenting votes in merger decisions each year. Figure 2 below illustrates the pattern in question.

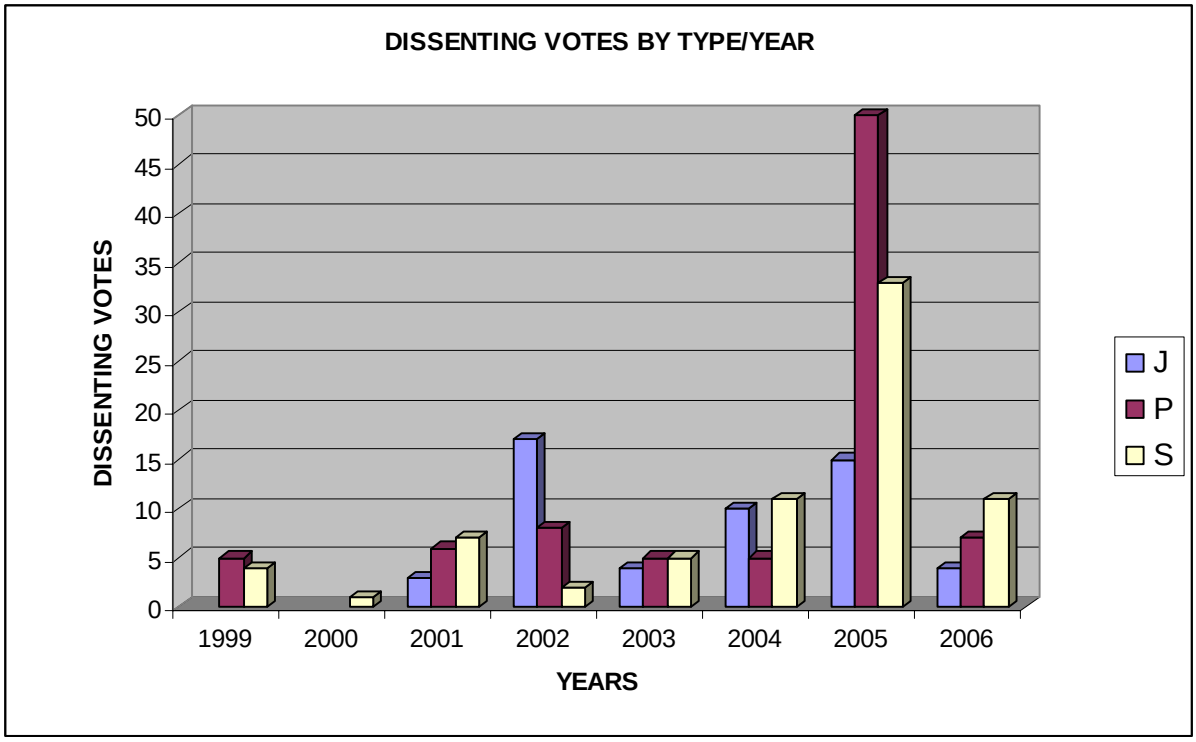


Figure 2. Dissenting Votes By Type/Year

5.2.4. Dissenting Votes by Sub-Topics

As the essential part of the DVA, we classified the sub-categories of the dissenting votes in order to come up with a sounder determination. This is the most important data that will serve as a basis for analyzing the arguments that Board Members raised.

As the above table shows, we have determined overlapping sub-categories. For example, "insufficient examination" exists in all three categories. This means that the Board member raises concerns of insufficient examination which may lead to either jurisdictional problems either substantial problems or procedural problems. Similar concerns exist in "internal procedure" in terms of procedural and substantial issues. Finally, dissenting votes on "relevant market" have both substantial and jurisdictional extensions.

Table 14

Sub-Categories of Dissenting Votes

Main Type	Sub-Category	Total
J	Powers of the Authority	18
	Concept of Undertaking	12
	Competence	10
	Control	6
	Insufficient Examination	3
	Relevant Market	3
	Effect Doctrine	1
J. Total		53
S	Ancillary Restraints	29
	Dominant Position	22
	Insufficient Examination	10
	Joint Ventures	7
	Relevant Market	5
	Remedies	1
S. Total		74
P	Quorum	38
	Fines	25
	Internal Procedure	13
	Legal representation	4
	Insufficient Examination	3
	Negative Clearance	2
	Notification timing	1
P. Total		86
Grand Total		**213**

Our final combined indicator is the sub-categories distributed by years. This time we have combined the overlapping sub-topics in order to facilitate the perception of the general standing.

From here on we will try to analyze the main "problem areas" touched upon by the Board members under the three major headings and try to create links with the EU Merger Reform. For doing so, we will analyze the cases in detail, in order to permit the reader better observe the outcome of the DVA. Accordingly, the rest of this section should be considered as the *in-vitro* part of the analysis; which in return shall provide for the necessary knowledge basis sufficient enough to evaluate our observations that will be contained in the following section.

Table 15

Sub-Categories of Dissenting Votes by Years

Sub Category	1999	2000	2001	2002	2003	2004	2005	2006	Total
Quorum							38		38
Ancillary Restraints			3	2	3	4	8	9	29
Fines	2		4	8	5	5		1	25
Dominant Position	3				2	1	15	1	22
Powers of the Authority					3	6	7	2	18
Insufficient Examination	3			3		4	5	1	16
Internal Procedure							12	1	13
Concept of Undertaking				8		4			12
Competence				3			7		10
Relevant Market	1		2			2	2	1	8
Joint Ventures		1	4				2		7
Control			1	3	1			1	6
Legal representation								4	4
Negative Clearance			2						2
Effect Doctrine							1		1
Notification timing								1	1
Remedies							1		1
Total	**9**	**1**	**16**	**27**	**14**	**26**	**98**	**22**	**213**

5.3. Dissenting Votes on Jurisdictional Issues

While reviewing the dissenting votes on jurisdictional issues, we observe that the sub-topics reflect almost all of the jurisdictional issues that may arise in a merger regime. Below we will try to elaborate cases that fall within each sub-category.

5.3.1. Powers of the Authority

The powers of the Authority are questioned in 18 instances in 10 different final decisions. A dissenting vote questioning "Powers of the Authority" was meant to describe either the instances where the Authority is thought not using the powers he is holding or it has thought to go beyond its powers and decided on a case where it shouldn't do so.

5.3.1.1. Negative Clearance Confusion

Among these 10 cases, five of them are considered not to be mergers and acquisitions. Two out of these five decisions contain "conditional" negative clearances[455]. The dissenting votes raise the argument that the Law does not provide for "conditional" negative clearance and, correspondingly the Board is not given the authority to address undertakings how they have to correct their unlawful acts in order to be qualified for negative clearance. The majority of the Board should have considered having this authority by the interpretation of the Article 9 of the Law stating that "the Board, prior to taking a decision ..., shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement." However, interestingly, in another case[456] which is not reviewed under the merger legislation a dissenting vote argues that although the transaction is not a concentration since it consist of a consolidation within the same undertaking, the Board should decide on whether to grant a negative clearance since the applicant formally requests so.

Law on the Protection of Competition gives the Authority to issue negative clearances. According to Article 8 of the Law the Board may, upon the application of parties concerned, "grant a negative clearance certificate indicating that an agreement, decision, practice or merger and acquisition are not contrary to articles 4, 6 and 7 of this Law". Since the Board has declared via the Merger Communiqué those mergers and

[455] Yurtiçi Kargo/Geopost, Decision No 04-38/427-107 dated 26.05.2004; Excel/Transbeynak, Decision No 03-58/674-307 dated 21.08.2003.
[456] Doğuş Otomotiv, Decision No 04-34/382-96 dated 13.05.2004.

acquisitions which needs to be notified and uses the power to give permission with respect to them, the option of application for a negative clearance, that ensures immunity from sanctions for the period until its revocation, is essentially designed for providing legal certainty for those concentrations that fall outside the scope of Article 7 and therefore the jurisdiction of merger control. It should not be forgotten that if the preliminary examination carried out following an application for negative clearance reveals that the concentration falls within the scope of Article 7 the application should be transformed and considered as a notification.

5.3.1.2. Court vs. Board Decisions

Among the remaining five cases which are reviewed under the merger rules, 3 of them consist of the same subject matter: the privatization of the technical inspection of motor vehicles[457]. The dissenting votes indicate that the Authority should take into account the interim court rulings on the privatization[458]. In this case, the court disregarded the stay of execution decisions of the Court and decided on the case. The same reasoning is also contained in a dissenting vote in the final decision concerning the privatization in block of the State Monopoly of Tobacco and Alcoholic Beverages[459].

5.3.1.3. Prior-Notifications Rejected by the Board

Among the dissenting votes questioning the powers of the Authority, two decisions[460] are strikingly important in terms of their implicit call for the review of the Authority's powers to have elements similar to the EU Merger Reform. KALDIRIMCI has a dissenting vote in both cases and ERSİN votes for dissent in one case. Both votes question the powers of the Authority in reviewing concentrations which are not yet signed but finalized with a framework agreement. KALDIRIMCI argues that "an understanding

[457] Decision No 05-07 dated 55-22 03.02.2005; Decision No 06-08/98-26 dated 02.02.2006 and Decision No 05-10/82-31 dated 10.02.2005.
[458] Dissenting votes on procedural issues concerning privatization issues shall be examined below.
[459] Decision No: 03-79/965-396 dated 15.12.2003.
[460] Marzotto/Verzoletto, Decision No 05-28/320-82 dated 25.04.2005 and Decision No 05-40/559-138 dated 17.06.2005

and practice claiming that agreements can in anyways be reviewed after their signing and that they can be cleared afterwards is not only an unnecessary, unjustified bureaucratic approach but also an approach which does not serve the very purpose of "institutional efficiency". Such an approach is nothing but contradicting with a method which enables ex-ante control, which is practical and meaningful in terms of economies of procedure." Conformingly, the EU introduced the pre-notification system of concentrations in order to provide the parties the ability to accelerate their clearance time and a prior chance to revise their agreements in case they demonstrate issues sensitive to competition matters.

In conclusion, concerning the "Powers of the Authority" we determined the dissenting votes of KALDIRIMCI and ERSİN calling for the revision of the Turkish merger legislation to include a prior notification procedure as in the new EU merger regime.

5.3.2. Concept of Undertaking

The concept of undertaking is not special to the merger legislation. It is the *sine qua non* prerequisite for the persons to be considered as undertakings for being able to be also considered as subjects of the competition legislation. The concept is defined in Article 3 of the Law as "natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole". The basic specification of the concept of undertaking is its carrying out any economic or commercial activity. Also, since the subject matter of Law No. 4054 is economic legal order, it is [normally] concerned with economic actors[461]; but the scope of the law does not cover the entire spectrum of economic entities. It is rather limited with undertakings and associations of undertakings. However the Law defines undertakings with an economic perspective and therefore diverges from Turkish commercial law in two points: First, undertakings can be natural as well as legal persons; second, legal persons

[461] Akıncı, *op cit*., pp. 2-5.

that are not economically independent do not constitute undertakings[462]. The irrelevance of legal personality is also observed in the definition of associations of undertakings where the existence of a common objective among participant undertakings is sought. As a result nor the lack of a legal personality neither the public authority status of certain professional organizations such as chambers of commerce is a barrier for the application of competition rules to associations[463].

The concept of undertaking is questioned in 12 dissenting votes gathered under four Board decisions.

5.3.2.1. No Activity No Undertaking

The case of Konya Şeker/Çumra Şeker[464] attracted five dissenting votes. The majority of the Board decided that the acquired Çumra Şeker does not fall within the definition of undertaking cited in the Article 3 of the Law with the simple reason that the company is not involved in the production of sugar which is its only area of activity. Accordingly the company is silent. The transaction also foresees the bankruptcy of Çumra Şeker after its acquisition. The dissenting votes, however argue that the acquired company is established as a joint stock company with the purpose of producing sugar, holds a production permit of 9.000t capacity from the Committee of Ministers and allowed a quota based on the relevant legislation. According to the votes all of the above facts show that the company started to activate in the market, at least as a potential competitor to Konya Şeker.

In similar decision also concerning the sugar market, 99.8% shares of MB Şeker A.Ş. was sold to Keskinkılıç A.Ş. between 23.03.2004 and 29.03.2004[465]. Remaining shares were transferred to members of Keskinkılıç family on 23.03.2004. In extraordinary general meeting of shareholders in MB Şeker A.Ş, held on 29.03.2004, it was decided to

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[462] Sanlı, *op cit*., pp. 27-31.
[463] Sanlı, *op cit*., pp. 37-38.
[464] Decision No 02-74/872-356 dated 25.11.2002
[465] Decision No 04-31/364-90 dated 03.05.2004

enter new shareholders to stock ledger, and the new board of directors was appointed. On April 2, 2004, the change was entered to trade registry.

MB Şeker A.Ş. holds permission 97/9582 of 23.07.1997 granted by Council of Ministers, for building a sugar refinery in Aksaray. Mentioned permission was obtained on ground of Law No. 6747 on Sugar, which was in effect by then. Article 1 of Law No. 6747 on Sugar provides *that it is required to obtain quota* and get permission from Council of Ministries to build and operate a sugar refinery. MB Şeker A.Ş. has a quota right. As a matter of fact, Sugar Authority's letter 1941 of 19.04.2004, which is in reply to a letter asking Sugar Authority about the quantity of the quote MB Şeker A.Ş. has, and the method of its calculation, notes that quota right of MB Şeker A.Ş., which had been kept reserved for 5 years, was valid until 20.04.2006, and that it is required to build the factory and start production within such period.

As also referred above, Law No. 4054 defines the concept "undertaking" as any natural or legal person who produces, markets or sells goods and services and who forms an economic entirety, capable of acting independently in the market. According to this definition of undertaking, a merger or an undertaking must be made between two economically independent decision-making undertakings, in order to be governed by Communiqué 1997/1. Whereas, MB Şeker A.Ş. does not produce sugar as it does not have a sugar refinery. For this reason, taking into consideration the facts that it does not produce goods nor have a turnover derived from sales of such goods, the Board reached the opinion that that the referred company cannot be qualified as an undertaking in terms of article 3 of the Law. Therefore, acquisition transaction in question is decided not to be subject to Article 7 of the Law, because the requirement of being "between undertakings", provided for in Article 7 of the Law and relevant article of the Communiqué No 1997/1, is not met in the case.

The case is decided with qualified majority and the dissenting votes of GÖKMEN, SONBAY and GENCER argue that though remains in stage of formation, MB Şeker Nişasta A.Ş., being subject of the transaction, acquired an identity of "undertaking" that

has initiated operating economically, from the moment when Sugar Authority assigned it a quota, which can be transferred any time, against any interest.

In an assumedly similar to the above cases, concerning the acquisition of some of the assets of Toros Biracılık by Erciyas Biracılık[466] the Board cleared the transaction with a unanimity vote. The case was concerning the purchase of assets of Toros Biracılık which was planning to quit the business after an unfortunate attempt of new market entry in a market where the acquirer was holding more than 75 % market share at the time of the transaction. It is a pity to not being able to comment further since the decision is not detailed and does not disclose the assessment procedure and the situation of the parties. However, based on the public information Toros Biracılık ceased its activities and should not be considered at the time of the transaction as performing an economic activity. Although not detailed, we observe from the final decision that KARACEHENNEM and EROL voted for clearance, thus, accepting the position of Toros as an undertaking within the meaning of Article 3 of the Law, confirming their objection in the Konya Şeker/Çumra Şeker case.

5.3.2.2. No Activity Yes Undertaking!

The second case concerns the acquisition of some of the assets of Anadolu Çimento by Konya Çimento[467]. In this case, the majority accepted both parties as undertakings while the dissenting votes claim that Anadolu Çimento should not be considered as an undertaking since the assets that the company holds and which are subject to the transaction consist of land (without production plant), mining licenses, office materials, one motor vehicle and few equipment not related with the production of cement. The dissenting vote of a member even draws the attention on the above Konya Şeker/Çumra Şeker case and argues that based on the similarities of the consequences in two cases the Board should decide in parallel. The decision on Konya Çimento/Anadolu Çimento is far from being consistent with Konya Şeker case by confirming the lack of a production plant.

[466] Decision No 52/379-43 dated 12.02.1998
[467] Decision No 02-81/946-392 dated 26.12.2002

An important determination can be that GENCER placed a dissenting vote in both decisions.

5.3.2.3. Can a Real Person be an Undertaking?

The application for permission to establishment of a joint venture[468], with trade name Eregli Denizcilik A.S., by Fuat MIRAS, Sadan KALKAVAN, Metin KALKAVAN, Merey Gündüz KAPTANOGLU and Esref Mehmet CERRAHOGLU is another example where the concept of undertaking is questioned through dissenting votes. Eregli Denizcilik A.S., being the subject of the notification, was established to invest in, and operate the vessels called "capesize", having a tonnage higher than 80.000 DWT, and to make dry cargo transport business. According to the Board decision, taking into consideration the facts that there is a limited possibility to substitute capesize vessels with smaller ones because of cost-advantage, that these vessels are considered, in worldwide, different from the rest of vessels and are subject to exclusive rent and usage pricing, that their opportunity to offer service in Turkey is different from the vessels of other sizes, due to character of the ports, and that they were specified as the exclusive engagement area in the transaction, the relevant product market is determined as "market of dry cargo transport with capesize vessels".

Founders of Ereğli Denizcilik A.S. are natural persons. These persons also hold share in various enterprises of maritime transport. With a view to Shareholding Structure of relevant companies, it is determined by the decision that shareholders of Eregli Denizcilik A.S. control such enterprises directly or indirectly (through their holding companies). It is found that none of the mentioned enterprises conduct business, in market of maritime transport with "capesize" vessels, where the joint venture to be established is planned to conduct business.

In the decision, it was held that the Transaction was an acquisition subject to permission, but a possible creation of dominant position or strengthening an existing

[468] Decision No 04-79/1147-287 dated 16.12. 2004

dominant position, which may result significant decrease of competition in relevant markets of all or part of the country, was out of question; therefore the company was granted permission for the transaction notified, on condition to amend the purpose and scope of the company in a way that they will be limited to the operation of large tonnage vessels, called “capesize” customarily in the sector, and conduction of business relating to such type of vessels.

The dissenting vote of GENCER, though, holds that, Article 2 of “Communiqué on Mergers and Acquisitions Requiring Permission from Competition Board provides as “Since the matters below are deemed merger and acquisition between undertakings under Article 7 of the Law, and are therefore deemed subject to this Communiqué, they require permission from Competition Board subject to conditions in article 4 of Communiqué, concerning them...”, and defines further, the transactions that can be implemented between undertakings. The term “undertaking” was defined in article 3 of the Law as “any natural or legal person who produces, markets or sells goods and services and who forms an economic whole, capable of acting independently in the market”.

According to GENCER, taking into consideration the definitions in the Law and the Communiqué collectively, it cannot be alleged that Competition Board’s permission is not required for natural persons, who do not produce, market or sell goods and services in the market, coming together to form a company. Therefore it was not appropriate to rule that the formation was subject to permission, before determining that the persons named Fuat Miras, Sadan Kalkavan, Metin Kalkavan, M. Gündüz Kaptanoglu and E. Mehmet Cerrahoglu as founders of Eregli Denizcilik A.S., being the subject of the file, are conducting acts that cause each of them be considered an undertaking.

5.3.3. Competence

Competence of the Competition Authority is questioned in ten instances gathered under four different cases brought before the Board. Three of the cases consist of

concentrations in banking sector while the remaining one is the sale of Star TV by the Savings Deposit Insurance Fund. However, all of the 10 dissenting votes consist of the same issue of exclusion of banking sector mergers from the competence of the Competition Authority. As an important issue, challenging the exclusive power of the Authority over mergers, we will analyze in detail the competence of the Competition Authority in banking sector mergers and refer not only to the transactions with dissenting votes but other banking merger decisions where necessary.

5.3.3.1. Discrepancies in Banking Sector Decisions

An explicit exclusion from the merger control regime was subsequently adopted and harmed the intactness of the regime: According to Article 14 of Law No. 4389 on Banks[469] as amended by Law No. 4491[470] the Banking Regulation and Supervision Board could decide to merge the banks placed under the control of the Savings Deposit Insurance Fund in order to strengthen their financial structure. Furthermore, Article 18 of the same Law necessitates the permission of this Board for other mergers and acquisitions in the sector. This provision by itself is not a derogation from the competition law, since overlap among the spheres of competences of regulatory agencies, especially those with sectoral vs. general (or horizontal vs. vertical) competences, is usual and not necessarily contradictory.

However, the same article 18, as amended by Law No. 4672[471], provides that if the sectoral shares of the total assets of the banks subject to a merger do not exceed 20 %, Articles 7, 10 and 11 of the Law No. 4054 should not apply. The 20 % ceiling is sufficiently high to ensure a *de facto* exclusion of all bank mergers[472].

Article 14 of Law No. 4389 is clearly the outcome of extraordinary circumstances, to be specific, major financial crises of 2000 and 2001 which had a devastating impact in the sector that justified extensive public intervention in the relevant market. Since then,

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469 Official Journal no. 23734 of 23rd of June 1999.
470 Official Journal no. 23911 of 19th of December 1999.
471 Official Journal no. 24416 of 29th of May 2001.
472 OECD, *op cit*., p. 27.

major independent banks went through a fast consolidation process, lowering the number of players (within the framework of definition of "undertaking" in competition law) in the sector while automatically increasing their market shares. However, it is also true that under the crisis conditions "the time and added complication of a competition policy review were evidently considered too great a burden, in view of the extent of the systemic problems requiring immediate action."[473]

Nevertheless, the exclusion in Article 18 is a general clause with no persuasive justification: The reasoning for the amendment states that parallelism with Article 14 and unity of provisions on mergers and acquisitions should be ensured[474]. This reasoning completely ignores the difference between sound financial institutions and those seized by the Savings Deposit Insurance Fund. Therefore while the former Article could be tolerated given its transitional nature, Article 18 is not acceptable for the integrity of the competition regime.

The new sectoral regulation, Law No. 5411 on Banking[475] also includes the same exclusion in Article 19 (while removing Article 14 of the previous law and thus the original grounds of Article 19) despite calls from the Turkish Competition Authority for its annulment as well as OECD's recommendation to the same end[476]. Although very high, further banking consolidations in Turkey may lead to the attainment of the 20 % ceiling in the future. Such a probable occurrence, or even the creation of such a probability, will then be an opportunity to confirm whether this threshold should be considered as an outcome of the mentioned extraordinary circumstances or an explicit attempt to exclude banking mergers from the control of the Competition Law.

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[473] OECD. The Role of Competition Policy in Regulatory Reform. Paris, 2002, p. 22.

[474] Letter no. B.02.0.KKG.0.10/101-237/2232 dated 7th of May 2001 from Republic of Turkey Prime Ministry Directora General of Laws and Decisions to the Presidency of Turkish Grand National Assembly. Available from the World Wide Web: http://www.tbb.org.tr [15.08.2006]. The fact that Law No. 4672 was drafted by the Banking Regulation and Supervision Board suggests that the sectorial board is not keen for sharing competences with the Competition Board.

[475] Official Journal no. 25983 of 1st of December 2005.

[476] OECD. (2005), *op cit*., p. 27.

Furthermore, the Banking Regulation and Supervision Board published, as was foreseen within Article 18 of the Law, the Regulation on Mergers and Acquisitions of the Banks[477] laying down rules and procedure to follow in request of permission in banking mergers. The regulation, free from competition concerns, sets specific financial requirements in order for a transaction to be cleared by the Board. Finally, another Regulation[478] is also published according to Article 19 of the Law No 5411, replacing the 2001 Regulation.

The transactions concerning banks or other actors of the sector are notified to the Competition Board, assumedly due to the legal uncertainties surrounding Article 18 of the Law No 4389 concerning the scope and subjects of the provision leading to different interpretations. Hence, the notifying parties may wish to have the Competition Authority's assessment on which transactions are exempted, with the intention of gaining a sort of legal security. However, the decisions reflect different assessments of the Article 18 of the Banking Law, being not less than the dissenting votes. The hind side may lie within a detailed analysis of the selected decisions. We gathered different dissenting votes on decisions concerning banks and their affiliates. The decisions and the dissenting votes are very interesting in the sense of their efforts to pursue the right interpretation of the jurisdictional duties and competence of the Competition Authority.

The last notified banking merger transaction before the introduction of the Article 18 of the Law No 4389 was the acquisition of the 99.94 % controlling shares of Türk Sakura Bank by Finansbank[479]. The transaction is found to be within the jurisdiction of Law No 4054 and its Article 7 thereof and was cleared with unanimous vote by the Board.

5.3.3.1.2. Share Transfer among Shareholders Cleared

The first transaction which was realized following the implementation on 12.05.2001 of the exclusionary sentence within Article 18 of the Law No 4389 with Law No 4672

[477] Official Journal no. 24445 of 27 June 2001.
[478] Official Journal no. 26333 of 1 November 2006.
[479] Decision No 99-52/562-352 dated 16.11.1999

consists of share purchase by GSD Holding, a shareholder of Tekstilbank holding 33.07 % shares, of 35.45 % shares from another shareholder of the bank, Akın Holding[480]. After this transaction GSD will be the sole controlling party. Accordingly, this was a transaction leading from joint to sole control.

The Reporters Opinion is straightforward, by concluding that the transaction is out of the jurisdiction of the Competition Authority based on the Article 8 and 18 of the Law No 4389. The Board, however, disagreeing with the Reporters Opinion based on the grounds that although the exclusionary sentence of Article 18 requires that:

> "Turkish Code of Commerce no 6762 and, -if the aggregate assets of the merging banks in the sector does not exceed twenty percent then- articles 7, 10 and 11 of Law 4054 on Protection of Competition shall not apply in bank mergers and acquisitions conducted pursuant to provisions of this Code. The procedure and substance governing mergers and acquisitions shall be determined by regulations to be issued by a Board Decision. After finalization of the merger and acquisition transaction all rights and obligations of the acquired bank shall transfer to the bank acquiring the deposit, and juridical personality of the acquired bank shall end and be deleted from the Trade Registry",

The first sentence of the Article orders that:

> "the merger of one of the banks operating in Turkey with one or more other banks, or transfers of its whole obligations, credits and deposits to another bank operating in Turkey is subject to [Banking Regulation and Supervision] Board's approval".

Accordingly, the provisions of Article 18 are found not to be applicable to transactions leading to change of control through share or stock transfers. Therefore, the Board, while recalling the grounds of the modification via Law No 4672 as rendering the banking sector sounder and healthier by facilitating the merger of banks or acquisition of a bank by another bank by terminating the legal personality of the acquired bank, declared the subject transaction as a concentration falling within the jurisdiction of the Competition Law and clears the transaction which, by decision, does not create or strengthen a dominant position. The Board, also by decision, invites the Presidency for a statement on

[480] Decision No 02-38/419-177 dated 13.06.2002

its reply which was by-passing the Board to a notified (and probably) connected transaction consisting of the acquisition of Rant Finansal Kiralama by Tekstil Finansal Kiralama[481].

The dissenting vote signed by three members[482] argue that Article 18 of the Banking Law orders not to apply articles 7, 10 and 11 of Law No. 4054 on Protection of Competition, provided that aggregate assets of the banks, being the target of acquisition and merger, in the sector is lower than 20 % in bank mergers and acquisitions and that the Banking Regulation and Supervision Agency - referred to as BDDK - is the competent authority for permitting such mergers or acquisitions. The members also refer to Article 8 of the Banking Law titled "Modifications of the Statute and Shareholder" which reads as follows:

> "it is subject to Banking Regulation and Supervision Board's permission for a person to acquire directly or indirectly stocks representing not less than 10% of the bank, and for a shareholder to acquire a share that will cause such shareholder to hold more than 10%, 20%, 33% or 50% of the bank capital".

The rest of the dissenting vote reads as follows:

> "Mergers and acquisitions are important for their aspects of generating concentration in view of competition law. This is why Article 7 of Law on Competition prohibits mergers and acquisitions that create or strengthen a dominant position. In this sense, affiliate undertakings of the parties (referred in article 4 of Communiqué 1997/1) are also important.
>
> In case stocks of a bank are acquired by an undertaking, which is not a bank, in a way that will cause transfer of the bank's control (which is recognized by the Competition Authority as an acquisition subject to permission), if the acquiring undertaking controls another bank, then those two banks are merged under one undertaking. As there is no difference between merger of a bank with another and acquisition of a bank owner of another bank, both cases are subject to article 18 of

[481] This part of the Decision shall be recalled within our analysis of further cases on banking sector. The Presidency is thought to provide an explanation to the separate notification of the part of the main transaction which was the acquisition of the leasing companies, operating as separate legal entities within the meaning of the Commercial Law but forming the same entity within the definition of "undertaking" as defined by competition law. The reference is intentional here, since different interpretations of the definition of undertaking within the meaning of the Banking Law and Competition Law are re-visited within the dissenting votes for other decision on banking sector.

[482] The three members are KARACEHENNEM, ATASAYAR and PARLAK.

> Banks Law. If an undertaking, acquiring a bank, does not have any other undertaking operating in banking sector (taking into consideration that size of its assets must be lower than 20%) there will be no question of increased concentration in the market, or a creation or strengthening of a dominant position. For this reason, under article 8 of Banks Law, such stock transfers subject to permission of Banking Regulation and Supervision Agency, does not require an additional permission from Competition Board.
>
> In this regard, and as a conclusion, because we opine that BDDK's permission is required for merger and acquisition if aggregate share of the parties in the sector does not exceed in case of a merger of two banks and acquisition of a bank by another bank or an undertaking, which is not bank, we cannot agree with the majority opinion suggesting that Competition Board is competent authority to permit the stock transfer transaction, which is subject of the notification."

First of all, Article 8 of the Banking Law is designed to provide supervision to the Board for either the inclusion of a new person in the shareholding status of a bank or for increases in shares of a shareholder leading to further control power within the direction of the bank by introducing a clearance mechanism based on incremental stationary thresholds. However, its link with the concept of "change of control" within the meaning of Competition Law is somewhat questionable. Article 8 does not refer, in its entirety, to the concepts of "merger" or "acquisition". The basic reason behind is the spirit of the law itself which clearly separates on one hand the entry of a person into the sector or the share increase of a person already shareholder of a bank and the merger and acquisitions among banks on the other hand, notwithstanding the fact that both transactions may contain elements of "change of control" within the meaning of Competition Law. As for the spirit of the law, it also clearly defines the qualitative and quantitative criteria for being a shareholder in a bank for real or legal persons. Accordingly, as the banking law and the related articles does not "primarily" aim at controlling the concentrative effects of banking mergers or transactions, it also, explicitly, differentiates among those persons entering in the sector or already holding and increasing their shares within the same bank and banks who takeover rivals through mergers and acquisitions as defined and perceived by the Banking Law. Conformingly, the definition of merger and acquisition within the Banking Law and its secondary legislation is not solely based on the definition and perception of the Turkish Competition Law. It is also and primarily based on the Turkish Commercial Law No 6762 as the efforts in the implemented exclusionary sentence clearly cite both the Commercial Law and the Competition Law. The predominance of the Commercial Law in

terms of the definitions contained within the banking legislation is also clear from the fact that both the Article 18 of the Law and the Article 5 of the Regulation governing bank mergers and acquisitions defines the two concepts limited with the types of transactions defined within the Commercial Law, thus unintentionally excluding concentrations creating change of control through share increases or new entries which are also accepted as acquisitions in competition law. In other words, what is neglected by the lawmaker is the clear fact that, some instances of share acquisitions and share increases defined within Article 8 of the Law No 4398 may lead to change of control which may also lead to an acquisition transaction within the meaning of the Competition Law. However, this is also subject to discussions since the definition set by the Banking Law and the related Regulation requires for a transaction to be classified as a "merger" or "acquisition" with the condition that the legal personality of the acquired bank disappears and is removed from the trade registry, which is not at all a pre-requisite for being classified as a merger or acquisition within the meaning of the Competition Law, but clearly inspired by the definitions of the Commercial Law. Furthermore, also in Article 18, the provision clearly exclude from the competence of the Commercial Law and the Competition Law *"bank mergers and acquisitions conducted pursuant to provisions of this Code*", a concept which is not visited in Article 8 of the same Law. This shows the efforts of the legislator for the will in framing some types of transactions in the definition of merger and acquisition. Accordingly, the Banking Law, as it was enforceable during the notified transaction, should not be expected to exclude from the review of the Competition Authority those new entries or share increases leading to change of control, irrespective of the definitions and the threshold of 20 % set by its Article 18.

Nevertheless, the discussion in the dissenting vote on whether the exclusion of mergers and acquisitions of the banks (as defined by the banking legislation) and the spirit behind it should also cover a transaction which is not *de jure* exempted but whose exclusion should *de facto* be assumed is to be left to further interpretations within the dissenting votes.

5.3.3.1.3. Change from Sole to Joint Control Cleared

Two and a half years after the clearance of GSD/Tekstilbank transaction, BNP Paribas joins TEB Mali Yatırımlar AŞ[483] through acquisition of 50 % shares of the bank from Çolakoğlu Group, a transaction leading from sole to joint control by the introduction of BNP as shareholder, an undertaking already active in the Turkish financial services market with a 39.99% share in BNP-Ak-Dresdner Bank. This transaction is between two banks already active in the sector. On the other hand, at the time of the transaction BNP was concretely planning the termination of its shareholder status within BNP-Ak-Dresdner, a matter directly related to the anti-competitive effects analysis of the activities of the parents in the market where the joint-venture is also active. The Reporters Opinion suggests that the transaction should be found within the jurisdiction of the Competition Law and should be declared compatible. The Board, basing its decision on the assessment of the joint-venture, clears the transaction with unanimity. The Decision surprisingly does not contain any reference to the Banking Law and directly considers the transaction as falling within the competence of the Competition Authority. Here, we assume that the Board adopted the approach of the Board decision in GSD/Tekstilbank by concluding that the nature of the transaction which is a simple share transfer, is not within those excluded by the Banking Law which requires -by definition of mergers and acquisitions- the legal personality of the acquired bank to disappear and to be removed from the trade registry. In this unanimous decision the only member left from the GSD/Tekstilbank with a dissenting vote was PARLAK, and the two other members were no longer Board Members. PARLAK seems to accept the Board decision and thus voted in favor of the current TEB/BNP Paribas transaction.

5.3.3.1.4. Share Transfer among Shareholders Exempted

The next banking sector case is related with the TEB/BNP Paribas transaction in the sense that it reflects the outcome of BNP Paribas' consent for abandoning its shareholder status within BNP-Ak-Dresdner through the acquisition of its shares by Akbank together

[483] Decision No 05-05/25-13 dated 13.01.2005

with the shares of Dresdner Bank, leaving the sole control of the bank to Akbank[484]. The transaction is a typical share transfer among shareholders having similar characteristic as the GSD/Tekstilbank, leading from joint to sole control. The transaction also incorporates the change of control of the related leasing company which is separately assessed within the decision. The Reporters Opinion suggests that the total assets of the acquired and the acquiring banks' assets is not above the 20 % threshold set by the Banking Law and thus the transaction should not require Competition Authority's clearance. As for the acquisition of the leasing company, it is suggested to be considered as falling within the jurisdiction of the Competition law and should be declared compatible. The Board agreed with the Reporters Opinion and concluded that the transaction is exempted from the competition review by the provisions of the first paragraph of the Article 18 of the Banking Law. The total assets of the banks subject to transaction are calculated to be within 11-12 %. Accordingly, the jurisdiction of the transaction is not questioned by its type but by the quantitative criteria set in the Banking Law. This is a clear contradiction with the previous decisions of the Board in GSD/Tekstilbank and also in TEB/BNP Paribas. This transaction is cleared with qualified majority, leading to a dissenting vote co-signed by five Board Members: SONBAY**,** ÜNAL, GENCER, AYTAÇ and ASLAN.

The dissenting vote questions the boundaries of the exclusion incorporated by the Article 18 of the Banking Law and suggests that an exception cannot be expanded by interpretation. The dissenting vote, as we clearly distinguished above in our analysis for GSD/Tekstilbank decision, points out the differences in the definition of mergers and acquisitions in different related legislation. We will completely quote the dissenting vote in order to come to a transparent set of arguments. The vote reads as follows:

> "According to Article 7, regulating mergers and acquisitions, of Law 4054 and the provisions of Communiqué 1997/1 issued based on it, stock transfers between bank shareholders also constitute an acquisition and are subject to Competition Board's permission if they meet the conditions set in the relevant regulation.
>
> Banks Law 4389 section 18/I, amended by Law 4672, and titled "Acquisition, merger and liquidation of Bank" provides as *"Turkish Code of Commerce no 6762 and, if the aggregate assets of the merging banks in the sector does not exceed*

[484] Decision No 05-12/144-51 dated 03.03.2005

twenty percent then articles 7, 10 and 11 of Law 4054 on Protection of Competition shall not apply in bank mergers and acquisitions conducted pursuant to provisions of this Code. The procedure and substance governing mergers and acquisitions shall be determined by regulations to be issued by a Board Decision. After finalization of the merger and acquisition transaction all rights and obligations of the acquired bank shall transfer to the bank acquiring the deposit, and juridical personality of the acquired bank shall end and be deleted from the Trade Registry".

With this provision, the legislator aims to exempt bank mergers and acquisitions (by which we mean the mergers and acquisitions in sense of Turkish Code of Commerce and Banks Law only, the stock transfers are not meant to be the transfers provided for in Law 4054) from certain provisions because of their exclusive characteristics or to avoid application of certain provisions under some conditions. We see that the government expresses the same reasoning during legislation.

Regulation provided for in article 18 was published and put into effect by Banking Regulation and Supervision Agency on June 27, 2001. "Merger" and "Acquisition" as the technical terms are defined in Article 5 of the Regulations in parallel with Turkish Code of Commerce, both of which refers to transfer by "terminating juridical personalities".

If the condition of assets of 20% is not met in accordance with relevant provisions of Banking Law and explicit definitions of the regulation issued based on them, then Law 4054 and provisions of relevant Communiqué will not apply in bank mergers and acquisitions. Article 18 of Banks Law, whose wording is quite clear and its definitions creates no doubt, does not apparently govern stock transfer of bank shareholders. Being an exception, this provision cannot be construed to govern stock transfers for the purpose of the universal rule of law saying "exceptions cannot be expanded by construction". The consideration that stock transfer are not governed by Law 4054, though article 18 does not provide for that, would not consist with legislator's aim to "render banking sector a strong and sound structure through making bank mergers and acquisitions easier", which it had when adopting the Law 4672.

Another point to be regarded is the fact that "merger and acquisition" concepts provided for in Turkish Code of Commerce, Banks Law and their respective Regulations do not match with the concept of "Acquisition" in Law 4054. The exceptional provision exempted by Banks Law can be constructed or handled only with the definitions provided for such act and regulations.

It would indisputably not be suitable with general principles of law to make an oriented construction on ground of, and subject to regulations that are provided for not to be applied, by legal provisions with an express purpose and wording, especially when another provision grants exemption. It would not be appropriate to obtain a conclusion by an urge construction, whereas the subjects, which are handled as "must" with regard to competition law, and exceptional provisions should be expanded only by way of legislation amendment.

> On the other hand, this is not the first time Competition Board handles bank stock transfers and application of article 18. In the similar acquisitions in past, Board considered bank shareholders' stock transfer as a matter governed by Law 4054 and cleared if the conditions are met. The last instance for that is the Board Decision 02-38/419-177 of June 13, 2002. With regard to precedent system, objective direction of practice, necessity of the ability to estimate Board's approach on similar cases, establishing an accurate competition law with principles, we do not find it appropriate for the Board to reach different conclusions by acting differently from its past decisions and practices though there is no information, finding or legislation amendment that may cause a change in Board's decisions and practice up to now."

Taking into consideration our analysis on the previous decisions and the above dissenting vote, we came to the conclusion that although the Banking Law does not clearly include stock transfers, which are considered as acquisitions within the meaning of Competition Law, among mergers and acquisitions which are destined to be excluded from the merger control, this does not fully satisfy the legislator's aim to "render banking sector a strong and sound structure through making bank mergers and acquisitions easier" since this would only be achieved by also excluding the transactions subject to Article 8 from the coverage of the merger control regime, a type of transaction which represents an almost equal (or of higher in the case of new entries) degree of importance when compared to "mergers" and "acquisitions" among banks. In that sense, the confusion among legislations in the definition of mergers and acquisitions should not lead us disregard the real spirit behind the exclusion which should be put (and probably designed to) "make change of control in banking sector easier". However, bearing this in mind, we agree with the above dissenting vote that the wording and the structure of the provisions in the Banking Law makes the stock transfers open to merger review. This controversy is not removed with the currently enforceable Banking Law No 5411 either.

5.3.3.1.5. Foreign-to-Domestic Bank Acquisition Undiscovered

In the forthcoming bank transactions, we are left with only one dissenting vote in Fortis Bank/Türk Dış Ticaret Bankası[485] (TDTB) leading to a change of control through the purchase of 89.34 % shares of TDTB by Fortis Bank. The Reporters Opinion reflects a

[485] Decision No 05-32/437-102 dated 17.05.2005

total confusion generated by the heavy discussions on the previous cases, leaving the door open for a two-sided optional assessment by underlining firstly that the transaction does not fall within the competence of the Competition Law in due consideration of the Article 18 of the Banking Law. The Opinion, as a degraded expansion, also evaluates the competition concerns in case the Board decides to review the case based on the competition law and suggests that the transaction should be declared compatible account taken from the fact that the acquiring party has no activities in the Turkish market which does not lead to the creation or strengthening of a dominant position. The Reporters Opinion is interesting in the sense that it directly focuses on the transaction among the banks, as legal entities and makes no reference to the acquisition of the ten related companies also being a part of the transaction. Here, the Reporters are thought to conclude that the definition of undertaking in competition law should lead to the assessment of the transaction as a whole.

On the other hand, the "Subject of the File" is the request for permission for the indirect change of control over Dış Ticaret Finansal Kiralama, an affiliate leasing company controlled by the bank, within the framework of the acquisition transaction of 89.34 % shares of Türk Dış Ticaret Bankası by Fortis Bank. Accordingly, as the subject of the file is expected to reflect the request of the parties, they automatically excluded the bank acquisition from the review of the Competition Authority but also seeking for clearance for the acquisition of the leasing company. This reflects the hesitation of the parties in interpreting the definition of undertaking within the meaning of the Competition Law and the uncertainties related to the Banking law.

The Board, in its decision, defines the relevant product market as the "leasing services market", thus accepts the approach of the parties. However, the Board also makes its assessment on the jurisdiction and concludes that the transaction between the two banks is subject to Article 18 of the Banking law and accordingly does not require the Authority's review by the fact that the total assets of the parties is (…) %[486], which is lower than 20 %. The Board also declares the acquisition of the leasing company as

[486] Confidentiality rules applied by the Authority.

compatible. However, as derogation from its usual application, the “Conclusion” part of the transaction only clears the transaction between the banks with no special reference to Banking Law, as if it was subject to Authority’s review, and makes no reference to the leasing firms at all.

The Dissenting Vote of ÇAKIN firstly points out to the differentiated handling of multiple transactions which are deemed to constitute parts of the same undertaking by mentioning that “it is found that the acquired undertaking is "Türk Dış Ticaret Bankası AŞ", which includes 10 separate juridical personalities including Dış Ticaret Finansal Kiralama AŞ. These juridical personalities were handled separately, whereas acquisition of Türk Dış Ticaret Bankası AŞ must have been handled as a whole when examining acquisition of the mentioned undertaking in accordance with competition law, whereby an evaluation incompatible with the concept of "undertaking", which is the subject of evaluation in competition law, was made.” The Dissenting Vote reinforces its argument with special reference to the relevant provisions of the Banking Law: *“The target undertaking of the acquisition is a "Bank". Banks Law 4389 Article 2 makes a definition as "Bank means the entities incorporated in Turkey under the name of bank in accordance with this Law and Turkish branches of the banks incorporated abroad."* Article 12 of the same Law provides that banks can participate in a partnership, which is not a financial institution, whose primary working fields are monetary and capital markets and insurance and operating with a permission and license in accordance with special acts in these fields, holding not more than fifteen percent of its own equity capital, and Article 13 provides for the way to keep accounts and records of affiliates and subsidiaries. The legislation shows that the banks' affiliates and subsidiaries are included in bank's assets and be considered within the definition of a bank. In the legislations the concept of "undertaking" in practice of competition law matches with the concept of "Bank" in the case of the file.” The Vote clearly argues that, from the spirit of the definition of “undertaking” contained both within the Competition Law and the Banking Law, acquisition of Türk Dış Ticaret Bankası by Fortis Bank should also constitute a transaction exempted from application of articles 7, 10 and 11 of Law 4054, under Banks Law article 18/I. As according to the competition rules all juridical personalities acquired under the same economic entirety must be considered as

acquisition of the same undertaking, the indirect acquisition of the leasing company should also constitute a bank acquisition.

5.3.3.1.6. Origin of the Bank and Further Confusions

The Decision on Fortis Bank/TDTB clearly states that the bank has no activity at all within the Turkish market. The decision, therefore leads us to another level of interpretation problems which is determined by our Dissenting Votes Analysis, through the analysis of the remaining three banking sector transactions. These are National Bank of Greece (NBG)/Finansbank[487], Dexia/Denizbank[488] and BankMed-Arab Bank/MNG Bank[489] acquisitions, all representing same characteristics in their nature of being subject to change of control by the acquiring parties having no operations within Turkey. The dates of all of the three decisions show that they are passed when the Banking Law No 5411, replacing the previous Law No 4389 was in force.

The NBG/Finansbank transaction is declared compatible with a unanimity vote with no special reference to the Banking Law either in Reporters Opinion or in the Decision text itself. The transaction is thus considered as falling within the jurisdiction of the Competition Law. On the other hand, when it comes to Dexia/Denizbank transaction, the Reporters Opinion also considers the transaction as falling within the reach of the merger control regime without the assessment of the Banking Law. However, the Board held that this transaction also falls within the competence of the Competition Authority based on the interpretation of Article 19 of the new Banking law which was assumed to introduce an originality such that the exclusion applies to the mergers and acquisitions among banks operating in Turkey and thus, as Dexia is a Belgian bank and has no activity in Turkey, the transaction is subject to merger review. The same principle is also applied in BankMed-Arab Bank/MNG Bank transaction, save the Reporters Opinion which has no reference to the Banking Law.

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[487] Decision No 06-53/686-193 dated 20.07.2006
[488] Decision No 06-57/718-208 dated 03.08.2006
[489] Decision No 06-67/910-264 dated 28.09.2006

This led us seek answers for first, why the transaction of NBG/Finansbank was not containing any assessment on the Banking Law No 5411, while the remaining two transactions clearly refer to it; secondly, why, contrary to its previous application, the Reporters Opinion does not refer to the Banking Law in none of the three decisions, and finally, if, and certainly, there is no difference in the wording of the exclusionary clauses of both Law No 4389 (Article 18) and Law No 5411 (Article 19) with regard to the nationality of the parties to a banking merger and acquisition, why the Transaction of Fortis Bank/Türk Dış Ticaret Bankası is found not to fall within the jurisdiction of the Competition Law since the Decision explicitly declares that Fortis Bank has no activity in Turkey. Regarding the previous decisions and the dissenting votes in the banking sector transactions, we would strongly expect to see a dissenting vote calling for special attention to the interpretation of the Banking Law with reference to the origin of the parties involved.

5.3.4. Control

In general, competition law's area covers rules prohibiting anti-competitive agreements, concerted actions and decisions by association of undertakings, abuse of a dominant position, anti-competitive mergers and acquisitions. Indeed, it can be said that the last group of rules concerning control of concentrations have a nature that supports the first two groups of rules. Controlling the concentrations is an effort to avoid formation of a market structure, where anti-competitive agreements and abuse of a dominant position becomes easier.

Competition law, having its basis in price theory, handles the concentrations with regard to their economic content more than their legal form. In order to consider a merger or an acquisition transaction a concentration, undertakings party to the merger transaction must be independent, which means they must not be within the same economic entirety; and as for acquisition transaction, an undertaking must take over the control of another.

Article 7 of the Law has counted some means of transfer of control for acquisitions. However several other means also exist[490]. Moreover, as in the definition of an undertaking, the legal basis of the change of control is not important here, as competition law is concerned with the economic impact rather than the legal form[491]. As a result when there is no change of control, mergers or acquisitions are not assessed as concentrations in competition law. Turkish Competition Board has made this clear in its decision[492] concerning the acquisition of Uludağ Maden Suları Türk Ltd. Şti. and Bursa Uludağ Meşrubat San. ve Tic. A.Ş. by Erbak-Uludağ Meşrubat ve Gıda San. A.Ş. as follows:

> "(...) when the essence of the acquisition transaction is dealt with, it is clear that both the partnership structures and the boards of management of the parties consist of the same persons, therefore even though they are legally independent from each other these undertakings are dependent from the economic perspective and should be evaluated as a single economic unit."

While Law No. 4054 does not define the concept of control that is so vital for the merger regime, the Merger Communiqué provides the following definition, again in Article 2:

> "For the purposes of this Communiqué control may be brought about by rights, contracts or any other means which, either separately or in combination, de facto or by law, grant the opportunity of exercising decisive influence on an undertaking, and in particular by an ownership right or an operative right to use on all or part of the assets of an undertaking, or by rights or contracts which ensure decisive influence on the composition or decisions of the bodies of an undertaking."

However this economic approach to control is not well understood by the undertakings that take part in relevant operations[493] partly because of the wording of Article 7 and also due to the complexity of the issue. The essence of the definition lies in the words "decisive influence on an undertaking" as in the ECMR since the means that bring control are not important. The existence of decisive influence cannot be established with certainty. The Merger Communiqué thus refers to the major forms. It should also be

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[490] Aslan, *op cit*., pp. 258-268.

[491] Aslan, *op cit*., p. 254; Güngördü, A. *AT ve Türk Rekabet Hukukunda Yoğunlaşmalarda Kontrol Unsuru*. Ankara, Rekabet Kurumu, 2003: p. 8; Sanlı, *op cit*., p. 321

[492] Decision No 99-12/93-35 dated 03.03.1999

[493] Güngördü. *ibid*: pp. 8-9.

noted that the Communiqué looks for the existence of decisive influence, not particularly for its past or present exercise[494].

The Communiqué also provides the possibility for the consideration of occurrences with indirect control instead of direct control, in the third paragraph of Article 2, by stating that control can be acquired either by holders of rights or those "in spite of not having such right and power, have de facto power to exercise such rights". Indirect control is a phenomenon associated with modern business life characterized by complex corporate structures[495]. What matters here is where the decision-making capacity on production and commercial matters lies[496].

The concept of "change of control" is raised in 16 instances related to six cases decided by the Board. This shows that in those cases a considerable number of Board members rejected to the decision of the majority. This figure requires further analysis of the subject matters raised by the Board Members with dissenting votes.

5.3.4.1. Change of Control over Special Rights

In two cases the transfer of respectively office stock property along with renting rights[497] are considered as not constituting a merger or acquisition as described in the Law. Although also related with the definition of concentration, we included these two instances under the control issue since it also constitutes of discussions on whether the controlling rights over these rights and assets change or not.

In two of the cases stated above, the acquired means were in the possession of the same seller "Beğendik". The Board, in the first decision decided that the transfer of office stock property does not involve change of control over the seller undertaking since Beğendik transfers only assets of two supermarkets, while continuing to be a competitor with the buyer in the market. As for the renting rights, since the property belongs to a third

[494] Güngördü. *ibid*: pp. 18-20.
[495] Sanlı, *op cit*., pp. 329-330.
[496] Güngördü. *ibid*: p. 21.
[497] Decision No 02-47/588-241 dated 08.08.2002; Decision No 02-28/313-128 dated 14.05.2002

party, the Board concluded that the transfer of renting rights does not constitute a transaction between two undertakings and involve the consent of a third party. The second case is concerning the transfer of similar rights. Both cases are interrelated since the Board relates its judgment in the second decision to the former case, although it determines within the decision that the transfer of office stock property is "clearly and without no doubt a concentration" within the meaning of Article 2 of the Communiqué No 1997/1 on Mergers and Acquisitions. We understand that the board avoided creating an erroneous past decision by taking another similar decision for the sake of referring to the case law. Hopefully the acquired party was the same in both cases. However, the decision of the Board in a future similar case which may create competition concerns will definitely deserve a further analysis.

In both cases, EROL, KARACEHENNEM and SONBAY argue that the transfer of renting rights –although realized over the consent of a third party- gives the buyer necessary rights to handle an established business with its assets and client portfolio. Thus the dissenting votes claim that the transactions should be declared as falling within the jurisdiction of the merger control legislation.

5.3.4.2. Transfer of Intellectual Property Rights

Another decision concerns the acquisition of the trademark BUDGET and some other assets by AVIS[498]. The notifying parties are AVIS Europe Plc. and Brac Rent a Car International Inc. The use of BUDGET trademark is licensed to Ecar Ekonomik Oto Kiralama Turizm ve Ticaret A.Ş. and that of the AVIS to Set Oto Turizm ve Ticaret A.Ş. The Board in its decision claims that there will be no change in the company structures of the licensees in Turkey and they will continue their commercial activities related to the new trademark holder licensor company. The dissenting votes argue that such a transfer of trademark is a transaction that should be reviewed under the merger legislation and the changes it will incur in the competition in the market should also be assessed. Surprisingly, the Board confirms in its second decision on Migros/Beğendik transactions above that the

[498] Decision No 03-11/124-58 dated 20.02.2003

transfer of trademarks and other similar rights on which a turnover can be attributed are concentrations.

5.3.4.3. Change of Control through Appointment of Professionals

Dissenting vote in Medya Holding Sabah Yayıncılık A.Ş.[499] argues that control does not change through only the changes in the Board of Directors. This is the only case out of the six cases on change of control which is considered as a concentration and thus reviewed by the Authority. In this decision GENCER, SONBAY, ATASAYAR and PARLAK raise the argument that the transaction which is considered to be a change of control by the Board decision does not involve any share transfer between the parties, namely from Sabah Group to MTM Consortium. The Board here recognizes the changes in the board of a company sufficient to establish a change in control. Change in the positions in the boards of the four companies was implemented by withdrawal of the directors representing Sabah Group and subsequent appointment of new directors among the nominees, who are assumed to be "bound to MTM group".

The dissenting vote further argues that there is no legal provision mandating a person, if appointed as a director in board of a company, to be bound solely to such company, nor prohibiting him from having a similar office in another company. In this point of view, it is not possible to consider a Sabah group company to be transferred to MTM group as persons, having office in a company, which is said to be incorporated under the name MTM, or is affiliated to any of the companies forming the consortium called MTM, is delegated, by Sabah group, as director to board of a company in question, and as Sabah group provides such companies' boards be completely formed of such people gradually.

We observe that the interpretation of the Authority in determining the change of control is consistent and few rejections are reflected to the decisions in cases of transfer of special rights.

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[499] Decision No 01-51/512-125 dated 23.10.2001

In terms of the EU Merger Reform, the new ECMR introduced the change of control "on a lasting basis", although the term was first introduced in the recitals of the old ECMR No 4064/89. We will strongly advice, in our policy proposal, a similar wording in the Turkish legislation[500].

5.3.5. Insufficient Examination

While preparing the database for the Dissenting Vote Study we observed 16 votes where the members were arguing that the subject investigation was not carried thoroughly and the data used for the evaluation of the transaction was solely based on the information supplied by the parties. At the beginning, we have planned to group those 16 votes and to analyze them as a whole. However, we discovered that although all of the votes were urging for insufficient examination, some of them related this deficiency to jurisdictional consequences in three votes, ten other to consequences related to assessment issues and finally in three votes procedural deficiencies were related to insufficient examinations. Accordingly, we will elaborate each group separately based on the type of the consequences they are believed to prompt. Insufficient examination claims leading to jurisdictional consequences are raised in three votes under two cases.

5.3.5.1. Relevance of the Information Supplied by the Parties

In the first case of Meteksan Lexel/Lexel[501] the transaction consist of a share transfer leading from joint to sole control of a joint venture company. The decision confirms the transaction as an acquisition within the meaning of Article 2(b) of the Communiqué No 1997/1. However, the Board decides that the market share of the joint-venture company is below the threshold in the "lightening equipments and control units" market with special reference to the dispersed character of the market shares in this market. However, the decision also notes that the information relied is the one that is supplied in

[500] See *supra*. Section 3.2.1.
[501] Decision No 02-18/207-88 dated 02.04.2002

the notification file. The market shares of the parties are also taken from that source. The dissenting vote of GÖKMEN and GENCER argues that the statements concerning the market share determination are showing that the subject matter was not examined with adequate care and seriousness. They also underline by reference to other cases brought before the Board that in the review of the notifications the Reporters are contented with the information supplied by the parties and do not deem it necessary to cross-check such information from other sources. Concerning the subject case, the holders of the dissenting votes argue that under such circumstances it is not possible to come up with a healthy decision on whether the parties' market shares are above the thresholds and whether the transaction is subject to approval of the Board.

5.3.5.2. Investigative Powers not Used

In another transaction conducted by Bomsaş Mukavva Sanayi ve Ticaret A.Ş. (Bomsaş) acquiring Tire Kutsan Oluklu Mukavva Kutu ve Kağıt Sanayi A.Ş. (Kutsan) with all its assets and liabilities[502], it is determined by the Board that Doruk Gıda Kimya Sanayi A.Ş., Anadolu Gıda Sanayi A.Ş. and Birlik Pazarlama Sanayi A.Ş., all of which appear to be shareholders of Bomsaş, are affiliates of Yıldız Holding A.Ş.. Shares held by Yıldız Holding A.Ş., by members of Özokur and Ülker families, who hold the control of Yıldız Holding A.Ş., added to the share held by aforementioned three companies, reaches to 59,4% of the total shares. This shows, according to the Board decision, that Bomsaş is controlled by Yıldız Holding A.Ş..

The Board also determined that Ülker Gıda Sanayi A.Ş., Taç Yatırım Ortaklığı A.Ş., Istanbul Gıda Dış Ticaret A.Ş. and Farmamak Ambalaj A.Ş., all of which appear to be the shareholders of Kutsan, are affiliates of Yıldız Holding AS. Together with these companies, Yıldız Holding A.Ş.'s share in the companies reaches to 25.25%. Considering this situation together with the information that all directors of the company board were appointed by Yıldız Holding A.Ş., it is determined that Kutsan, being a publicly held company and having many small shareholders, is controlled by Yıldız Holding A.Ş. With a

[502] Decision No 02-43/503-208 dated 11.07.2002

view to shareholding structure and decision-making processes of Bomsaş and Kutsan, as the parties to the transaction notified, in light of the foregoing information, it is determined by the Board that the transaction is not subject to Article 7 of the Law and to Communiqué 1997/1 as they are controlled by the same company and the transaction will not cause a change in the controlling element.

The dissenting vote of GENCER in this decision raises the argument that there is insufficient information about shareholding structure of both Kutsan as the acquiring party, and of Bomsaş, as the acquired enterprise, involved in the transaction. The dissenting vote further emphasizes that in the evaluation on Bomsaş, the shares held by members of Özokur and Ülker families, supposing they would act in parallel with each other in business decisions in any case, were just automatically added to the share held by Yıldız Holding A.Ş., and thereby it was held that Bomsaş was controlled by Yıldız Holding.

GENCER claims that the query and evaluation is deficient because of the fact that reporters exactly accepted the facts stated by the relevant undertakings, of the failure to review company's articles of association with regard to control power (or failure to reflect to report, the review, if made any), and of the omission to provide confirmation, considering it unnecessary whereas one can give a thought to obtain, in some critical conditions, even by asking members of the same family whether they act together with the groups in question. We understand that GENCER has doubts concerning the relevance of the information and he was unable to agree with Decision based on the aforementioned acceptation of the Board that there is no change in control, thinking that there is no sufficient information to determine that both enterprises are controlled by Yıldız Holding A.Ş. in the case.

5.3.6. Relevant Market

The calculation of market shares requires the determination of the relevant market first. The relevant market is an applied concept that is different than the economic market where, according to economic theory, the prices for substitute goods are equalized save the

transport costs. In competition policy the emphasis is not on prices *per se*, but on market power. Therefore the relevant market is where an undertaking or a group of undertakings perform market power. This does not need to be equivalent to the economic market[503].

Two types of relevant markets are subject to determination in order both for determining the jurisdiction and for assessing the competition concerns of a transaction[504]: relevant product market and relevant geographical market. This distinction is reflected in the wording of Article 7 of Law No. 4054 that is concerned with the lessening of competition "in any market for goods or services" (meaning the relevant product market) "within the whole or a part of the country" (meaning the relevant geographical market). Both Article 7 and the Merger Communiqué give equivalent weight to both types of relevant market[505]. However, it is clear that the relevant product market should be determined first.

Interestingly, the Merger Communiqué, while giving the basic guidelines for the determination of both types of relevant markets, provides a detailed definition only for the relevant geographic market in the fourth paragraph of Article 4:

> "The geographic market, which covers a substantial part of the country ... is any area in which undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighboring areas, as the conditions of competition are appreciably different from these areas".

Aslan argues that the adjective "substantial" is a divergence from Article 7 of the Law No. 4054 which puts it as "the whole or a part of the country". However, since Turkey consists of only one competition law jurisdiction, this divergence is not critical

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[503] Senyücel & Aktaş, *op cit.,* pp. 41-44.

[504] It should also be emphasized that the relevant market is used both as a criterion for the determination of the scope of application and, once it is found that the transaction falls within the scope, the assessment of lessening of competition. This situation constitutes a difference between the merger control and the control of abuse of dominant positions in Turkish competition policy. Sanlı, *op cit*., p. 342.

[505] Article 4 of the Merger Communiqué includes the term "relevant product market" while relevant geographical market is mentioned by the words "within the whole or a part of the territory".

since the criteria used in the determination of a geographical market can only be observed in a substantial part of the country anyway[506].

The fourth paragraph of Article 4 counts the factors that should be used in the assessment particularly as the characteristics of the relevant goods or services, existence of entry barriers in respect of consumer preferences, and appreciable differences in the market shares of undertakings or prices of the relevant goods and services between the relevant area and neighboring ones. The fifth paragraph states that the relevant product markets should be considered as the market comprising the relevant goods or services and those goods and services that are identical from the perspective of the consumers in terms of their prices, intended use and characteristics. This analysis should include both demand and supply substitution; but the Competition Board has not sufficiently taken into consideration the substitution effect so far in its decisions[507]. Conformingly, the concept of supply substitution has been subject to a very short reference in the relevant market determination in the transactions concerning the fertilizer market and in a transaction concerning computer software market[508].

Relevant markets are likely to shift over time as changes take place that affect the factors taken into consideration in their assessment. Such changes might include technological advances that create new substitute goods and decreases in transport costs that erode the differences in the conditions of competition among neighboring areas. Therefore the relevant time period should also be established[509].

In analyzing the dissenting votes we came up with only two transactions containing three votes, all of them claiming the wrong determination of the relevant product market. Therefore we can also assume that there has been no disagreement in any merger decision on the determination of the relevant geographical market. Furthermore, in most of the cases the relevant geographical market was determined as the territories of Turkey with exceptions related to goods and services that are automatically geographically located such

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[506] Aslan, *op cit*., pp. 275-276.
[507] Ardıç, İ. Y. *Yatay Yoğunlaşmalarda Potansiyel Rekabet*. Ankara, Rekabet Kurumu, 2004: pp. 60-61.
[508] Decision No 03-75/921-387 Dated 20.11.2003
[509] This is especially important in examinations on the abuse of a dominant position. See: Su, *op cit.,* p. 14.

as the cement market where the cost of transportation determines the marketable area of the product, the market for airport management, local retailing markets such as supermarkets, dialysis markets where the services are provided to local patients, ports and airline flight destinations.

5.3.6.1. Parents of a Joint Venture and the Relevant Market

The first case concerning the market shares is the establishment of a joint venture company of which the parent companies are Sodexho Restoran Servisleri A.Ş. and Yemek Servisleri International A.Ş.[510] both active in the same market defined by decision as "providing ready to consume food to clients through money and other representative means" with equal market shares of 40 % each. The parent companies are willing to explore jointly the smart card activities and agree on combining their means under a joint venture company which will be active in the market for "providing infrastructure and management for smart cards" as described by the decision. The Board held that neither of the parents have activity in the providing infrastructure and management for smart cards market, thus the joint venture has no turnover nor market share which makes it remain below the thresholds. The decision recognizes the concentrative aspect of the joint venture.

However, two Board members raise concerns on the relevant product market of the parents and argue that the market for providing ready to consume food to clients through money and other means should "also" be subject to further analysis. The members also noted that the transaction should be cleared following the determination whether the establishment of the joint venture creates concentration in the markets where the parents are active.

The EU practice clarifies the issue of determination of the undertakings concerned for the calculation of market shares and turnovers via its Notice on the Concept of Undertakings Concerned where it underlines that in the case of acquisition of joint control of a newly-created company, the undertakings concerned are each of the companies

[510] Decision No 01-37/365-97 dated 31.07.2001

acquiring control of the newly set-up joint venture. The Commission Notice also makes it clear that the joint venture itself cannot be considered to be an undertaking concerned since it does not exist and, thus, has no turnover of its own yet. Based on the EU practice which is also the basis for the Turkish competition regime the Board is wrong in not taking into account the turnover and market shares of the parents.

5.3.6.2. Supply Elasticity and the Relevant Market

The second case concerning the relevant market definition is the recent acquisition of Kars Karper by Societe Industrielle Commerciale[511] in which one of the relevant product markets is broadly determined as the "cheese market". The decision, departing from the dairy products market narrows the market definition as the cheese market and refrains from narrowing it further with the reasoning that it will not have influence on the determination. The decision also points out the supply elasticity among different types of cheeses however does not question why the parties are almost completely active in the cream cheese market. That is where the dissenting votes are concentrated. The votes claim that the market is defined very broadly and should be taken as the "cream cheese market" where the market shares of the parties are above the thresholds. However, in another decision concerning formation of a joint venture company between Andros/Eker in the dairy products market, a similar market definition with reinforcing supply elasticity argument is established by the board and the decision is taken unanimously[512].

5.3.7. Effect Doctrine

In the first reading Article 2 of Law No. 4054 might create the impression that the law can be applied only "within the boundaries of the Republic of Turkey"; but in fact the place of application of the law is not restricted since any act of undertakings "operating in or affecting" competition in Turkish markets for goods and services are covered. In other

[511] Decision No 06-13/154-38 dated 16.02.2006
[512] Decision No 06-18/217-56 dated 09.03.2006

words, even though it might create difficulties in practice because of collusion of different national jurisdictions and lack of related international trade arrangements, the principle of extra-territorial application is valid in Turkish competition law[513].

5.3.7.1. Foreign-to-Foreign Transactions

The effect doctrine has been questioned once in a single dissenting vote in One Equity Partners/Thyssen Krupp[514] case in which the transaction is considered to be falling within the jurisdiction of the Competition Authority and cleared following its review. The parties are active in the battleship and civil ship production markets. The purchase of battleships in Turkey is made through military bids regulated by the Public Procurement Law. On the other hand, the parties did not have any sales of civil ships to Turkey. Accordingly, the dissenting vote argues that the acquisition is falling outside of the Competition Law based on Article 2 which lays down the scope of application of the Law. Although the parties have generated revenues through sales of battleships to Turkey, the fact that the provisions of purchasing battleships are based on a very strictly regulated military bids, says the dissenting vote, the transaction is thought not to have effect on any markets in Turkey.

5.3.7.2. Domestic-to-Foreign Transactions

The effect doctrine has also been subject to a transaction which is found to be out of the reach of the Turkish competition regime and thus declared as not having effect in Turkish markets even though one of the parties was operating in Turkey[515]. The dissenting vote claims that the transaction has national effects since EKS, a Turkish company controlled by Eczacıbaşı Group, is active in the Turkish ceramic tiles production and sales market even if the acquired company, Engers, is in Germany and will continue to be active within the German ceramic tiles market. The dissenting vote is not detailed but we assume that the member wanted to raise concerns on the increase in the production capacity of

[513] Sanlı, *op cit*., pp. 38-41.
[514] Decision No 05-01/7-6 dated 06.01.2005
[515] Decision No 06-13/147-34 dated 16.02.2006

EKS worldwide which may also affect the Turkish market by the possible allocation of the domestic capacity of EKS to its supply within Turkey. Accordingly, it is assumed that although EKS's domestic capacity will not change, it will no more export to Germany and will be able to gain more market power in Turkey through an indirect capacity increase.

5.4. Dissenting Votes on Substantive Issues

5.4.1. Ancillary Restraints[516]

When assessing anti-competitive effects of a merger or acquisition transaction in the relevant market, along with criteria such as the undertakings' market share, demand structure for the relevant product, characteristics of the market, content of other agreements envisaged by the parties is also taken into account. These agreements generally impose restrictions on competition with the new entity or the acquired business. Rules governing competition law prohibit all agreements or concerted practices which have the intention of restriction of the competition between undertakings. Nonetheless, if these restrictions can be declared necessary for the realization of the concentration operation, known as *ancillary restraints*, they are automatically authorized as part of the principal operation. The notion of "being necessary for the realization of the concentration operation" means that, in the absence of those restraints, the operation will either not be realized or will only be realized under considerably less favorable conditions such as at higher cost or over longer period[517].

Accordingly, the acceptance as an "ancillary restraint" of any contractual obligation on the parties in a merger, acquisition or joint venture transaction means that, although having a negative effect on competition, the restraint have to be considered as necessary for the realization of the assessed operation. Ancillary restraints contain obligations such as

[516] Also referred to as "Ancillary Restrictions".
[517] Gülergün, E. C. *Topluluk Rekabet Hukuku Işığında Birleşme-Devralmalarda Yan Sınırlamalar.* Ankara, Rekabet Kurumu, 2003: pp. 14-23.

purchase and supply from the parent companies, non-competition on the seller or the buyer, or information exchange between the seller and the buyer and they are assessed, in the mean time, within the main operation.

For a restriction to be accepted as an "ancillary restraint", its restrictive effect has to be limited with the parties, it has to be directly related with the operation, it has to be necessary for the realization of the operation and its scope should not go beyond the necessary limits of what the realization of the main operation requires.

Restrictions in an acquisition are generally imposed for the benefit of the buyer, though, in limited cases, they may also be for the benefit of the vendor. The purpose of so called non-competition obligations imposed on the seller for the benefit of the buyer is to ensure the buyer to fully make use of the material and non material goods like know-how at their real economic value after the operation. The reasonable period is accepted by the case law as 3 years to 5 years in exceptional cases.

In another decision (held unanimously by the Board) concerning Pfizer/Sanofi[518], a non-competition obligation for a period of 5 years has been accepted by the Competition Authority. In this decision, the Authority makes a quotation from the contract obligation and concludes that it is convenient in all aspects: "Restrictive Commitments: (i) For a period of 5 years following the closure of the operation (limited period), vendor or its subsidiaries and Aventis or its participations (for the time that they are affiliates of the vendor), can not have a position of shareholder, partner, representative, consultant or any other position in any company buying, producing or selling the product or its substances in Aventis Region. However, none of the dispositions of this contract can provide the vendor or its affiliates from: (x) producing the product in order to sell it to the buyer in terms of the supply contract, (y) having any relation like acquisition, concentration, joint-venture or foundation of a R&D partnership with any other parties whose activity is the production, marketing or sale of this product or other products having it as a substance or (z) acquisition of shares representing less than 5% of shares sold in national stock markets of

[518] Decision No 04-48/652-162 dated 22.07.2004

these people envisaged by article (y) – provided that they don't have any other relation with those people-. Although not containing dissenting votes, this clearance decision is important since it reflects the concerns of GENCER who strongly argued in three different dissenting votes that a restriction on the sellers to acquire shares in competing undertakings just for investment purposes was more than necessary[519].

5.4.1.1. Five Years of Non-Competition Clause Cleared

This period of three years is generally authorized by the Competition Authority. However, in the decision of Novartis-Hexal[520] acquisition operation, the Decision has concluded that a non-competition period of 5 years on the vendor is reasonable "as the operation has a global dimension and an effect on Turkish market". It is well known that, for the operations that have been accepted by US an EU Competition Authorities, the Turkish Competition Authority avoid from envisaging additional conditions in order to ensure that these operations can be implemented without any problem on Turkish market. In this decision we can see the dissenting votes of two Competition Board Members questioning the deviation from the usual jurisdiction.

5.4.1.2. Three Years of Non-Competition Clause Reduced to two Years

In another decision concerning the acquisition of Proser By ISS Global[521], the Board ruled for the reduction of three years of non-compete obligation to two years (assumedly based on the EU standard application) and a Board member criticized this decision by claiming that this reduction should be based on more reasonable, economic and technical grounds since such decisions may lead to the removal of the agreement by the parties.

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[519] Decision No 03-35/414-181 dated 27.05.2003; Decision No 03-45/519-230 dated 26.06.2003; Decision No 04-38/426-106 dated 26.05.2004

[520] Decision No 05-36/450-103 dated 26.05.2005

[521] 31.03.2005 /05-20/229-67

5.4.1.3. Client Portfolio and Employment Concerns

Obligations on the parents such as not to "pick up" the clients of the JV or not to employ its employees are also deemed as obligations complementary to the non-competition obligations and are authorized under the same considerations. The portfolio and employment issues have been brought into subject each in different decisions through dissenting votes. However, both transactions were acquisitions and not formation of joint-ventures. In Konya Çimento/Anadolu Çimento decision[522] concerning the restriction of portfolio, the dissenting vote argues that the acquired party has no portfolio since the company is not active in the market. Accordingly, the cleared ancillary restraint is claimed to go beyond being necessary, thus restrict competition. In Cadbury Schweppes/Pfizer[523], a restriction on the seller not to re-employ its ex-employees working in the company which is subject to sale is combined with a non-compete clause restricting the seller entering into the sold business activity is criticized through a dissenting vote claiming that only the non-compete clause should be considered as an ancillary restraint since re-employing would only occur in the case of the breach of the non-compete obligation due account taken from the expertise of such employees. Another obligation of non-recruitment of the employees of the joint-venture is considered as being a complementary non-competition obligation[524] with a unanimity decision where the restrictions were limited with one year with the pre-condition that this period should fall within the life of the joint-venture.

5.4.1.4. Joint Ventures and Ancillary Restraints

In case of forming a joint-venture (JV), a non-competition obligation between the parent undertakings and the joint-venture can be agreed in order to ensure that the new entity can maintain its autonomous economical status. Such obligations imposed on the parent companies aim at demonstrating that the new entity is not established for the purpose of coordinating the competitive behavior between the parent undertakings. Such non-competition obligations imposed on the parent undertakings can be declared as

[522] Decision No 02-81/946-392 dated 26.12.2002
[523] Decision No 03-22/247-108 dated 03.04.2003
[524] Decision No 06-18/217-56 dated 09.03.2006

ancillary restraints if they do not exceed the reasonable necessary limits for the realization of the expected benefits from the new entity in terms of geographical scope, duration and subject matter. For non-compete obligations to be considered as ancillary to a JV operation they must also be confined to a reasonable requirement limits in obtaining the advantages expected from the JV in means of its subject matter, geographical scope and people it restricts[525].

According to the Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) such competition obligations reflect the need to ensure good faith during negotiations for JV and to enable the JV to assimilate know-how and goodwill provided by its parents undertakings or the need to protect parent undertakings' interests in the JV against competitive risk increased by their privileged access to the know-how transferred to the JV. Such non-compete obligations are acceptable for as long as the joint-venture exists. As a matter of fact, the Competition Authority ruled in a decision[526] that, "non-competition obligations should not be considered as restraints of competition as long as the control of the parents over the JV continues; however non-competition obligations which exceed joint venture's life can not be declared directly related to the main operation and will be considered as agreements which restrict competition on the market". However, in a decision limiting the duration of the confidentiality clause with the life of the joint-venture which was originally destined by the parties to go beyond is criticized in dissenting vote claiming that confidentiality of sensitive information that is exchanged during a joint-venture should not be restricted with the life of the joint-venture[527]. On the other hand, in another decision[528], the Competition Authority ruled that "in order to conclude whether non-competition obligations imposed on

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[525] Competition Authority decision of 26.05.2004 (04-38 / 427-107):

> *"Although non-competition obligations as seen in above Agreement between parent undertakings and JV and limited to JV's activity area can be seemed as ancillary restraints, non-competition obligations between parent undertakings are not considered as directly related or necessary for the implementation of the JV. Thus, it's considered that non competition obligations between the JV and parent undertakings whose geographical scope or subject matter exceed JV's business are not deemed to be ancillary restraints. Consequently, such obligations have to be removed from the contract so as to ensure that notified non-competition obligations can be declared and accepted as ancillary restraints"*

[526] Decision No 03-69/832-362 dated 23.10.2003

[527] Decision No 01-29/293-86 dated 28.06.2001

[528] Decision No 01-37/366-98 dated 31.07.2001

the parent companies are reasonable or not, it is not the joint venture's life or the parents' position as a shareholder, but it is the effect of the shareholders on the control which is taken as criteria. Non-competition obligations referring a period where parent undertaking do not maintain their control on the joint venture shall not be deemed as ancillary restraints".

The loss of control of a parent company over the JV and reduction of its shares to a level where they will be considered as an investment requires a notification to the Competition Authority where the thresholds are exceeded. As this notification shall concern the change in the structure of the JV and, thus the formation of a new JV, non-competition obligations to be imposed on the shareholder who loses its control have to be brought up within this notification. According to the duration of non-competition obligation, these clauses can be accepted as ancillary restrictions.

As declared by the Competition Authority in a decision[529], obligations imposed on the parent undertakings not to operate in the activity field of the JV during the life of the joint venture indicate that the JV is not a joint venture creating coordination. The decision reads: "while assessing the autonomous character of joint ventures, the fact that parent undertakings are no more active in the field of activity of the JV or all their activities in the relevant market are transferred to the JV shows that there exist no risks of coordination of competitive behaviors between parent undertakings". That is to say, when it comes to JVs, non-compete obligations imposed on the parent companies are not anymore considered as "acceptable" ancillary restraints, but as compulsory acts for the avoidance of cooperation between the parent companies[530]. A land marking decision on this matter is Metro/Migros[531] joint-venture transaction which were not containing any non-compete obligation for both parents with the joint-venture. The Board cleared the transaction with the condition that either of the two parents shall not compete with the JV in any market.

[529] Decision No 05-78/1066-304 Dated 10.11.2005
[530] The Competition Authority, Decision of 10.02.2000 (00-6/61-28): *"According to general opinion, the fact that two or more parent undertakings are active within the same geographical and product market with the JV, is a sign of a possible coordination of competitive strategies"*
[531] Decision No 57/424-52 dated 19.03.1998

The decision is taken with qualified majority but, as was the case in other decisions from 1998, the dissenting votes were not published contrary to the requirements of the Law[532].

In another decision related to the duration of non-competition obligations imposed on the parent companies[533], it is stated that "for a non-competition obligation to be considered as an acceptable ancillary restraint it has to be valid not during the existence of the status of being a shareholder but as long as the control status over the JV continues". What is accepted here is that undertakings jointly controlling a JV or having at least a veto right shall be affected from the non-competition obligations until they lose such control rights over the operation of the JV. The Competition Authority intends to ensure the competition rights of the undertakings rising from a switch from the status of a controlling shareholder to an investing shareholder.

The Competition Authority, while considering the non-competition obligations between the parent companies and the JV as ancillary restraints, does not accept non-competition obligation between parent undertakings, as it considers that these are not directly related and reasonably necessary for the implementation of the new entity[534].

5.4.1.5. Reverse Non-Compete Obligations and their Duration

As for the so called reverse non-competition obligations imposed on the buyer in cases where it retains part of the activities or assets closely related and substitutable with

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[532] The Metro/Migros Decision reads (From the english version of the Competition Authority 1998 Annual Report accessible at www.rekabet.gov.tr):

> *"Therefore, METRO AG- MIGROS TÜRK T.A.Ş. joint venture procedures are permitted provided that in accordance with paragraph 3 of Article 6 of the Communiqué No: 1997/1, as long as the joint venture agreement in question remains in effect, the parent companies (Metro-Migros) do not directly or indirectly enter the relevant product market, together, in the same geographical market with the joint venture. In other words, only one of Metro AG or Migros Türk T.A.Ş. may operate in the relevant product market in any Turkish city or central town with the joint venture; and that in case of non-compliance with this condition, a notification be made that as of the date of non-compliance, the joint venture in question shall be deemed to be an agreement restricting competition under Article 4 of the Law No: 4054, and a preliminary inquiry and/or investigation shall be started on the Board's own initiative."*

[533] Decision No 04-72/1045-259dated 19.11.2004

[534] Decision No 04-38/ 427-107 dated 26.05.2004

those who are subject to transfer, they aim to ensure the seller to fully make use of the retained activities at their real economic value after the operation. Non-competition obligations that are imposed on the buyer up to 5 years[535] in case of a direct relation between the activities sold to the buyer and the activities kept by the seller are not deemed to be ancillary restraints unless they are formulated in a proper manner. In case of non-declaration of these obligations, the Competition Authority may pronounce fines[536]. In order to illustrate exactly what means the criterion of being formulated properly it is useful to analyze the Daimler Chrysler/Camulos decision[537] which is among few decisions where reverse non-compete obligations are authorized. The decision, which provides a quite reasonable explanation for the reverse non-competition obligations, reads:

> "According to Article 3 of Non-competition Contract between the parties, it is agreed that the transferred companies, MTU-F and MTU-DD and the buyer, Camulos, will not compete against Daimler Chrysler's non-transferred business which is "diesel engine for inner road applications". Such non-competition obligations for the buyer are named as "reverse non-competition obligations". Generally, there is no positive approach when assessing such restrictions. However, if there is a direct relation and a supply substitution between the activities transferred to the buyer and unsold activities of the seller, such reverse non-competition obligations are considered as directly related and reasonably necessary for the main operation. In this transaction, non-transferred business which is "diesel engine business for road applications" and maintained activity which is "diesel engine business for off-road applications" are directly related. Furthermore, as very similar technology and know-how are used in both activities, supply substitution exists. In this context, it is possible that the buyer can produce "diesel engine for road applications" with know-how transferred for "diesel engine for off-road applications". Consequently, reverse non-competition obligations for the benefit of the vendor are directly related and necessary for the acquisition. In addition to this, Daimler Chrysler furnishes engine only for Daimler Chrysler group companies and has no activity in the sale of diesel engines for road applications in Turkey. Similarly, engines produced by Daimler Chrysler are only for companies' own vehicles, so Daimler Chrysler does not furnish any engine for distributors or importers in Turkey, as a result of which the parties have no activity for this domain where they agreed not to compete. In this context, non-competition obligation envisaged by article 3 is deemed to be reasonable and necessary".

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[535] The Competition Authority, Decision of 26.2.2004, (04-17/149-32, DuPont-Koch Decision) "In addition to this, as non-transferred activity which is EP (engineering polymer) is in a direct relation with Invista's transferred activity (nylon and spandex fiber), non-competition obligation for the buyer is to be considered as directly related and necessary"

[536] The Competition authority, Decision of 19.10.2005 (05-69/959-260, Ulusoy Denizcilik Decision) where it is penalized to agree that the buyer can only utilize acquired ship in a determined line.

[537] Decision No 06-16/188-48 dated 02.03.2006

As also seen by the decisions, the underlined issue is the existence of a direct relation between the transferred and retained businesses. As for the supply substitution, it means that the buyer may easily produce goods and services in non-transferred activity field through the activity acquired. Another possible justification is the need to protect the important know-how and the goodwill of the transferred business –which are not subject to patent protection-, so the need to discourage the seller to compete with transferred activity[538] .

Although reverse non-compete obligations in Daimler Chrysler are accepted by the Board, they are also reduced from five years to three years period which led two board members raising concerns with dissenting votes claiming that the authority should take into account the conditions which are specific to the nature of the transaction and should not automatically apply standard periods as in other typical transactions.

5.4.2. Dominant Position

Focusing on the current application of the Turkish merger regime, once it is established that a concentration falls within the scope of Article 7 of the Law, the Competition Authority is required to carry out an examination that involves the execution of a dominance test and, if the outcome is positive, checking whether or not the concentration significantly decreases competition, i.e. applying what is called the SLC test. Accordingly, the Law defines the determination of the dominant position as a prerequisite for the assessment of whether the competition is significantly lessened through this dominant position.

Aslan criticizes the existence of two interrelated criteria and states that a concentration that creates or strengthens a dominant position restricts competition *per*

[538] See decision of 26.2.2004 of the Competition Authority (DuPont-Koch Decision)

se[539]. However the *per se* approach in competition law and policy has been replaced by the case by case approach that utilizes rule of reason[540] with the case of explicit collusions mostly remaining an exception. The competition policy of the Community that had previously relied on the *per se* approach also shifted to the opposing side that was first endorsed by the US thanks to the recent reforms[541]. In fact as Sanlı states, there is necessarily no absolute cause-effect relationship between dominant positions and restriction of competition[542]. The same goes also for the case of strengthening of a dominant position, a phenomenon that covers a wide range of transactions since it is possible for a dominant undertaking to acquire a small actor in the relevant market without altering the competitive conditions[543]. Otherwise competition law and policy would seek to eliminate dominant positions; but declaring them illegal when there is no material limitation of competition would be an unjustified restriction of freedom of enterprise. Moreover it would also prevent the creation of possible benefits from a concentration. Therefore competition law and policy instead aims to prevent the abuse of dominant positions. Since Article 6 of the Law No. 4054 titled "Abuse of Dominant Position" does not diverge from this general practice it is clear that the legislator intents not to prohibit dominant positions *per se*. In that respect, Erdem brings into subject a variety of criticism for the wording of Article 7; such that *"it is not clear in which case a merger or acquisition is prohibited… [and], should a merger or acquisition operation be prohibited, the creation or strengthening of a dominant position is not enough and it shall be concluded that the effective competition is impeded"*[544].

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[539] The author further implies that the existence of these conditions in the Law is not intentional, but a result of poor linguistic and legal performance of the drafters. Aslan, *op cit*., pp. 254-255.

[540] Parasız, İ. *Rekabet Ekonomisi ve Düzenlemeleri*. Bursa, Ekin Kitabevi, 2001, pp. 7-8.

[541] Öz, G. In: *AB Rekabet Hukukunda Son Gelişmeler ve Türk Rekabet Hukukuna Muhtemel Yansımaları*. Ankara, 2000, p. 25.

[542] Sanlı, *op cit*., p. 343.

[543] Decision No 00-16/160-82 (Cisco/IBM) in which Cisco is market leader in switch market in terms of market shares and the transaction is found not to strengthen dominant position. See also Eczacıbaşı/American Standart Decision No 00-6/51-23

[544] Erdem, E. Amendments Brought By the Regulation 139/2004 of The Council, Dated 20 January 2004 Regarding The Control Of The Operations Of Concentration Between The Undertakings, 5 April 2004, p. 27.

However, although as the criticism of Aslan and Erdem suggests that Article 7 may be considered as badly drafted from both legal and economic perspectives, it is, within the context of Dominance Test, a carbon copy of the previous EU legislation which implemented the European perception of merger control for fifteen years[545]. Accordingly, it will be more appropriate to evaluate the effort of Aslan and Erdem as a call for the inefficiency of the dominance test in modern competition law[546]. The merger control regime in the USA, which is then followed by the EU, has a single criterion approach for the assessment of concentrations and that criterion is significant lessening of competition. In other words USA has implicitly accepted that concentrations can restrict competition without creating or strengthening a dominant position.

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[545] Article 7 of Law No 4054 reads as follows:

> "Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.";

while Article 2(3) of Regulation 4064/89 as follows: *"A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market"*. The main difference between two texts is that the Regulation 4064/89 uses the word "concentration" while the Law No 4054 separately denotes mergers and acquisitions without referring to the joint-ventures within the same legal text. This controversy is being compensated with the definition of mergers and acquisitions in the Communiqué No 1997/1 so as to cover joint-ventures. The definition of the concept "concentration" has found its place in Article 3 of Regulation 4064/89. Erdem criticizes this by underlining that "[t]he article makes no reference to joint-ventures as mergers and acquisition. This situation creates a contradiction between thisArticle and the Communiqué No: 1997/1 as the Communiqué regulates a possibility which is not foreseen by the Law No 4054. See: Erdem, *op cit.,* p. 27.

[546] Sanlı is also at pains to justify this aspect:

> "As a result it can be stated that the creation or strengthening of the dominant position does not necessarily cause a significant reduction of competition. On the contrary it is not possible to accept that the opposite situation, that is the significant reduction of competition, can occur independently from the phenomena of 'sole or collective dominant position. A contrary view would both be incongruous with the intention behind the inclusion of the concept of dominant position in the Law and incompatible with economic realities."

See: Sanlı, *op cit*., p. 344.

The first paragraph of Article 6 of the Merger Communiqué requires the Turkish Competition Authority to take into account numerous factors in the assessments it carries out for concentrations[547]. In other words the Authority should determine the level of competitiveness in the relevant market and also study the factors that will have a bearing on actual and potential competitive behavior of the concentration including the efficiencies. According to the OECD this policy is an application of the standard multi-factor analysis to concentrations[548].

The preliminary examination of the Authority consists of the determination of the relevant markets which serves as the initial stage for the assessment. Once this is accomplished the dominance test is run. Article 3 of the Law defines a dominant position as the *"power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers"*. The expression "particular market" in this definition is construed as the relevant market in the practice while the undefined term "power" is evaluated on a case by case basis[549,550]. The basic element of the dominance test is the market structure that can be determined by an examination of the distribution of market shares in the relevant market, the supply and demand elasticity of the relevant product, the market concentration (as measured by CR4[551], HHI[552] or atrophy index), barriers to entry and exit and also the developmental stage of the market[553].

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[547] The paragraph reads as follows:

> "a) the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country,
> b) the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to the consumers, and the other factors".

[548] OECD. (2002), *op cit*., p. 13; OECD. (2005), *op cit*., p. 25.

[549] Sanlı, *op cit*., pp. 245-246.

[550] Even though the Law includes a single definition of dominant position Articles 6 and 7 diverge in their approach to dominance since the former aims to prevent the abuse of dominant positions while the latter's objective is the prohibition of concentrations that have both dominance and a lessening of competition effect.

[551] Although the use of the CR4 test is left by the US practicioners and the EU with the introduction of the Merger Reform pointing only the HHI test as the relevant initial monitor, the Turkish Competition Authority still uses the CR4 test in different cases. The CR4 test was used in transactions in packed drinking water

The relationship between the market share of the relevant undertakings and those of other undertakings in the market reveals the comparative position of the parties of the concentration and provides the single most important piece of information about the question of dominance[554]. However this relationship is often not sufficient and is likely to lead to errors by itself in ruling[555] whether or not a dominant position will be created or strengthened as a result of the concentration; because economic power of an undertaking (that can be measured by the Lerner index, the profitability ratio, Rothschild's demand curve approach and, as a supplementary measure, Tobin's firm value/property ratio[556]) might be revealed or mitigated due to several factors. These factors, which are used as auxiliary measures for the dominance test, are covered in an unrestrictive manner by subparagraph b of first paragraph of Article 6 in the Merger Communiqué. The Article is silent on the relative importance of the factors; so it should be assumed that none have primacy over the others. What is common about most of these complementary factors is that they decrease the possibility or feasibility of entrance to the market for newcomers, i.e. they act as entry barriers[557]. Some entry barriers also function as exit barriers making entry to the market even less desirable. Even though they are case specific and so not countable, it is possible to list the most commonly observed entry barriers: legal and administrative barriers (such as the granting of special or exclusive rights and the protection of intellectual and industrial property rights), capital requirements caused by sunk costs, prevalence of

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market in combination with HHI test (Decision No 06-59/774-227 dated 24.08.2006); port services market in combination with HHI test (Decision No 06-72/951-273 dated 09.10.2006); cement market in combination with HHI test (Decision No 05-86/1189-341 dated 20.12.2005); electronic switches and routers market (Decision No 00-16/160-82 dated 02.05.2000); whipped cream and puding markets (Decision No 00-45/475-260 Dated 16.11.2000); Voice communication control systems market (Decision No 01-27/258-73 dated 12.06.2001); crop protection products in combination with CR8 test (Decision No 02-28/316-131 dated 14.05.2002); textile fiber and weaving market in combination with CR8 (Decision No 05-36/456-107 dated 26.05.2005); media planning and purchasing market (Decision No 05-41/581-149 dated 17.06.2005); plastic garment racks market (Decision No 06-46/586-159 dated 29.06.2006)

[552] The HHI test was used in transactions in cement market (Decision No 05-86/1191-343 dated 20.12.2005; Decision No 05-86/1189-341 dated 20.12.2005; Decision No 05-86/1190-342 dated 20.12.2005; Decision No 05-86/1187-339 dated 20.12.2005; Decision No 05-86/1188-340 dated 20.12.2005; Decision No 06-31/379-96 dated 28.04.2006); fertilizer market (Decision No 05-30/373-92dated 05.05.2005; Decision No 00-43/464-254 dated 03.11.2000); pharmaceutical market (Decision No 00-29/308-175 dated 03.08.2000); tobacco market (Decision No 05-14/168-61 dated 11.03.2005); packed drinking water market (Decision No 06-59/774-227 dated 24.08.2006); port services market (Decision No 06-72/951-273 dated 09.10.2006)

[553] Su, *op cit*., pp. 17-27.

[554] Sanlı, *op cit*., p. 252.

[555] Gülergün, 2003, *ibid*, p. 165.

[556] Su, *op cit*., pp. 31-34.

[557] Sanlı, *op cit*., p. 253.

natural monopolies, economies of scale, existence of excess capacity, length of time required for market exit or penetration, product differentiation, supply of products based on new technologies, advertisements and customer loyalty, horizontal integration and the organization of channels of distribution and sale. The small scale and the saturation of markets might also be accepted as entry barriers[558]. Entry barriers can be categorized as natural barriers that result from the characteristics of the relevant market and induced barriers created intentionally by the undertakings in the market[559].

5.4.2.1. Oligopoly to Duopoly Cleared

One of the first Board merger decision with a dissenting vote claiming that the transaction may lead to the creation of a dominant position is Fresenius/Pharmacia Upjohn[560] acquisition. This international transaction consists of the acquisition of parenteral feeding business of Pharmacia Upjohn by Fresenius. The Reporters of the case concluded that the transaction concerning the market for parenteral feeding products containing amino acids could be cleared, however in the market for parenteral feeding products containing lipid the transaction creates dominant position and the competition in that market will be significantly lessened and thus the transaction should be prohibited in that market.

Table 16

Market Shares in *Pharmacia & Upjohn/Fresenius*

Undertaking	Market Share (%)
Eczacıbaşı	46
Fresenius	25
Pharmacia	25
İrengün	4
Fresenius + Pharmacia	*50*
TOTAL	**100**

Source: *Pharmacia & Upjohn/Fresenius* (18.02.1999, 99-8/65-22)

[558] Yanık, M. *Rekabet Hukukunun Hakim Durum ve Hakim Durmun Kötüye Kullanılması Uygulamalarında Piyasa Giriş Engelleri*. Ankara: Rekabet Kurumu, 2003: pp. 26-42..
[559] Sanlı, *op cit*., pp. 253-255.
[560] Decision No 99-08/65-22 dated 18.02.1999

According to the decision the relevant product market is generally defined as "parenteral feeding products". The market shares of the undertakings active in this market are reflected as in Table 16 above.

The decision is not detailed and automatically jumps to the conclusion that

> "although Fresenius will be the market leader following the transaction, the market share difference with its biggest competitor shall not be significant. Furthermore, according to the information in the notification file, the fact that Eczacıbaşı will expand its business with new investments and taking into account the growth potential of the market it has been understood that Fresenius will not be in dominant position. Accordingly, it has been acknowledged that following the conclusion of the transaction there will be no question of creation of a dominant position or strengthening of a dominant position in the market which may lead to the significant lessening of competition".

First of all, although there is a classic heading of "Determinations and Legal Evaluation" in the decision text, it consists of a single paragraph providing no information on why the market is determined as parenteral feeding products as a whole, while the Reporters claim that there are more than one markets concerning the transaction. Assuming that the Reporters conducted a substitutability test, the determination of the Board should contain more details, at least the basic reasoning behind their market definition. According to the accepted practice of the Authority in pharmaceutical sector transactions, the markets are defined based on the internationally accepted ATC-3 Classification which therapeutically regroups the products based on their substance.

Second of all, related to the product market, the Dissenting Vote signed by three Board Members (ELÇİ, BENGÜ, UZUN) mention further detail on the products and calls for special attention on a product named "Vitrimix", the acquisition of which is claimed to create dominant position taking into account the high market entry barriers despite the potential competition from other undertakings' ongoing license application to the Ministry of Health. Such details are not included in the final decision either.

It is also possible to raise the argument that the Board did not prefer to impose conditions on the parties since this is a worldwide transaction. However, there are examples of conditional clearance decisions of the Board on foreign to foreign mergers which, due to the parties' market situation in Turkey creates competition concerns. A famous such decision is on Glaxo Wellcome/SmithKline Beecham[561] merger in which a very detailed market share analysis is conducted with the use of both HHI and CR4 tests and the transaction is cleared with the condition that the parties have to transfer some of their licenses in the J5B Anti HIV antiviral products market sufficient to decrease the total market share of the parties to the level of the one holding the highest ratio before the transaction.

Nevertheless, the decision does not either contain whether the transaction could lead to coordinated effects between Eczacıbaşı and Fresenius, the two out of the three market players which hold 96 % of the market for parenteral feeding products. Thus, we strongly believe that the decision should at least analyze the post-merger market situation which is directed from oligopoly to duopoly. This could then be a very good opportunity to analyze whether a transaction which, according to the decision, does not lead to the creation of a dominant position could anyway lead to the lessening of competition.

5.4.2.2. Clearance of a Confirmed Thread on Competition

Another important clearance decision is Novartis/Hexal acquisition[562], taking place in pharmaceutical products market and which is cleared with qualified majority. The dissenting vote argues that the Board did not take into account the significant lessening of competition through the creation of a dominant position in N5B market, while basing its decision on the declaration of the acquiring party that the overlapping product in question shall be withdrawn from the market. It is also stated that this risk is also referred to in the Preliminary Investigation Report with an attachment dated 23.05.2005. The report takes the view that even in the case of the withdrawal of Novartis product in N5B market the total market share of the parties will be extremely high due to the high market share of the

[561] Decision No 00-29/308-175 dated 03.08.2000
[562] Decision No 05-36/450-103 dated 26.05.2005

overlapping Hexal product. The vote questions the fact that the Board should not unconditionally clear this decision by relying only on the declaration of the parties. The member rightfully claims that the legal status of "withdrawal from the market" is not clear and determined and whether it was consisting of the transfer of the patents or licenses. The member also claims that although the parties informed the Authority on the fact that the Ministry of Health is informed of the withdrawal form the market with a letter dated 05.04.2005, with the absence of a conditional clearance the Authority will not be able to monitor a possible market re-entry and will not be able to take action.

The reasoning behind this dissenting vote held by AYTAÇ and ÜNAL can be translated as such that, if the withdrawal from the market is seen as a possible remedy for the "significant lessening of competition", and not the creation of a dominant position, the Board declares that in the absence of the market withdrawal the transaction could not be cleared under the dominance test. Accordingly, not basing the withdrawal upon a conditional clearance will also be the approval of a highly potential risk of significant lessening of competition. We believe that this is an important dissenting vote catching a Board decision which leaves the door half-open for a possible elimination of competition.

Let us assume that Novartis re-enters the N5B market. It is clear that once the transaction is cleared without condition this would not automatically lead to a competition infringement by itself. This time, the Authority will have to wait for necessary grounds to initiate an investigation of Article 6, the abuse of dominant position. Accordingly, Novartis is now holding a privilege to re-enter its product back into the market and face no sanctions from the competition Board until it abuses its approved dominant position. This is where also lies the different treatment of dominant position in competition infringements and in concentrations.

Conversely, let us assume that the Authority did clear the transaction with conditions and the market conditions have changed so that even in case of re-entry of Novartis product it can be no longer possible to detect a dominant position not in terms of market shares but in terms of other factors such as the increase in the number of competitors.

This time, the conditional clearance decision would not only create a legal uncertainty but also create a barrier since Novartis would (at least until removing the legal insecurity) refrain from re-entry and would be deprived of using its competitive capacity, resulting with the loss of consumer and producer benefit that would have been created if Novartis could have had the ability to compete with another product. This would be the social cost of the reverse scenario.

Another issue to be discussed is whether the conditional clearance mechanism does exist in Turkish merger legislation. Furthermore, even if so, conditional clearances that are decided by the Board does not contain any confirmation mechanism implemented in the decision in order to verify whether the conditions are applied by the parties or not.

5.4.2.3. Plus Royaliste que le Roi

A further transaction notified to the Authority is Rockwood Specialties/Süd-Chemie[563] acquisition, which also leads to the creation of a very high market share in Turkey, through the elimination of one of the three competitors in non-carbon developers market. The product is used in paper industry in obtaining copy-papers through different chemicals that are applied to the surface of a set of papers used in copy forms such as invoices etc. This international transaction shows another aspect of conditional clearance decisions of the Board in the sense that the dissenting votes argue that it is nonsense to impose conditions to such a transaction which is unconditionally cleared by the EU Commission. However, the interesting aspect is that the very high market share is rationalized by the assessment attracting no objection by the Board members. The reasoning behind is the specific conditions governing the market (the technology is outdated; there are alternative sources of supply; buyer power and competitive pressure from substitute products) and the competitors, especially the acquiring Rockwoods Specialties who is planning to switch to newer technologies and quit non-carbon developer market in 18 months otherwise the transaction is not realized. This case is one of the

[563] Decision No 05-88/1229-358 dated 29.12.2005

highest market share creation case (almost 100 %) notified to the Competition Authority apart from liberalization of single player markets. The conditions attached to the clearance decision are the reduction of the non-compete obligation from five to three years and the reporting by the parties of their market shares and prices to the Authority every six months for a period of two years. The dissenting votes reflect a degree of sarcastic touch with reference to the severe conditions imposed to the transaction.

5.4.2.4. Clearance of Creation of Market Dominance in Smaller Markets

Another transaction raising concerns of market dominance in overlapping smaller geographic markets is the acquisition of control of Tansaş by Migros[564] in the retail market for consumer goods. The case is outstanding in the sense of the Reporters disagreement in market definition based on the net selling area of the retail stores. A suggestion from the reporters reject a single definition of "retail stores larger than 300 square meters" underlining the fact that between 300-1000 square meters the market entry is relatively easy while placing above 1000 square meter stores in another market due to consumers perception. Another suggestion, though, divides the market into two distinct groups being below and above 300 square meters. The Board, in its turn defines three different markets in retail market[565]: discount markets, markets below and above 1000 square meters[566] basing its judgment to CarrefourSa/Gima Decision, and highlighted that "in the modern FMCGs (Fast Moving Consumer Goods) retailing market, those stores above 1000 square meters differentiated in the eye of consumers due to services offered by them (such as the variety of products, largeness of the car park capacity, offering miscellaneous side services), emphasizing that the one above the threshold referred to can be determined as a distinct market. On the other hand, in examinations performed under the transaction referred to, particularly in those regions where concentration was experienced, the establishment made was that stores below 1000 square meters could also take place within the scope of the relevant market. Therefore, even though the threshold

[564] Decision 05-76/1030-287 dated 31.10.2005

[565] While the relevant product market was determined in the Migros/Tansaş Decision, a dual separation was resorted to, being the retail market and the supply (purchase) market. However, due to its characteristics, the supply market is not found to create competition concerns.

[566] In previous transactions, the Competition Authority defined the market for retail consumer goods based on the parties to the transaction. See Decision No 00-24/243-130 dated 27.06.2000; Decision No 00-13/125-60 dated 04.04.2000, Decision No 00-11/119-58 dated 23.03.2000

has been determined as 1000 square meters, the analysis of dominant position was also made for the market definition where the threshold referred to was lowered to 300 square meters"[567].

A dissenting vote suggests that the threshold of above 1000 square meter is usually accepted in the EU and the world practice, while on the other hand voting in favor of the clearance decision[568]. Another dissenting vote claims that the transaction creates a risk of market dominance and lessening of competition in overlapping small towns which requires further investigation. The vote also argues that the assessment for possible market entry should also be coupled with the potential increase in demand and the capacity of the parties in those overlapping markets. Although alarming on the possibility of creation of a dominant position through which the competition might be significantly lessened in some markets[569], the dissenting vote does not provide a detailed backing argument.

5.4.2.5. Privatizations and Dominant Position Concerns

The following three transactions with dissenting votes are typical examples of concerns raised against creation of dominant positions through privatizations in three different industries.

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[567] Competition Authority 2005 Annual Report.

[568] The market definition issue is also discussed in Metro/Migros decision (Decision No 57/424-52 dated 19.03.1998) where the number of items included in the store was also taken into account. The Decision reads as follows:

> "Accordingly market chains start from 250 m^2 which is the optimum size in terms of the diversity of products, proper shelf order, ensuring managerial effectiveness. At the same time, market chain administrators stated that the market size had to be at least 250 m^2, and 3500 types of products had to be available in market chains. At this point, it is possible to say that in de facto state of the marketing market, the tendency of consumers towards "one-stop shopping" can be met in the markets having 3500 items of products. The size of a market that may have such diversity of products appears to be 250 m^2, considering proper shelf order, and effective shelf arrangement of products."

[569] The market share of the parties is 100% in Çeşme, 72% in Edremit, 100% in Nazilli, 100% in Kuşadası, 66% in Marmaris and 69% in Eskişehir. In case the threshold used in the relevant market definition is reduced to 300 square meters, total market share of the parties become 74% in Çeşme, 60% in Edremit, 46% in Nazilli, 67% in Kuşadası, 52% in Marmaris and 39% in Eskişehir.

5.4.2.5.1. Market Entry Concerns

The first case concerns the privatization of Alkollü İçkiler Sanayi ve Ticaret A.Ş.[570], the state owned alcoholic beverage producer. The highest bidder is a joint venture of three undertakings having no previous activities in the market except from the Wholesellers Union having a significant distribution chain organized through either exclusive or non-exclusive dealer contracts. The focus point is the market for "rakı" where the acquired entity was holding an absolute dominance despite the fact that the market is opened to competition in 2001. The Board's assessment is mainly based on the potential competition in the market for rakı, taking into account alternative sources of supply, supply elasticity in production, new market entries and the supposedly strong brand image of "Yeni Rakı". The Board clears the transaction disregarding the Reporters Opinion on the proposed implementation of a market watch mechanism in the final decision based on the fact that this already being the essential role of the Authority. Apart from other market entry possibilities, the Board underlined that the Yeni Rakı brand is not as strong as it is thought to be and new entries with efficient marketing and sales strategies can easily capture market share from Yeni Rakı due to the homogeneous character of the product. The Decision underlined this by concluding that

> "although TEKEL had a high market share in the rakı and high alcoholic beverages markets, potential competitive conditions were present in the markets referred to, in other words, following the acquisition transaction, the joint venture group would be exposed to the competitive pressure of undertakings which planned to enter the market or would enter the market de facto after a short period of time, and that therefore, it would not assume a dominant position in the relevant markets as a result of the acquisition transaction"[571].

The dissenting votes in this decision raise no direct concern on the creation of a dominant position which may significantly lessen competition but disagree with the board decision disregarding the proposed implementation of the market watch mechanism arguing that the acquiring joint venture may create barriers for new market entries by using its extensive market power. However, account taken from the current situation of the

[570] Decision No 03-79/965-396 dated 15.12.2003
[571] Decision No 03-79/965-396 dated 15.12.2003

market witnessing successful market entries the Board seems to be right in its decision to hold that watching markets for competition infringements is already the essential duty of the Authority.

5.4.2.5.2. Essential Facility Concerns

The second decision is on the privatization of Ereğli Demir Çelik Fabrikaları A.Ş.[572] and the assessment of the first three bidders on how the acquisition of each candidate will change the competition environment in the long and flat steel markets for Turkey. Confirming the Reporters Opinion and following a relatively detailed examination, the Board held that the acquisition of Eregli by OYAK, the military originating private holding company and by Novolipetsk a fully integrated Russian steel company would not create or strengthen a dominant position. However, the Board ruled that the acquisition of Ereğli by Ereğli Joint-Venture Group, a consortium of steel producers already active in the market, would lead to competition problems since the joint-venture company does not satisfy the basic requirement of being an autonomous economic entity independent from the parents. The Board considered the joint-venture agreement as an agreement having restrictive effects on competition within the scope of Article 4 of the Competition law and, furthermore, ruled that it also does not qualify for an individual exemption.

Dissenting votes in Eregli privatization decision raise concerns on the size and market power of Eregli[573] which can facilitate exclusionary abuses of dominant position by also acquiring (as part of the privatized entity) Ereğli-Erdemir port which is an essential facility for nearby competing undertakings and also Divriği-Hekimhan mines containing almost 65 % of the total reserves of Turkey. Another dissenting vote concentrates on the position of Ereğli Joint Venture Group, the banned candidate for the acquisition through the Board Decision. The holder of the vote, KALDIRIMCI, argues that the prior-opinion of

[572] Decision No 05-79/1083-271 dated 24.11.2005 and Decision No 06-64/882-254 dated 15.09.2006. The two decisions are exactly the same. The Authority re-decided the case with procedural concerns following the Council of State's decision ordering stay of execution.

[573] The Authority confirmed in its previous decisions that Eregli was joining a dominant position in especially cold rolled (CR) products. See Decision No 01-27/260-74 dated 12.6.2001. The reader must be careful on the fact that in the current privatization Decision the market is defined as long and flat products with no breakdown of sub product markets.

the Authority concerning the privatization should contain more details on instances where the participation of a possible joint-venture to the bidding may raise competition concerns in order to provide the candidates opportunity to evaluate their position. According to the dissenting vote, such a deficiency and such a decision automatically excludes joint-ventures which would otherwise seek to eliminate competition concerns of the Authority after the privatization. Furthermore, the Member recalls that the question on how a joint-venture which cannot be negatively cleared nor individually exempted could participate to such a privatization remains unanswered. Conformingly, the prior-opinion of the Authority[574] shortly notes that the "block sale" of Ereğli does not necessitate any prior-condition or a restriction at the bidding stage but the Bidding Conditions should underline the fact that the Authority may, where deemed necessary based on the relevant provisions of the Competition Law, impose conditions or request undertakings or even may not clear the acquisition.

5.4.2.5.3. Clearance of a Confirmed Dominant Position

The third decision concerns the privatization of Samsun Gübre Sanayii A.Ş.[575] and the evaluation of the Authority on the possible acquisition by the market leader Toros Gübre and İstanbul Gübre[576]. The decision raises no concerns on the creation or strengthening of a dominant position. Obviously, the acquisition of Samsun Gübre is assessed within the framework of the parties involved and the surrounding market conditions but the confirmed market power of Toros Gübre in a previous cartel infringement decision[577] and the prohibition decision concerning its acquisition of İstanbul Gübre[578] due to creation of a dominant position in the azote fertilizer market may lead to further questioning. The fact that Samsun Gübre is not a producer of azote fertilizer but only involved in its trade, the correlation between the previous decisions and the current clearance decision cannot create a direct link. However, the dissenting votes in this decision disclose stronger evidences on the possibility of creation of a dominant position in

[574] Held in Meeting No 04-61 dated 21.09.2004
[575] Decision No 05-30/373-92 dated 05.05.2005
[576] Previously privatized. See Decision No 04-01/3-1 dated 08.01.2004 for clearance decision.
[577] Decision No 02-07/57-26 dated 08.02.2002
[578] Decision No 04-01/3-1 dated 08.01.2004

case Samsun Gübre is acquired by Toros Gübre. AYTAÇ and ÜNAL refer in their co-signed dissenting vote to a Board Decision which is held in relation to the previous attempt for privatization of Samsun Gübre which clearly rules that the acquisition of Samsun Gübre by Toros Gübre would create dominant position[579]. In essence, the Members also question the market power that would be held by Toros Gübre in composite fertilizer market in case it acquires İstanbul Gübre. The vote argues that the decreases in the production volume, capacity utilization and productivity of İstanbul Gübre -factors which led the Board to reject the creation of a dominant position- are normal consequences faced by any company pending for long periods in privatization program. Accordingly, it is claimed that since the composite fertilizer market is an overcapacity oligopoly of five players, and since overcapacity is a strong barrier for new entries, and since there is no change in market conditions from the time of the previous decision of the Board confirming the creation of a dominant position through the concentration of the very same players, the previous opinion of the Board should not change and the possible acquisition of Samsun Gübre by Toros Gübre should be prohibited.

5.4.2.6. Cement Industry Transactions and Dominant Position Concerns

The following three decisions are concerning the sale of cement factories previously owned by Rumeli Holding in three different regions through open bidding. The sale operation is undertaken by the Savings Deposit Insurance Fund, the controlling State entity acting as a trustee for the holding company's assets which are seized following serious frauds detected in the bank credits allocated to different companies affiliated to the holding company. The sales operation consisted of a total of nine cement production plants all previously controlled by Rumeli Çimento[580]. Each decision assesses the competition

[579] Decision No 03-46/538-M dated 30.06.2003

[580] The Fund realized the bidding for nine factories at a time. We have had the concern that, account taken from the specificities arising from the establishment of the cement industry in Turkey, the bidding model is directly related to the competition problems that are expected after the transfer of the assets. A model that could apply would be the sale of the nine factories to the same economic entity. This would of cours create competition problems for current players, in case they are willing to acquire the whole package, placing them in dominant position in certain regions or strengthen their already existing dominant position. Such a model would be a call for a new player in the Turkish market. Another model could be the succesive sale of each plant leaving time for the establishment of the new competitive environment which would then provide for the candidates to reconsider their situation in the market. However, we believe that in the sale of Rumeli

concerns for the highest bidder candidate acquirers. And each case represents a different aspect of the market dominance arguments.

Here, it is necessary to put forward the way the Competition Authority handles cases in cement industry, a line of business which, since the establishment of the Authority was subject to different regional cartel investigations and imposition of heavy fines. This is mostly due to the functioning of the Turkish cement industry which is dispersed throughout the country with 39 integrated cement factory and 18 mills being the Europe's second largest and the World's seventh producer. The sector is fully privatized between 1989-1997, now operated by three different essential groupings such as the international companies (Lafarge, Vicat, Heidelberg (CBR), Italcementi and Cementir), big nationals (OYAK, Sabancı Group and Rumeli Holding) and "others" (i.e. Batıçim-Batısöke, Denizli Çimento, Nuh, Bursa, Kurtalan).

In many of the cases concerning cement industry, the relevant product market is determined as the grey cement market, a main product group, the production of which makes available the production of other sub-types of cements. What is complicated with relation to market definition in the cement industry is the way the relevant "geographical" market is determined. An extensive experience of the Authority led to the establishment of a geographical market determination based on the essential assumption that the product is not profitable when transported far from a distance of 200-300 kilometers from the production site. Accordingly, and also with the use of the *Elzinga&Hogarty Test* which is based on both the ratio of the products entering to a market to the total sales within the same market (LIFO: little in from outside) and to the ratio of the outgoing product to the total production within that region (LOFI: little out from inside). The test yields a collection of 4 to 6 neighboring cities which form the geographical market for the related case for which the investigation is conducted or the merger is assessed. Under these circumstances, the Turkish cement industry is usually analyzed in regions where undertakings hold high market shares, despite the fact that they have relatively much less production capacities and sales when compared to the total national figures. This mostly

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Çimento premises the model is primarily shaped within the framework of the expected maximum revenue, disregarding the competition concerns.

leads to oligopolistic markets where the allegations of parallel conduct or collective behaviors are likely to happen with the great help of the excess capacity observed in many of the markets and the base price system which requires the product to be priced at higher levels near the production site area and lower at distant points with the help of subsidized transport costs[581]. The following three cases, though, are all assessed based on the above market definition approach.

5.4.2.6.1. Van Çimento/Limak Prohibition and Single Firm Dominance Concerns

The first transaction is the sale of Van Çimento either to Limak Kurtalan Çimento or to OCI Çimento[582], the two highest bidders. The Reporters conclude that the acquisition of Van Çimento by OCI, among the largest producers in the Middle East having no activities in Turkey, is not subject to permission while the acquisition by Limak Kurtalan Çimento should not be permitted since the transaction creates market dominance through which the competition is significantly lessened. The geographical market in the grey cement market is set as the region formed by nine neighboring cities (Van, Siirt, Bitlis, Hakkari, Şırnak, Muş, Batman, Diyarbakır and Mardin). While the decision respects to the commercially sensitive market data of the current market players and does not disclose the market shares and sales values, Limak is ranked first, and Van Çimento is ranked fourth among nine undertakings with regard to market shares derived from the sales to the determined geography. The Board, totally agreeing with the Reporters Opinion, bases its assessment on the fact that Limak is the nearest producer to Van Çimento and this can easily lead to price determination in outer parts of the geographical market where there are relatively fewer producers due to the low demand. The decision, in our opinion, classifies the transaction as leading to single firm dominance.

The only dissenting vote held by KALDIRIMCI, though, argues firstly that such an increase in the post-acquisition market share of Limak is not likely to create a dominant

[581] This is where the allegations on market partitioning occur in cement markets. Subsidized transportation costs leads to different control mechanisms to ensure the sale of the subsidized product at its destination and not deviating to a "higher price" market where the profit margin of the dealer will increase (or the subsidy may be reflected to prices).
[582] Decision No 05-86/1192-344 dated 20.12.2005

position. Secondly, the low capacity utilization rate of Van Çimento contradicts with such a prohibition decision based on increase in concentration in the market. KALDIRIMCI further argues that Van Çimento's sales in Van region is … % (confidential information) of the total sales. Accordingly, further to the acquisition of Ladik, there will be competitive pressure from the region's other strong competitor OYAK Mardin already holding … % (confidential information) market share. The essential argument of KALDIRIMCI is that concentrations leading to the creation of relatively stronger undertakings should not automatically classified as transactions creating dominance and lessening of competition but should be deemed to improve the competitive environment. Finally, in his unlimited pursuit for efficiency and transparency in public administration, KALDIRIMCI requires the disclosure of such competition concerns before the public bidding process in order to make it available for the candidate undertakings to save time and money. The competition assessment in the sale of Van Çimento is purely based on the assumed concentration of the market leading to the creation of a single firm dominance. The dissenting vote however, raises concerns on the classic approach to dominance and requests further analysis which should take into account the specific characteristic and dynamics of the cement industry in companion with the regional factors affecting them, while calling for a green light for competition among strong players. However, the Board, with its extensive training on the sector, seems to take into account the ossified market behavior of the actors.

5.4.2.6.2. Gaziantep Çimento/Sanko Prohibition and another Single Firm Dominance Concern

The second transaction is the sale of Gaziantep Çimento either to Sanko or to Çimko Çimento[583], both controlled by the same entity, the Sanko Group. The Reporters conclude, with similar concerns they called for in the sale of Van Çimento that the acquisition of Gaziantep Çimento by either of the parties should not be permitted since the transaction would create market dominance through which the competition would be significantly lessened.

[583] Decision No 05-86/1190-342 dated 20.12.2005

The Board determined the geographical market as the region composed of three cities, namely Gaziantep, Adıyaman and Şanlıurfa. Sanko has sales to all of the three cities. Based on the sales figures, Gaziantep Çimento is the market leader, followed by Adıyaman Çimento of Sanko Group; a ranking that attracts the Board to further analyze the market. At this stage, the Decision incorporates an HHI analysis to highlight the market concentration. The HHI test and the quantitative results are analyzed based on special reference to the principles set in the 2004 Horizontal Merger Guidelines of the EU which is reshaped as part of the EU Merger Reform and in the 1992 Horizontal Merger Guidelines of the US. It is true that the figures show extraordinary concentration rates which are evaluated as being more than a starting point for the assessment of market power but as clear evidence since the increase in change in HHI is ten to fifteen times more than the values which are accepted as normal. The Board, without further analysis, finally concludes based on the generally accepted characteristic of the market (homogenous product, high transportation costs, high entry barriers, transparency of the market, low price elasticity of the demand, technological saturation, lack of competitive pressure from third party competitors) that the acquisition of Gaziantep Çimento by Sanko Group would lead to a dominant position which would significantly lessen competition.

The only dissenting vote comes again from KALDIRIMCI with criticism to the assessment criteria of the Authority in determining market dominance describing it as being an effortless and preconceived judgment. KALDIRIMCI argues that the real problem should not be sought in dominance but in coordinated behaviors in duopolistic and oligopolistic markets. He claims that

> "for example, an attempted breach such as an arbitrary increase in prices at a region, by one or a few firms, assuming they are in dominant position, would be followed by, apart from intervention by and deterrence of the competition authority concerned, the manufacturer in the neighboring provinces, which would cause undertakings … make efforts to have a share in the "high profitability" existing in such market, unless they have "some other" relations. In addition, if the breach continues and cannot be prevented, solution for the problem must be sought in somewhere else. As a common fact, basis for a substantial or heavy breach of competition in this region of our country would probably be an agreement, a co-ordination or a concerted action, rather than dominant position".

KALDIRIMCI here underlines the importance of post-merger coordinated behaviors, which should be the essential focus point rather than the dominance factor.

KALDIRIMCI also emphasize the past record of the region in terms of competition breaches. Although the Authority investigated many different markets in cement industry, this part of Turkey has never been subject to an investigation. Especially, the important market player who holds the undertakings presently sold has never been involved in a case tried by Competition Board, nor filed with an allegation of breach and awarded no penalty by acting independently in the market. However, the holder of the dissenting vote saw this argument as an evidence of the competitive behavior in this market disregarding the fact that the transfer of controlling rights of this undertaking may also lead to the disappearance of this competitive behavior.

In many of his dissenting votes, KALDIRIMCI stresses the importance of economic efficiencies. His analysis is rarely based on efficiencies in the way the merger control regime makes use in order to clear transactions, but usually calling for the argument that getting bigger does not always lead to anti-competitive behavior. In this transaction, the dissenting vote argues that if there are strong competitors in a market, the competition can be more effective. However, the concept of strength here, as we understand, is not linked to the competition risks associated with an increased market power which then may lead to the strengthening of a dominant position, a situation sufficient to prohibit a transaction under the current dominance test. His argument with economic rationale is based on the required minimum capacity of nearly 1.000.000 tons for an undertaking to operate in the region which would be the size of the new entrant forcing it to operate with lower capacity and higher costs. KALDIRIMCI argues that it would be a useless effort to try to increase the competition by comparatively small undertakings a policy, which cannot be considered and accepted as an effective competition policy. However, in our opinion KALDIRIMCI ignores here one of the essential purposes of merger control which is to enable the establishment of a market where market entry barriers are not strengthened.

5.4.2.6.3. Ladik Çimento/Akçansa Prohibition and the Instinctive Application of SLC Test

The Third transaction is the sale of Ladik Çimento to either Akçansa or Türkerler[584]. Here, the Board prohibits the sale to Akçansa which is a joint venture company controlled by Sabancı Group and Heidelberg Cement, while giving a green light to Türkerler, which has no previous activities in the cement industry. The decision is open to discussion since it is the first prohibition decision of the Authority based on collective dominance.

5.4.2.6.3.1. Overview of the Decision

Although there are two different product markets (cement and kraft paper) subject to analysis we will only focus on the cement market since the part of the transaction concerning the kraft paper is found to raise no competition concerns. Based on the Elzinga&Hogarty Test, the relevant geographical market for the cement market is determined as the territories of Samsun, Tokat, Amasya, Çorum and Sinop.

- Market Concentration: The production activities of Sabancı Group and Ladik overlap in Sinop, where Sabancı Group controls Karçimsa. The pre-merger and post-merger market shares reflect that the number of total competitors diminish from six to five. Although the market shares were subject to confidentiality treatment, the pre-merger ranking of the firms are Ladik, YLOAÇ, OYAK, Set, Karçimsa, Baştaş based on their sales data for the year 2003 and 2004[585]. The post merger simulation places Akçansa to the top position incorporating Ladik and Karçimsa. The decision underlines that the sales of

[584] Decision No 05-86/1188-340 dated 20.12.2005

[585] We have to note here that the Decision declares that the data for YLOAÇ is gathered from the total sales of the undertaking's Çorum and Samsun premises; for OYAK from the total sales of the undertaking's Bolu and Unye premises; for Set from the sales of the undertaking's Ankara premises (assumedly to the relevant market since there is no reference to "total"). However, there is no special reference to whether the "total sales" are the total sales to the relevant geographic market or the aggregate sales of the companies, no matter where the product is finally sold. We raise this concern since for example in the decision concerning the sale of Gaziantep Çimento the Decision included detailed sales figures of the competitors to each city of the relevant geographical market. Such an –assumedly- restricted approach in the current decision may well affect the HHI and CR4 test results and the analysis of the concentration. Unfortunately, the confidentiality treatment disables the verification of our concern.

Set and Baştaş are negligible since their relatively small amount of sales to the relevant market are originating from the undertakings' Ankara premises which is also the main target market of both companies. Accordingly, in the post-merger simulation the market is expected to be mainly dominated by Akçansa, YLOAÇ and OYAK. The CR4 figures are % 97 for the pre-merger and % 98.5 for the post merger situation. Although the decision notes that the CR4 value is extremely high, the delta value remains almost the same. For a further analysis, the HHI test is also conducted for the years 2003 and 2004 and the figures are respectively 3450 and 3707 for the pre-merger market situation and 3552 and 3814 for the post-merger situation. The delta values for the years 2003 and 2004 being 102 and 107, the decision notes that the HHI-Delta combination is not met (based on the principles of the EU's 2004 Horizontal Merger Guidelines) since although the HHI values are above the critical limit of 2000, the Delta values are below 150. This figure does not prevent the Authority to further analyze the market dominance, reference made to the EU Guideline alarming for the necessity of a more detailed analysis in HHI figures exceeding 1000 or 2000 in cases where for example one of the parties to the transaction is a potential new entrant to the market, the case of Sabancı Group as claimed by the decision.

- Number of Players in the Market: The emphasis is on the possibilities of the players in the market to enter into a long term secret agreement and on the collective dominance. The decision holds that the assessment of dominance should be conducted with three undertakings (Akçansa, OYAK, YLOAÇ) having % 96 post-merger market share. Accordingly the number of players is set as three but not five.

- Entry Barriers: Based solely on the case-law generated in the Decision[586] concerning an investigation involving anti-competitive practices of cement producers located in Aegean Region, start-up capital and sunk costs are assumed to be serious entry barriers in the cement industry, as also are economies of scale and excess capacity (the capacity is ten times bigger than the demand in the relevant market), vertical integration in the sector (clinker, cement and ready-mix concrete), distribution network based on exclusive contracts. Account also taken from the fact that there are no new entries into the

[586] Decision No 04-77/1108-277 dated 02.12.2004

relevant market since from more than a quarter of a century is also considered as a strong evidence for barriers to market entry.

- Characteristic of the Relevant Product Market: The market is highly transparent and competitors' access to each others price, production and sales data is open either through information sharing or benchmarks which make it easier for the competitors to detect the cartel cheater in a possible anti-competitive coordination or agreement. Furthermore, the decision notes that there is no buyer power in the sector since 50 % of the sales are realized through exclusive distributors which were subjects of market sharing determined in different investigations[587]. At this stage the decision jumps to a possible post-merger collective dominance analysis by underlining that the relevant market will be left to OYAK Group, Sabancı Group and YLOAÇ due to stable demand in the market and no possibility of sales from other regions and imports due to the excess supply. The combination of all of these factors and other factors above are assumed to be the facilitating factors for the creation of coordinated effects.

- Structural Links between Undertakings: At this stage the decision concentrates on the structural link between OYAK and Sabancı through their jointly controlled OYSA joint venture operating in Niğde and Iskenderun. Although both plants are located in a different market, the existing link calls for special attention for a possible coordination in the relevant market. Being joint venture partners at the time of this decision and being subject to competition infringement in the past[588], the company has been subject to a de-merger ordered by a recent Competition Authority decision[589].

- Risks of Contacts in other Markets: A supporting argument for increasing the possibilities of collusion in the relevant market is linked to either the undertakings other business areas in which their activities overlap as competitors or their overlapping activities in the cement industry in other regions of Turkey. The decision notes 11 overlapping fields of activity for Sabancı and OYAK and overlapping activities in the

[587] See Decision No 99-30/276-166 (a) dated 17.06.1999 and Decision No 02-06/51-24 dated 01.02.2002
[588] See Decision No 02-06/51-24 dated 01.02.2002
[589] Decision No 06-69/930-267 dated 03.10.2006

cement industry for all of the three undertakings in Marmara and Anatolian region. Although the contacts in different regions can be perceived as supporting arguments for possible collusion, the co-existence in other lines of businesses not even being upstream or downstream markets should not be taken as an argument unless strong evidences of coordination are found during previous investigations in those premises which are used as a cover-up for an existing anti-competitive collusion.

- The Past Record of the anti-competitive Behaviors of the Undertakings: Here the decision provides a list of previous investigations conducted by the Authority which are all concluded with determination of serious infringements and imposition of fines to many undertakings[590]. The decision also highlights the EU Commissions Cement decision in 1994 and Bundeskartellamt's 2003 decision imposing fines totaling 660 million Euros to different undertakings including Lafarge and Heidelberg which are also competitors in the relevant market. An important highlight here is that the decision confirms the outsider position of Rumeli Çimento, ex-owner of Ladik Çimento, in any anti-competitive practice determined by the Authority.

- Other Factors: Among other factors, the market shares, production capacities and integration levels of the three competitors are very close. Furthermore, the structural link between OYAK and Sabancı should be evaluated as a serious potential for a possible collusion in the market, says the decision, which can further reach to a level of a duopoly between Oyak/Sabancı and YLOAÇ. Finally, for the sake of mentioning the existence of a deterrence mechanism, a must have component of coordinated behavior, the decision just mentions the existence of excess supply, without touching the possibilities and consequences of using it in a restricted geographical market where the undertakings also compete in many other different markets within Turkey.

Following the analysis of the above factors, the Board in its decision concludes that regarding the post-merger market shares, the acquisition of Ladik Çimento by AKÇANSA shall not lead Akçansa to hold a dominant position by itself. However, it is also concluded

[590] See Decision No 99-30/276-166 dated 17.06.1999; Decision No 02-06/51-24 dated 01.02.2002; Decision No 04-77/1108-277 dated 02.12.2004.

that the transaction shall lead to the collective dominance of Sabancı, OYAK and YLOAÇ groups in the relevant geographical market. In the conclusion part of the decision, though, for the sake of relying on the wording of the Law, the Board states that the acquisition by Akçansa shall lead to the creation of a dominant position, as defined by Article 7 of the Law, and shall lead to the lessening of competition. We understand that the Board, here, considers for the first time that Article 7 of the Law comprises also the prohibition of the collective dominance created through a concentration.

5.4.2.6.3.2. Market Definition

KALDIRIMCI, the holder of the only dissenting vote in Ladik Çimento decision, underlines that the Board's prohibition decision confirming that Akçansa would not constitute a dominant position in the relevant geographical market by itself, but in case the acquisition gets into effect, a "Collective Dominant Position" will arise together with other undertakings should not be considered as a competitive approach. Here the reference to a "competitive approach" does not reflect a criticism on whether the Board should clear the transaction on the grounds that the Turkish legislation does not give way for the prohibition of transactions leading to collective dominance. Here, the emphasis is mostly on the competitive environment that would be created after the merger, which, in view of KALDIRIMCI, should not be judged as collusive.

We think that the first concern should be raised on the way in which the geographical market is defined. KALDIRIMCI also questions the use of *Elzinga & Hogarty Test* which, as required by the technique of the test, did not include the province of Ordu, where, in its district of Ünye, there is a premise owned by OYAK, which is one of three leading undertakings in the region that are deemed able to constitute a collective dominant position" together in the geographical market. It is to remember that the decision of the Board is based on a simulation of collective dominance and a high risk of coordination. The Decision, in order to reinforce its reasoning, refers heavily on the past decisions on cement investigations, the relationship between the competitors, the market structure and the characteristics of the product which are deemed to facilitate such coordination. In a sense, the decision assumes that the market has all the elements

necessary for the creation of a cartel. Furthermore, at this stage, the exclusion of a plant which can technically make sales to the defined market should raise questions on the competitive level of the market when considered accompanied with the results of Elzinga & Hogarty Test. Accordingly, we argue that the test can lead to a fallacy by disregarding the motives of the market players in choosing the destination of their sales. This may be generated either by an established anti-competitive behavior of the pre-merger competitors or by their independent decisions. Even in the latter case, the possibility of the existence of a tacit collusion should be taken into account. Therefore, in its determination of the relevant geographical market, the Board should not bind itself solely with the results of the Elzinga&Hogarty Test but should also take into account the actual market conditions as well. Nevertheless, the Board, as it used to define in its previous decisions, should consider or refer to the transaction in a scenario where a wider geographical market is determined with the inclusion of Ünye Çimento[591]. To date, the Competition Authority defined the following geographical markets which are larger regions when compared to Ladik Çimento Decision: Middle Anatolian Region / East Mediterranean Region and neighboring provinces / Anatolian part of İstanbul, Kocaeli and Bursa provinces[592]; Middle Anatolian Region / West Black Sea Region[593]; Aegean Region[594] [595] [596]; Middle Anatolian Region / Black Sea Region [597] [598]; Marmara Region[599]; Middle Anatolian Region [600]; Middle Anatolian Region, East Mediterranean Region and neighboring provinces / Anatolian part of İstanbul, Kocaeli and Bursa provinces [601]; East Anatolia, Southeast Anatolia and parts of Mediterranean Region[602].

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[591] Robert B. Bell urged in its Testimony of Eastman Kodak Company before the Federal Trade Commission, that "Landes & Posner argue for a general rule that, "If a distant seller has some sales in a local market, all its sales, wherever made, should be considered part of that local market for purposes of computing the market share of a local seller". They contend that if the foreign firm can sell any "product in the domestic market, they ought to be able to sell many units at no appreciably higher cost, since they only have to divert output from other markets." October 19, 1995, Washington, D.C. See also: Landes, W. M. & Posner, R. A. Market Power in Antitrust Cases. *Harvard Law Review* 94, 1981, p. 937.
[592] Acquisition Decision No 99-16/108-43 dated 18.03.1999
[593] Decision No 99-21/173-92 dated 28.04.1999
[594] Formation of a JV Decision No 00-19/188-100 dated 23.05.2000
[595] Acquisition Decision No 01-39/391-100 dated 07.08.2001
[596] Investigation Decision No 04-77/1108-277 dated 02.12.2004
[597] Acquisition Decision No 01-13/121-31 dated 28.03.2001
[598] Acquisition Decision No 03-03/20-5 dated 09.01.2003
[599] Acquisition Decision No 01-63/652-174 dated 25.12.2001
[600] Investigation Decision No 02-06/51-24 dated 01.02.2002
[601] Acquisition Decision No 02-81/946-392 dated 26.12.2002
[602] Negative Clearance Decision No 04-01/9-6 dated 08.01.2004

5.4.2.6.3.3. Market Shares and Market Concentration

Save our concerns on the definition of the geographical market, the HHI and CR4 tests and the market shares are also questionable. KALDIRIMCI holds that the pre-merger and post merger market shares and CR4 figures do not expose a serious difference and that it was difficult to allege that a new anticompetitive structure would appear in such an environment. Nonetheless, the decision itself points to the findings of HHI and CR4 tests and explains that the figures are initial indicators and they at least show that further analysis should be carried.

The Commission itself makes its approach by underlining that the HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns[603]. The Board determined that although Akçansa becomes the market leader, the market shares are not found to create a single dominant position[604]. Furthermore, CR4 levels show negligible increase and HHI levels partly satisfy the combination of HHI>2000 and Δ>150 in terms of very high HHI levels and a below 150 delta. However, the analysis of dominant position is further expanded due to the special circumstances where the authorities are called for additional care despite the unsatisfied HHI levels. Taken into account the nature of being an initial indicator of HHI and CR4 tests, the Authority is right in further deepening its analysis of other factors affecting market dominance. Nevertheless, the Board's assessment of single dominance seems somehow impatient to jump directly to the analysis of coordination through collective dominance. Therefore, we tried to retract from the decision the few arguments concerning single dominance and added a few more comments which may help prove strongly the absence of single firm dominance.

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[603] OJ, C31 of 05.02.2004, Horizontal Merger Guidelines, point 21, p. 7

[604] Market shares are treated confidential. However the pre-merger and post-merger ranking of the firms are exposed. Combined with the CR4 levels and the reference within the decision that the three leading firms will have close market shares give an idea.

5.4.2.6.3.4. Single Firm Dominance

First of all, merging firms do not have large market shares. The acquired company is the market leader but the buyer group's plant Karçimsa is ranked the 5th firm out of a total of six firms within the market. Based on the CR4 test results for pre-merger and post-merger situation, we understand that the market share of the acquired entity is around 1 %. Furthermore, the firms are not close competitors. Their activities overlap only in Sinop where Sabanci group has its Karçimsa plant with negligible market share. The EU Horizontal Merger Guidelines accept that the higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. However, although the product is completely homogeneous, the acquired market share is around 1% adding almost no market power to the buyer. Accordingly, there is no reference in the decision to the likelihood of anti-competitive price increases within the framework of a unilateral conduct. Since the market is defined as an oligopoly among three post-merger players, and price increases are expected in cartelistic forms the decision automatically accepts that the buyer will not have sufficient market power to increase prices unilaterally, a must have factor for being in dominant position.

From the customers' side, there exist no barriers for switching between suppliers. There is no specific reference to this factor in the decision. Actually, the post-merger market is formed of five players (six with Ünye Çimento) which should normally allow customers to switch between competitors. The homogeneity of the product creates a cost free switch. However, as referred through citations to an earlier investigation decision, the low price elasticity of demand impedes price competition which wouldn't normally allow for customers a motivation for switching between competitors. However, another related factor that should provide for different additional sources of supply for the customers is the link between the increase in the price of cement and the unleashing of the traditional assumption that the product is not profitable when shipped farther than 250-300 kilometers. This is an important issue that can also call for the redefinition of the markets in cement industry based on the relation between the profit margin of a producer and profitable transport distance of the product.

Another factor that could be referred to is the capacity of the competitors to increase supply if prices increase. According to the EU Horizontal Merger Guidelines, the capacity constraints are more likely to be important when goods are relatively homogeneous since the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices. However, account taken from the capacity utilization rates of the market players (around 50%) this should not be a viable option for Sabanci to reduce its output. As confirmed by the Guidelines, such output expansion is unlikely when competitors face binding capacity constraints and the expansion of capacity is costly or if the existing excess capacity is significantly more costly to operate than capacity currently in use.

5.4.2.6.3.5. Assessment of Collective Dominance

Coming to the critics on the collective dominance assessment of the decision, KALDIRIMCI argues that the prohibition of Akçansa is mostly based on the structure of the undertakings operating in the region, their interrelation and the concern that they may have aspects that would impede competition and allow co-ordination. KALDIRIMCI further claims that the analysis is centered to Akçansa's shareholding structure and its relations with OYAK and YLOAÇ; while also referring to previous "cement investigations" conducted in this region, where the Board regards the probability of a "co-ordination" in such area a ground for the prohibition. This approach, although right in the sense that the structural links among the competitors and previous anti-competitive practice may be considered as one of the signs of future collaborations, should not be considered as the centre of the assessment that tries to touch almost all aspects of coordinated behavior. The intensive references to the previous Board Decisions and assuming that the same concerns are also applicable to the case in subject questions the level of persuasiveness, the use of techniques or the strength of evidences in the decision. Nevertheless, KALDIRIMCI, while agreeing that "despite all these "facts" known, a determination that Akçansa's acquisition of Ladik Çimento will cause "SABANCI-OYAK-YLOAÇ groups to become dominant in the relevant geographical market" may seem right with a view to the existing panorama" he also adds that "a determination that

competition will be eliminated or lessened "only due to this reason" would not be a sound decision to be adopted in sense of competition".

It is true that Ladik Çimento decision establishes an assessment directly based on the possible coordinated behavior of the post-merger actors, namely the three large groups active in the region OYAK, YLOAÇ and Sabancı. In that regard, the analysis of single firm dominance is clear-cut with the conclusion that the possible acquisition of Akçansa would not place it to such a position. At this stage, the Decision should at least show the existence of a collective dominance in order to act in accordance with the assessment requirements of the Law. Here, we presumably accept that the dominant position, as described in the Law, covers the concept of collective dominance as well[605]. Accordingly, the decision has to prove, with sufficient evidence that the post-merger actors would indispensably coordinate their behavior in order to enjoy the benefits of an abuse. We understand that the Board based its assessment of coordinated behavior to the generally accepted US and later adopted quasi-similar EU practice of horizontal merger assessment. The main reason for this is that the assessment of mergers and acquisitions are subject to the analysis of factors enumerated in Article 6 of the Communiqué No 1997/1 which are exhaustive, as the article orders, and provide a general and wide field for the analysis. Although they reflect the exact wording of the ECMR Article 2(1) (a) and (b), the Turkish legislation has no guidelines providing a detailed assessment prescription. Accordingly, the Board may well found itself in the comfort of following the EU principles. However, as there are still uncertainties in Turkey in the application of Dominance Test in supporting a prohibition on collective dominance grounds, basing a decision completely on EU guidelines which are redesigned taking into account the SLC Test which provides the necessary field for prohibitions in cases where there is no creation or strengthening of dominant position, would definitely lead to calls for more profound economic analysis that support the arguments.

[605] KALDIRIMCI also refers to this uncertainty with no specific further explanation: "Moreover, it is a disputable approach to make the analysis of concentration under 4054 by regarding the probable agreements and concerted actions between the enterprises, and, on that ground, disallowing a merger or an acquisition".

5.4.2.6.3.6. The Aftermath of the Decision

Further to the Board Decision, Akçansa Çimento A.Ş. brought the decision to appeal before the Council of State Chamber 13, claiming that Competition Board's decision must to be cancelled and its execution must be suspended. In March 2006, State Council Chamber 13, unanimously, suspended execution of Competition Board's decision. In the Council of State's decision, it was held that Akçansa's acquisition of Ladik Çimento would not make it dominant in the relevant geographical market, and therefore "becoming dominant through a merger or an acquisition, as prohibited under Article 7 of Law no 4054 on Protection of Competition" does not apply in the case. Furthermore, the decision notes that previous anti-competitive acts committed in cement sector cannot bring about the presumption that Akçansa's acquisition of Ladik Çimonto will constitute a repetition thereof. On these grounds, State Council Chamber 13 suspended execution of Competition Board decision until the lawsuit is finalized in substance.[606]

The Decision of the Council of State orders the stay of execution of the Competition Board's decision. Thus, at this stage the, we can assume that the assets transferred to Turkerler will have to be returned to the Savings Deposit Insurance Fund. If the final decision of the Council of State upholds the decision of the Competition Board, which seems unlikely, then the Fund will have to return Ladik Çimento to Akçansa, as the decision of the Competition Board shall become definitive. However, in case the Council of State quashes the Board decision on grounds that the Competition Law does not allow for the prohibition of collective dominance, Akçansa will have the possibility to acquire Ladik Çimento. Both scenario disregards the problems that will be created from the release of Ladik Çimento by Turkerler, which, for a good period since the Competition Board decision has established an ownership and management over Ladik Çimento.

Meanwhile, whatever the decision of the Council of State, it will either confirm that the collective dominance is a concept covered within the dominant position as defined in Article 7 of the Law, or it will create additional dynamics for the implementation of the

[606] http://www.8sutun.com/node/8756

SLC Test that will automatically provide for the necessary legislative environment for sounder assessment for concentrations in Turkey.

5.4.3. Insufficient Examination

We have previously noted that the insufficient examination claims are distributed under three types being jurisdictional, substantial and procedural. Accordingly, here, we will try to refer to important decisions where the dissenting votes claim that the insufficient examination of the subject cases raise serious assessment concerns.

5.4.3.1. Vertical Integration Concerns

The Board's *first* TUPRAŞ privatization decision[607] clearing the sale of the entity to Efremov Kautschuk GmbH (a company controlled by Taftnet) AYTAÇ and UNAL held two different dissenting votes claiming that although the transaction does not lead to the strengthening of a dominant position, the specific position of TUPRAŞ should be taken into consideration related to the refinery market. Accordingly, the dissenting votes urge that the acquirer company may abuse its dominant position in the refinery market in case an integration with the distribution markets are built. Furthermore, the binding rule that the distribution companies have to procure 60 % of their sales from TÜPRAŞ is also underlined by the holders of the dissenting votes as sign of the consistency of the market power.

The dissenting votes also refer to the confirming determinations in both the decision and the report which is the basis for the decision. In order to remedy the situation AYTAÇ and UNAL claim that a condition mechanism should be introduced to the decision which would be binding on the buyers and which would create deterrence for possible abuses of dominant position in the future. However, we think that, the likelihood of abuse of

[607] Decision No 04-09/77-19 dated 29.01.2004

dominant position should not be subject to imposition of conditions in such a regulated industry.

Furthermore, the dissenting votes draw attention to the factors creating the market power of TUPRAŞ but show no simulations (other than the integration with the distribution) on how likely is the abuse of such power with sufficient data. Following the clearance decision, the privatization of TÜPRAŞ is cancelled on 03.06.2004 by Ankara 10th District Court on grounds other than competition law. A second privatization took place and, this time the Competition Board cleared the acquisition of TÜPRAŞ by KOÇ-Shell Joint Venture[608]. This time, the decision attracted the dissenting votes of AYTAÇ and ÇAKIN mostly arguing on the vertical integration and the associated competition risks[609].

5.4.3.2. Privatization of Ports and Assessment Turmoil

In another decision of the Board, the transfer of management rights for 36 years of Mersin Port was the subject matter and the position of the highest two bidders, PSA-AKFEN and Dubai Ports Authority, are assessed. The Board cleared the transaction and gave permission to the highest bidder with jointly submitted dissenting votes of AYTAÇ-

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[608] Decision No 05-71/981-270 dated 21.10.2005. The decision is referred to in the next chapter under Joint Ventures since the dissenting vote to this decision questions the assessment of the Board on whether Koç-Shell joint venture is jointly controlled or not.

[609] The dissenting vote reads:

> "It is unanimously decided that Koç-Shell Joint Venture Group's acquisition of TÜPRAŞ would strengthen TÜPRAŞ's existing dominant position in refining market. However it would not cause a substantial lessening of competition in case "LPG export facilities located in İzmir Refinery are opened for usage to allow distributor companies conduct exportation directly for 3 years, as an addition to the practice carried out under the protocol", and therefore there is nothing inconvenient with granting it a permission on such condition.
> Board decisions and the administrative report dated October 17, 2005, as a ground to the decision, which handled the markets, in general, as refining market and the affected markets, held that the existing dominant position in refining market is strengthened, however that does not cause substantial lessening of competition. Before all, it would be appropriate to classify the markets under titles of refining, export and import in order to handle and determine consistently the size of the lessening of competition. Thus, such markets were handled with regard to horizontal-vertical relationship, but under the title of "affected markets", many times in the report. In sense of the necessary measures to take or the conditions to stipulate, it is important whether horizontal integration and competition in export and vertical integration and competition in refining markets were lessened substantially."

ÜNAL and ÇAKIN[610]. The problematic in the decision was that in its Position Paper, the Authority gave its opinion so as to create a competitive market in the region which was also concerning the presence of İskenderun Port, a 180 km nearby facility, as an alternative port and İzmir Port, an alternative for container handling. The major concern of the Authority was to prevent the control of a single economic entity over both Mersin and İskenderun Ports; and also to prevent the control of a single economic entity over both container handling activities of Mersin and İzmir Ports (horizontal concerns). Another concern was to prevent entities having liner activities in Mersin Port to acquire the management rights which would create barriers for other liner firms making use of Mersin Port (vertical concerns). Finally, the Authority proposed the divided sale of the management rights (for the container handling services) in order to create "competition within the same port", which was considered as a more competitive alternative to the "competition among ports". However, although the Presidency of the Privatization Administration refrained from the divided sale of the entity due to technical and economical reasons and also softened the prohibition of the Authority on the integration of liner services and port management services by only putting a damper on those liner companies having activities with *significant market power* in Mersin Port, it introduced the control condition of either Mersin or İzmir Port for a single undertaking. Here, the Administration tried to compensate its reluctance for division of the ports by introducing severe conditions in the Transfer Agreement which are designed to prevent a possible "abuse of dominant position". These conditions seem quite persuasive to the Competition Authority, as the Decision clearly notes.

5.4.3.2.1. Lack of Coordination between Authorities

However, the dissenting votes argue that the opinion of the Authority on divided sale contained in its Position Paper should be reflected to the bidding procedure; otherwise the Board decision should clearly provide for necessary analysis to prove whether the expected outcome with the divided sale is attained anyway. We agree with this argument since the decision of the Board contains nothing further than confirming the

[610] Decision No 05-58/855-231 dated 15.09.2005

deterrent mechanisms introduced in the Transfer Agreement in order to prevent a possible abuse of dominant position.

Furthermore, the dissenting votes argue that the decision of the Board should contain a condition on the buyer preventing it from acquiring the management rights of Iskenderun Port. Acquisition of management rights of Iskenderun Port by the same entity holding similar rights in Mersin Port is considered as the strengthening of a dominant position. This fact already exists in the opinion of the Authority. Accordingly, one can argue that putting firms under conditions for their possible future transactions will serve no purpose, since such inconveniences can nevertheless be regarded by the Authority within the assessment of the subject transaction. However, the controversy here is that the Authority in its opinion for the privatization of the ports introduced no conditions for the transfer of management rights of İskenderun Port presuming that the privatization of the Mersin Port would be based on a divided scheme as requested within the very same opinion. However, the Administration, while omitting the divided sale in its conditions of contract and realizing the transfer to a single entity by trying to adjust the situation with requirements introduced in the Transfer Agreement, introduced no conditions for the sale of Iskenderun Port, this time, as requested by the Authority. This puts at stake the position of PSA, the owner of the rights in Mersin Port, since it was the highest bidder in the sale of Iskenderun Port as well. There were no binding conditions on PSA which would prevent the company from bidding for Iskenderun Port as well. The Board prohibited the acquisition of İskenderun Port by PSA[611]. Accordingly, the claim of the dissenting votes requiring the Board decision to impose conditions for the future sale of Iskenderun Port would be binding on PSA, and would avoid the legal conflicts which are still pending at the Council of State. This decision is a clear example of how an insufficient examination of the facts in a transaction can lead to economic inefficiencies and legal costs and waste of time for the economy and social welfare.

[611] Decision No 05-70/967-261 dated 20.10.2005.

5.4.3.2.2. Possible Theoretical Grounds for Insufficient Examination Claims on Port Decisions of the Authority

It is observed that both horizontal and vertical concerns are reflected in the opinions of the Competition Board concerning the sale of ports. The restrictions provided for the sale of Izmir and Mersin ports by being divided into parts, and for the acquisition of the docks of the both ports can be classified as horizontal restrictions. However, the restriction that any shipping agencies and/or freight transporters operating between those ports in Izmir and Mersin with relatively high numbers of terminals, or any enterprises that are engaged in Ro – Ro transportation business can not acquire Samsun port refers to vertical concerns.

Here, at this point, one can claim that such conditions constitutes an ultra-interventionist scheme in the sense that it runs counter to the main principles of free market economy regulated by the Competition Board. The free market economy is based on the premise, called as invisible hand theory, that the market stability can be achieved through its own dynamics, which would, in return, promote the social welfare. However, these theories cannot be fully implemented under some exceptional circumstances, and, therefore, may require government intervention. On the other hand, such intervention should be carried out in an exclusive way to be limited to the scope of such circumstances, and to avoid damaging the essentials of the free market mechanism. In any other situation, a state controlled interventionist economic model would surpass, rather than that of a free market economy. For all of these reasons, due consideration should be made while addressing the issue of state control, and the extent of the need for such intervention should be clearly outlined.

The horizontal restrictions envisaged by the Board include those restrictions which provide for privatization of Izmir and Mersin ports by dividing them into two parts, and for introducing both the ports into business activities.

The wording of Article 7, RKHK suggest that one of two criteria is sought for prohibition. In order to prohibit a merger or acquisition, such merger or acquisition must

either create a dominant position or strengthen an existing dominant position. It can be said that the Competition Board introduces the above restriction on the ground that in case of a practice otherwise, there would be a creation of a dominant position, or strengthening of an existing dominant position. It should, therefore be examined if the structural aspects of the market in question tends to create the mentioned situations.

This examination should have two phases. The first one is to determine the underlying market, i.e. the geography of the markets and services that are subject to the effect of the proposed transaction. The second phase should focus on the verification whether the structure of the market in question has a tendency to create a dominant position, or to strengthen an existing dominant position.

The examination of mergers and acquisitions, also including the transactions relating to the privatization is achieved by determining the economically meaningful markets which enable strengthening of the market power. In other words, the market is identified for each good and service produced by an undertaking that is subject to the merger or acquisition, where, in the said market the undertakings can use the existing market power or co-ordinate their attitudes.

It is clear from its opinion that the Competition Board considers both Izmir Port and Mersin Port within the same market. Otherwise, there would be a condition imposed for any acquirers of one of these ports, providing for the ownership status of any properties at the other port by such acquirer. Therefore, it can be said that both of the ports are presumed to be competing with each other in the same market. The Competition Board has previously adopted a similar approach in its decisions. For example, Competition Board Decision on Ambarlı Port included the following statements:[612]

> "... distant ports may become alternatives for each other as far as the container transportation is concerned. It is, therefore, necessary to take into account the other Turkish ports, in particular Izmir Port when an assessment is made. Such railway connected ports as Mersin and Izmir ports are much advantageous for

[612] Decision No 04-17/125-27 dated 26.02.2004

> transportation of the inward freight over the other parts of the country, and for exporters to dispatch their goods to the ports..."[613]

This decision reveals that the Competition Board assumes that competition exists not only between Izmir and Mersin ports, but also between the other distant ports, and that the relevant market includes such ports. Besides, the decision of the Competition Board on privatization does not exclude the said approach[614].

Such approach of the Competition Board on the relevant geographical market is stated below in the following paragraphs of the very same decision:

> "... by taking into consideration that even those Turkish ports like Mersin and Izmir ports which lie outside of the region may become alternatives, in the particular case of container transportation, for their railway connections and high capacities, and that Akport, as an alternative to Ambarlı Port for its position, technical equipment and capacity, has been launched ...".

In this regard, it can be said that Competition Board's opinion is not concerning strengthening of an existing dominant position, but concerning creation of a dominant position. If its concern was the first one, it would be stated that an enterprise in dominant position cannot be a party to an acquisition transaction.

As it is seen that the Competition Board is concerned with the creation of a dominant position, we should find out whether a dominant position would be created if there were no restrictions required by the Board, in fact. Considering that dominant position is the power to assign economic parameters independently from the competitors and customers, we should find out whether a dominant position would be created if Izmir and Mersin ports were sold without dividing, or in case it is divided, if the same enterprise acquired the large parts of Izmir and Mersin ports. Indeed, the question was answered by Competition Board's decision quoted above. Therefore, a pressure by competition of other

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[613] Emphasis added.

[614] Other ports are not mentioned not because they are excluded from the relevant market, but because they are not included within the scope of privatization.

distant ports (as Ambarlı and Akport) or, at least, the pressure of competition between Mersin port and Izmir port would eliminate such a risk.

In other words, in a scenario where there are no restrictions, therefore, Izmir and Mersin ports are sold as a whole or both of them are acquired by the same enterprise, an increase in fees by port owners will cause involvement of other ports, and there will be no more possibility to increase prices, as stated in Competition Board's decision.

These evaluations bring solution for the matter in respect of existing ports. We should add to these arguments the conditions of market entry. Since Competition Board considers that Izmir and Mersin ports are in the same geographical market, it assumes, in a way, that a port built in the regions of these ports will be within the same market. With a view to the regions in question, one would see many places available to locate a port. It is not a difficult task to build and manage a port as in the case of Akport. Thus, in a decision on Eskihisar and Topçular[615], Competition Board sets forth the following facts in this context:

> "Taking into account that there are 158 ports and wharfs, in total, within Turkey, 60 of which are owned by private sector, it is seen that establishing ports and wharfs is not an investment made only with public sources both in legal and economic aspects. Moreover, a ferryboat port is so low-cost an investment that would not even be remarked, when compared to container ports built by the private sector.
>
> Complainant's estimation on cost of such a port that will operate in the relevant geographical market is TL 1.000.000.000.000 (USD 600.000). But the biggest barrier on the way to build a new wrath is not the cost; it is the length of time passing to obtain the necessary permissions."[616]

As Competition Board found in this decision, there are many private container ports in service within Turkey. In other words the market is available for more than one

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[615] Decision No 03-03/25-7 dated 09.01.2003 File Subject: Allegation that Türkiye Denizcilik İşletmeleri A.Ş. infringes competition by denying the request of complainant, who wants to use launching platforms, owned by Türkiye Denizcilik İşletmeleri A.Ş., in Eskihisar and Topçular, in order to conduct ferryboat transportation business.

[616] Emphasis added.

ports providing service. This fact also shows that an artificial increase in port service fees would cause emergence of new ports in a short period.

Even if a restriction is imposed on Izmir and Mersin ports, the actual competition to be created by other ports and the potential competition that will cause new players enter into the market, would prevent creation of a dominant position in the relevant market. Unfortunately, Competition Board's opinion disregards these two facts and creates a situation that does not match with its previous decisions.

On the other hand, Competition Board's opinion ignores the possible benefit from positive scale economies. One of the possible situations that may arise after selling Izmir and Mersin ports by dividing them is the creation of four separate enterprises beginning to render service in these markets. This may render it more difficult for container handling service, where the revenues increase according to the scale, to reach the efficient scale. In other words, Competition Board prevents business managers to benefit from scale economies, because of its concerns about dominant position, which is of quite low a possibility. Such prevention can only be legitimate in case of a dominant position where the actual value of loss of welfare, caused by such possibility coming true, is more than the revenues derived from scale economies. However, such possibility is, as we stated above, is quite low.

In summary, Competition Board's opinion on privatization of Izmir and Mersin ports ignores the existence of ports that are substitutes to these said ports, whereas in a previous opinion of a year ago, Competition Board mentioned existence of at least four ports substituting each other. Existence of substitute ports would also eliminate the risk of creation or strengthening of a dominant position even in case both Izmir and Mersin ports are acquired by the same undertaking. Existence of four alternatives to each other also renders groundless, in respect of competition rules, the sale of facilities in the same port to separate enterprises. Such a distinction also renders it impossible to benefit from positive scale and scope economies and may cause loss of economic effectiveness in port management. Competition Board's interventions for dividing Izmir an Mersin ports and for assignment of those to acquire the divided parts, whereas it could remove the concerns

about creation of dominant position by declaring an opinion for selling these two ports, as a whole, to separate enterprises, shows that Competition Board acts in a struggling approach instead of an approach adopting free competition, which is the basis of competition law.

5.4.4. Joint Ventures

The concept of joint venture, a type of partnership frequently observed in recent years, is a very wide one. Several competing definitions have been suggested; but it is very difficult to come up with a concise definition given first that there is no legislation exclusively dealing with joint ventures and also that they can be designed in various ways and for very different purposes[617]. However it is again the economic dimension[618], the issue of control and not the specific contractual obligations underlying the joint venture relationship that is important here.

From the legal perspective, Article 2 of the Merger Communiqué titled "Cases Considered as a Merger or an Acquisition" covers joint ventures *"which emerge as an autonomous economic entity possessing labor and assets to achieve their goals, and which do not have the aims or effect of restricting competition between the parties, or between the parties and the joint venture"*, as another possible form of concentration.

The inclusion of joint ventures under merger control as a possible form of concentration creates the need to distinguish between sole or exclusive and joint control. What determines control is the decisive influence on another undertaking. The simplest and the most evident method of acquiring sole control is the transfer of the majority of voting rights of an undertaking. However as explained before it can also be acquired through several other methods such as obtaining share levels that provide control, qualified

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[617] Kayıhan, L. *Rekabet Hukuku Uygulamalarında Ortak Girişimler*. Ankara, Rekabet Kurumu, 2003: p. 10.

[618] Aslan, *op cit*., pp. 318-319.

minority shares and actual control[619]. In any case the determination of sole control is simpler than joint control[620]. Contrary to the general belief, competition law does not seek for the equality between the shares of parent companies for a joint venture to come into existence[621]. In joint control two or more undertakings obtain decisive influence on the strategic commercial or organizational decisions of a third party through means such as equivalent weighting of votes, equal representation in executive bodies, common veto rights, joint voting or actual control in a lasting way. Even in case of a partner holding a single golden share which can veto critical decisions, this structure shall be deemed as a joint venture. The power to appoint the majority of the administrative board, the appointment of the general manager or the acceptance of the business plan can be considered as examples of means of controlling the joint venture. Some financial rights affiliated with the minority rights are not considered within this context. The distinguishing feature is that none of the parties have the final say over the management of the controlled undertaking by itself[622].

The Authority has had the chance to assess multitude of applications for clearance of parties that either form a joint venture company or enter into more complicated transactions in which the position of the joint venture company involved within the transaction required special attention with regard to competition issues.

Among them, the most striking decision is a prohibition decision based on the grounds that the formation of the joint venture company was failing to satisfy the primary conditions required for it to be considered as a joint venture as defined by the competition

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[619] Güngördü. *ibid*: pp. 25-29.
[620] Sanlı, *op cit*., p. 330.
[621] As an example, let us assume a JV company where each shareholder holds 25% share of the company, also, -notwithstanding their share ratio- having the right to appoint at least one member of the board of seven members where the critical decisions are taken unanimously. In this JV company, acquisition by a shareholder of 10% shares of all other shareholders and thus holding the majority of the shares will not change the control status of the JV company forasmuch as the veto rights of all the shareholders remain through the board members. Accordingly, such acquisitions which do not change the control status are often characterized as "acquisitions with investment purposes".
[622] Aslan, *op cit*., p. 320; Güngördü. *ibid*: p. 29; Kayıhan. *ibid*: pp. 36-42.

rules[623]. This decision recalled the primary principle that a joint venture is an economic structure which should be independent from any of the parent companies, where - notwithstanding the share ratios of the shareholders- the decisions are taken with mutual agreement with quorum requirements or may not be taken due to the veto rights held by any of the shareholder. In its decision, the Board held that the fact that only one of the co-founders had the right to veto the decision indicates the absence of a joint control.

The Competition Board has determined in its Decision on Borusan Mannesmann Endüstri ve Yatırım A.Ş. that even though 77 % of the capital of the new undertaking was provided by Borusan Group a joint control existed[624]. According to the Board the joint venture required an implicit joint control[625]. When neither sole nor joint control exists as in the LPG Joint Venture case, the Board has decided that the joint venture cannot be assessed under Article 7 of the Law. In other cases the nature of the decisions taken jointly were reviewed in order to determine whether or not a joint control existed.

5.4.4.1. Flexible Approach to the Co-existence of both Parents in the JV's Market

If the parties of a joint venture operate in the same market with the joint venture itself and do not exit the market, it is accepted that the joint venture aims to reduce competition and therefore it is assessed under Article 4 of Law No. 4054 instead of Article 7[626]. A landmarking decision focusing on the overlap of the activities of the parents and the joint

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[623] The Competition Authority, Decision No 99-26/230-138 dated 27.05.1999 related to the notification of the concentration of 39 companies active in Turkish LPG market, for the formation of a joint-venture company whose purpose was planned to be the supply of LPG. In this decision, the Competition Authority has concluded that:

a) as the notified operation doesn't form an autonomous economic entity and has restrictive effects on competition, this is not a Joint Venture in terms of Communiqué Notification N°1997/1
b) as the cumulated market shares of the 39 companies reach 92% of the national LPG market, the operation eliminates current and potential competition for the undertakings who do not participate to this operation
c) as there will be a unique price in markets of distribution and sale, there is no benefit effect for the costumers (furthermore, as the operation restricts the competition more than what is necessary, it doesn't fulfill the conditions of an eventual exemption)

It is decided with unanimity that the notified operation will not be authorized.

[624] Decision No. 80/617-119 of 20th of August 1998.

[625] Güngördü. *ibid*: p. 34.

[626] Aslan, *op cit*., p. 328.

venture company is Metro/Migros[627]. The Board cleared the transaction on condition that as long as the joint venture agreement in question remains in effect, the parent companies do not directly or indirectly enter the relevant product market, together, in the same geographical market with the joint venture.

However, in an exceptional decision[628] on the formation of a joint venture company followed by share transfers of Garanti Koza which was controlled by Koç Group prior to the transaction to Balfour Beatty Overseas Ltd., the Board assessed the joint venture and concluded that, although the past case-law of the Board (referring to Metro-Migros Decision) and the competition rules require that the activity of all the parents in the same market with the joint venture constitutes competition problems and thus should be restricted, regarding the fact that Balfour Beatty Overseas Ltd. is not fully active in the Turkish market (but has an established entity with potential to compete) and the market is composed of many players, the presence of both parents in the same market with the joint venture does not hinder competition. The Board only imposed a condition on the parents that only one of the parents should participate in the biddings where the joint venture is also present. Further to that decision, KARACEHENNEM criticized in its dissenting vote that the objective principle governing the activities of the parents and the joint venture in the same market should not be subject to flexibilities regarding the competitive level of the market.

5.4.4.2. Existence of Joint Control Questioned

Another dissenting vote questioning the joint ventures was contained in the decision on the privatization of TUPRAŞ[629] through the acquisition by Koç-Shell joint venture where the decision does not qualify the association between Koç and Shell, and the agreement regarding it, a joint venture, but qualified it a cooperative agreement in scope of Article 4 of Law 4054. The formation was not found incompatible with the legislation, on ground that it met conditions for exemption. AYTAÇ and ÇAKIN held that this conclusion

[627] Decision No 57/424-52 dated 19.03.1998.
[628] Decision No 00-29/307-174 dated 03.08.2000
[629] Decision No 05-71/981-270 dated 21.10.2005

was incompatible or inconsistent with the agreement texts and the conditions sought. They furthermore draw attention to the fact that the clarification of the nature of the Koç-Sheel association was very important, in the sense that, as noted in the Administrative Report, page 60 "… that parties to such association make business in the relevant product markets and the affected markets, so the acquisition transaction causes vertical and horizontal integration."

According to the dissenting vote, in the structure of Koç-Shell association, it is foreseen that Board of Directors shall be formed of five members, and Koç shall appoint four of them, whereas Shell shall appoint one of them. Furthermore, in spite of the capital allocation of 90% to 10%, the agreement grants Shell significant veto powers. Consequently, as long as Shell holds 5% of the capital, it is prohibited, without Shell's approval, to change the dividend policy, nature of the business that the joint venture and TÜPRAŞ engages, and it is seen that Shell shall be consulted for any election and appointment to top management. According to the dissenting vote, these three powers mentioned above are among major veto powers that involve joint control in joint ventures. AYTAÇ and ÇAKIN, while referring to studies[630], emphasize that both EU theory and practice, and Turkish Competition Law literature and the Board decision's practice qualify the amendment to the nature of business of a company, the resolutions on dividends and the co-assignment of management as veto powers in a joint venture.

However, as clearly specified within the Decision, the Joint Venture Agreement declares that Koç shall have absolute control over the joint venture and that Shell will hold a minority rights. Furthermore, also according to the joint venture agreement, Koç shall manage both the joint venture and TUPRAS. Accordingly, the veto rights associated to Shell minority shareholding are limited with the change of activity field of the joint venture company and the change of the dividend policy. The Board, apparently, considered such rights as not conferring joint control rights to Shell.

[630] Kayıhan, *op cit.,* pp. 33 et seq., 60 et seq.; Determination of Existence of Joint Control in Joint Ventures in light of EU Competition Law Practices. Memo no 343, 2003, pp. 14, 19 *et seq*., p. 26.

In a further transaction, TÜPRAŞ acquired 40 % Opet shares[631] held by Aygaz, another Koç Group company. Structure of the shareholding status in TÜPRAŞ must be re-examined in order to find out whether this acquisition caused any change to joint control.

The 51% of shares in TÜPRAŞ are owned by Enerji Yatırımları A.Ş., and rest of the shares was offered to public. As we explained above, sole control generally arises when an undertaking obtains majority of the shares or voting right in another undertaking. Generally, an undertaking obtains the control of another when it obtains the majority of the shares therein. When there are no other legal or actual factors, holding 51% of the total shares will be enough for control. Therefore, we can say that Enerji Yatırımları A.Ş. has the control of TÜPRAŞ.

With a view to shareholding structure of Enerji Yatırımları A.Ş., it is seen that 75% of shares are held by Koç Holding, 20% by Aygaz, 3% by Opet and 2% by Shell Group. Koç Holding has the control over Enerji Yatırımları A.Ş.; consequently, we can also argue that TÜPRAŞ is also under control of Koç Holding, as held by the Board in its decision concerning the privatization of TÜPRAŞ. However, Competition Board has a remarkable decision in this issue. The Board decision 06-08/103-29, dated 02.02.2006 on the formation of Shell-Turcas joint-venture, states that 98% shares of the company controlling TÜPRAŞ (Enerji Yatırımları A.Ş.) was held by Koç Group and 2% of the same company was held by Shell Group, and then it states that this company is a "joint venture". As mentioned above, the distinguishing element of a joint venture is to be under a joint control and there is no doubt that when choosing the technical terms, the Competition Board would not disregard the fact that it has to use the concepts with their meanings with regards to competition law. Therefore, on ground of the fact that the Board qualifies the company controlling TÜPRAŞ a joint venture, we can allege that this company is not under control of Koç Group, and in fact, Competition Board had acknowledged this situation as well. However, the following sentence in the same decision says Shell Group does not have any controlling right over TÜPRAŞ or over the joint venture company controlling TÜPRAŞ. It

[631] Opet is a joint venture in the sense of competition law jointly controlled by Koç Group and Özturk Family Undertaking on a 50-50 share basis.

is not clear whether the wording "any control" therein means Shell Group does not even have a "joint control" over TÜPRAŞ, which means TÜPRAŞ is under control of Koç Group, or such wording means Shell Group does not have a "sole control" over TÜPRAŞ, which means TÜPRAŞ is under joint control of it. Assuming the first possibility, we can come to the conclusion that the wording "joint venture" contained in Competition Board decision does not refer to a joint venture in technical terms of competition law, but to a joint shareholding irrespective of control issues. On the other hand, considering the wording in the decision on privatization of TÜPRAŞ, the Board, in spite of using the concept joint venture for association between Koç and Shell, it implicitly expresses that such undertaking to be established, is not under joint control in the essence, but is under sole control of Koç Group. As referred above, the dissenting opinion notes that the undertaking in question is a joint venture and alleges that Shell Group has a strengthened veto right, therefore there is a joint control. However, as it is seen from the share ratios, Shell Group transferred part of its shares to Koç Group during the period between two decisions, so it is quite probable that TÜPRAŞ was taken under control of Koç Group in this relationship wherein Shell Group became more passive, gradually.

In an article dated 2002, Güngördü and Kayar argue that the Board has not produced a coherent and sound body of decisions regarding the strategic commercial and organizational issues[632]. However, the Metro-Migros Decision taken in 1998 was a strong reference in assessment of joint ventures in Turkey and was followed thoroughly by the Board with mostly unanimous votes. As the few exceptions are referred above, we also conclude that the assessment of the Board in Garanti Koza/Betty Balfour transaction goes beyond an evaluation but seems quite a deviation from the soundly and persistently applied objective criteria. Furthermore, it is also to be noted that the transactions concerning TÜPRAŞ are also noteworthy in the sense they involve both conceptual and substantial concerns. The compensation should lie in a recent decision of the Board[633] where, further

[632] Güngördü, A. & Kayar, M. A. AB Rekabet Hukuku Uygulamaları Işığında Ortak Girişimlerde Ortak Kontrolün Varlığının Belirlenmesi. *Rekabet Dergisi* 11, 2002: pp. 98-102.
[633] Decision No 06-70/936-270 dated 05.10.2006

to the EU Merger Reform, the assessment criterion is totally based on the EU application[634].

5.4.5. Relevant Market

The dissenting votes that refer to relevant market issues are categorized under two sub-groups based on their consequences. They either argue that the determination of the relevant market may lead to jurisdictional problems, meaning that a proper determination would have placed the transaction out of the scope of the merger control regime or vice versa; or lead to substantial problems, meaning that a proper determination would create or eliminate dominance issues. We already referred to the theory of relevant market in the section where dissenting votes having jurisdictional concerns are analyzed.

5.4.5.1. Cursory Determination of the Relevant Market

Within the framework of substantial issues, we have four decisions, with five dissenting votes. The first decision is on the acquisition of 49.97% of the shares of Tepe Knauf to Knauf International[635]. The transaction leads to change of control to Knauf International, which was previously an investment shareholder in the target company with

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[634] From the Decision:

> "If we refer to the approach of the EU to joint venture companies, the EC Merger Control Regulation is published on 20.01.2004. The Regulation sets forth the assessment criteria of the joint ventures regarding the competition rules in both adverse and affirmative conditions. These conditions make a separation of joint ventures so as to be concentrative or coordinative. The assessment of a joint venture under the Merger Regulation is subject to the following conditions:
> 1) Presence of a joint control of the parent companies over the joint venture,
> 2) Establishment of a joint venture performing all the functions of an autonomous economic entity,
> 3) Performing on a lasting basis,
> 4) the Joint venture does not lead to the coordination of the competitive behavior between the independent undertakings.
> Joint ventures satisfying the first three conditions are deemed to be full function joint ventures. Merger Regulation 139/2004 considers it sufficient for a joint venture to be full functional in order for it to be assessed within the framework of the Regulation."

[635] Decision No 99-36/368-235 dated 20.07.1999

no control. The transaction is found to fall outside of the notification requirement since the market shares and the total turnover of the parties are found to be below the thresholds. The relevant product market is determined as products used in the finishing of the wet or dry interior surface of concrete plaster, concrete gas brick, separation walls and suspended ceilings. The decision states that the market is determined based on the information contained in the notification file.

However, GENCER, in its dissenting vote, claims that the market share ratio of 4 % is calculated based on the total of two different markets namely plaster boards (in which the target company is mainly active) and bricks and concrete plasters which are definitely not substitutes. Accordingly, adds GENCER, this market definition led the transaction which may create dominance stay outside of merger control. As far as we are concerned from the short dissenting vote that GENCER is right in the sense that a market determination should not rely only to the information supplied by the parties. He is also right in claiming that such a determination eliminated a possible examination of the Authority which could then lead to a more reliable case-law for further transaction taking place in the same markets. It is also to be noted that the acquiring party, Knauf International had no other activities within the Turkish market. Thus the transaction does not create an increase in the market power. However, all being said, it would be more appropriate for the Board to conduct a much detailed relevant market determination analysis in order to back its finding, which, as used to be in the early decisions of the Board, is neglected.

5.4.5.1. Disregarded Demand Substitution

Another decision of the Board which attracted criticism of two Board members with concerns raised in market determination is the acquisition of the OTC (Over the Counter) business of Roche by Bayer[636]. This is a foreign to foreign transaction which is also notified to the EU Commission. The Reporters Opinion claims that the transaction, while subject to merger control regime, is not leading to the creation or strengthening of a

[636] Decision No 04-80/1153-288 dated 21.12.2004

dominant position which may significantly impede competition, thus should be cleared. Contrary to Tepe Knauf transaction above, the relevant product market is analyzed in detail, probably thanks to the information supplied by the parties within the framework of the monotype multi-jurisdictional notification package. Accordingly, the product markets are determined as multivitamins-minerals, antacids-antiflatulents and analgezics with no narcotics. In multivitamins and minerals market Roche's *Supradyn* and Bayer's *One-a-Day* are found to overlap with regards to ATC 3 Classification. However they are not found to be substitutes since first, Supradyn was reimbursed by the social security system and One-a-Day was not and second, the price of One-a-Day was tripling Supradyn. In the market for analgesics with no narcotics, Bayer's *Aspirin*, the market leader, and Roche's *Minoset* with relatively lower market share as being the sixth firm in the market, are found to be substitutes. However, the Board concluded that the competition in the market would not be impeded with the presence of strong competing products such as *Vermidon* (Hexal), *Navalgin* (Sanofi-Aventis) and *Panadol* (GSK).

The market for antacids and antiflatulents is attracting all the criticism of the two dissenting votes by AYTAÇ and GENCER. In the specified market, Roche's *Rennie* and Bayer's *Talcid* are the leaders in ATC 3/A2A classification on products to relieve heartburn and gas problems. The parties to the transaction claimed that a neighboring category in ATC 3 classification (A2B) containing products used in the treatment of peptic ulcer are close substitutes to A2A products. The Board conducted a further comparative analysis of the two categories and referred to the substitutability of the products with regard to their therapeutical purposes and concluded that the "H2 receptors" a sub-category within the A2B group of products is a close substitute to A2A products. Thus the Board expanded the market definition based on a quick conclusion. However, we learn from the dissenting vote of AYTAÇ that further to discussions during the Board meeting on the substitutability of the two product groups it has been decided to refer the issue to the Ministry of Health. The information supplied by the Ministry is presented to the Board in the form of an Information Memo dated 20.12.2004. The Memo was contesting the argument that the A2A and H2 receptors are close substitutes and stated that the two products were complementary. However, the Board disregarded this approach and dismissed the proposal to initiate a Phase II investigation. The dissenting vote also

underlined the fact that the transaction was subject to conditional clearance by the EU Commission concerning the markets in Ireland and Austria[637].

It is clear that the Competition Authority has no general prohibitive attitude for mergers and acquisitions, furthermore, unless the EU Competition authority clears a concentration with conditions, the Turkish Authority merely never asks for further justifications or conditions for the parties of the operation. Obviously this presumption requires further input as to whether the market structures show similarities. We understand from the argument of AYTAÇ, by referring to the Commission's decision, that since the EU did not refrained from imposing conditions on the parties for markets where competition is significantly impeded, a parallel conduct could be followed by the Turkish Authority for the markets in which the overlapping products of the parties raise competition concerns, especially in such a case where the Ministry's opinion could be taken into account. Besides, antacids are sold in many countries as OTC products in supermarkets with no prescription requirement. Accordingly, a consumer survey could also be of use in determining the substitution effect.

Turkey is on the way to establish an OTC market and the producers of such products will be freed from restrictions on sales only through pharmacies and on advertisement. Accordingly, the consumers' choice will be an important deriving force of the competition in OTC products and especially antacids. Accordingly, the decision of the Board, free from any condition, will have an impact on the increased market power of Bayer in antacids market in Turkey.

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[637] Case M.3544 dated 19.11.2004; Commission Press Release (IP/04/1386) dated 19th of November 2004:

> "The operation, as initially notified to the Commission, raised serious competition concerns in the OTC segments of the non narcotic analgesics (N2B) market in Austria and of the topical antifungals (D1A) market in Ireland. In order to remove the competition concerns, the parties offered the following commitments:
> - as regards non narcotic analgesics : to divest the Aspro and Aspro C products in Austria
> - as regards topical antifungals: to divest the marketing authorisation and trademarks for the existing formulations of Caldesene and Desenex, which are the two Roche products in Ireland."

Another decision that could be referred within the framework of market definition is the acquisition of Tansaş by Migros[638]. However this decision and concerns of the dissenting votes on market definition are analyzed in detail under market dominance issues, as we thought for it to be more appropriate.

Similarly, the final dissenting vote on market definition is in the decision concerning the privatization of Iskenderun Port[639], where KALDIRIMCI questions the efforts of the Board decision in perceiving Mersin Port and Iskenderun Port as substitutes and thus tending to grant permission to different undertakings for each port.

5.4.6. Remedies

Under this sub-category we have refrained from citing conditional clearance decisions of the Board, for which we already previously referred to in different sub-sections being mainly in ancillary restraints[640]. Accordingly, we included only one decision with a dissenting vote questioning the conditions attached to a privatization transaction. The transaction is concerning the privatization of Türk Telekomünikasyon A.Ş. in which the Authority imposed, for the first time, a structural condition, among others, being the separation of cable TV services and the exclusion of it from the scope of the privatization. The dissenting vote of ÜNAL questions the rationale behind such a structural condition and argues that cable TV infrastructure is not a substitute of the telecommunication infrastructure and such a condition weakens the competitive position of Turk Telekom.

The importance of this condition lies under the consequences it created in the market. The fact that cable TV services stayed in the ownership of the State, incurred problematic issues that caused an important delay in establishing a competitive environment in this market.

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[638] Decision No 05-76/1030-287 dated 31.10.2005
[639] Decision No 05-70/967-261 dated 20.10.2005
[640] Also see our comments in Section "4.4.2.2. Clearance of a Confirmed Thread on Competition".

In 1997 an auction for providing cable TV services was made and distribution of income agreements were concluded between the four highest bidder undertakings and Turk Telecom which was holding the only license for Cable TV operations in Turkey. In 1998 revenue sharing agreements for upgrading the infrastructure previously build by Turk Telecom was again signed by these undertakings. In accordance with both agreements, all investments for infrastructure and equipments were guaranteed by the undertakings. Under those agreements, revenue sharing private firms have enlarged the network to cover approximately 2 million households mainly in big cities of Turkey.

Before the privatization of Turk Telecom, as a remedy ruled by Turkish Competition Authority, the cable TV services of Turk Telecom have been divested and transferred to Turksat A.Ş. (the state-owned undertaking in charge of satellite services) with the entirety of its assets. In April 2006, a year before the 10-year duration of the revenue sharing agreements would be closed; revenue sharing firms have given licenses by the Telecommunications Authority for cable TV services. Accordingly, they have obtained the same authority and responsibility as Turksat. That was considered as a big step in telecommunication market in order to have the opportunity of facility-based competition at least in the Cable TV serving territories of Turkey which covers most of the regions having high revenue potential for incumbent telephone operator, Turk Telecom. But it also brought up a number of problems. A question came up and has been highly controversial. Who owns the infrastructure and equipments? Both parties of the revenue sharing agreements assert that the infrastructure is owned by them. The issue became a matter of big legal disputes and a quick resolution is a sharp necessity in order to have more qualified and common cable TV services.

Industry's regulator, the Telecommunication Authority has decided to stay silent, and government somehow favored the state-owned company in the disputes. If the disputes are left to the courts, it will take at least two or three years to solve this problem, which is described as a long-run in a dynamic industry as telecommunications. Another question here is important: what would have happened if the cable TV business was not divested

and privatized along with the telecom business? Probably the same legal recourse would have been carried between independent private undertakings; and the State, both through the courts and the Telecommunication Authority would assumedly have arbitrated the dispute in a faster way. Otherwise, the parties would come to a resolution and avoid legal disputes.

5.5. Dissenting Votes on Procedural Issues

The third and final classification of dissenting votes is made under the procedural issues. These are mostly issues that objecting members present a dissenting vote on an automated basis without even changing a word.

The most frequented issue is concerning the quorum of the Board which is triggered by a change in the number of the Board members through an amendment in the Law. While the amendment set the number of board members as seven, the board, at that time found itself with eight members. Accordingly, the discussion was on the number of the members to attend the meetings.

The second issue is concerning the administrative fines. Under this sub-heading we have come up with dissenting votes either rejecting to the imposition of fines for late notifications or claiming that the Board should impose fines.

The third issue is the internal procedure mostly tackling issues concerning the procedure that applies to the privatizations. The remaining issues are legal representation of the firms by ex-competition experts, insufficient examination calling for a phase II investigation in one case, rejection to the withdrawal of a negative clearance within a merger decision and notification timing in joint-stock company mergers.

5.5.1. Quorum

Article 3 of Law no 5388 on Amendment of Several Articles of Law on Protection of Competition amends article 22 of Law no 4054 as *"Competition Board shall be formed of seven members, one of which shall be Chairperson and another shall be Vice-Chairperson"*[641]. However, despite this provision, there is a period where the Board was formed of eight members, because at the time when the Law No 5388 became enforceable, the Board was already formed of eight members with three empty seats and the Board did not know what to do with the eighth seat. The amending Law was not proposing any procedure to decrease the number of Board members from 11 to seven. The Board implemented its own practice by meeting with eight members until a seat is emptied in anyways, but not through self initiative. However, there was also no provision for meeting with eight members until the number of members is decreased to seven. In Article 5 of the same Law, quorum for decision is fixed considering seven members, and this cannot be applied, by analogy, for the cases where the number of members is other than seven. Therefore, Competition Board, which is required to be formed of seven members pursuant to express provision of Article 22 of Law, was, at that time, composed of eight members, being in breach of the Law. Therefore, there existed an inconsistency in Competition Board's structure and its legal structure provided for in Article 22 of the Law. Considering that an actual situation cannot change imperative provision of the Law, structure of Competition Board formed of eight members was incompatible with Article 22 of Law No. 4054.

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[641] The Former Version of the Amended Article:

> "The Competition Board is composed of a total of 11 members, one being the Chairman and the other being the Deputy Chairman.
> The Council of Ministers elects and appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: four members from the Competition Board, two members from the Ministry of Industry and Trade, one member from the Ministry of State with which the Undersecretariat of State Planning Organization is affiliated, and one member apiece from the Supreme Court of Appeal, Council of State, Inter-University Board, and Turkish Union of Chambers and Commodity Exchanges."

What if the “eight members Board” meets with equal to or less than seven members? Let us assume that a decision meeting was held with the participation of five members. We believe that even participation of less than eight members in the meetings of decision process will not eliminate Board structure’s incompatibility to the Law, because Competition Board’s structure itself is against the Law. An answer is requisite for the question as to “which seven members among the eight existing members have the power to attend the meetings?” How, when and by whom will it be decided who is the eighth member that will not attend decision meetings, and which meetings he or she will attend? Quorums for meeting and decision in the Law are specified for seven members, and board’s formation by more than seven members affects these quorums automatically. Therefore, in a board formed of more than seven members, quorums for meeting and decision will have been formed against the will of the legislator even if more than seven members had attended the meeting actually. Consequently, although one might consider that a decision that is adopted by attendance of five members is established in accordance with wording of the act formally, such a decision involves an irregularity and invalidity that may affect the essence of the administrative decision. Given that soundness and validity of an administrative decision cannot depend on personal initiative and temper of some members of the Board to give such administrative decision, in respect of attending the decision meeting, Competition Board’s “eight member” structure is against the Law, regardless of the number of the members attending the meeting.

On the other hand, assuming that a decision adopted by attendance of five, six or seven members reaches the decision quorum of 1-4, 2-4 or 3-4 respectively, it is a fact that absent members’ vote could have resulted adoption of a contrary and indifferent decision. Due to structural irregularity and legal incompatibility in formation of its decision organ, this situation makes extremely disturbing indication of arbitrariness and ambiguity for decisions of an administrative authority, which has the power of enforcing serious economic and penal sanctions. All decisions adopted by the existing structure, regardless of whether they were adopted by attendance of eight or seven or less members, are subject to same suspect in view of those such decisions may concern, as well as in view of the public opinion. Constitutional securities as predictability of administrative proceedings, reliability thereon, and the principle to apply same rules and practices for the people and

situations with the same characteristics (equality) are being breached by these decisions adopted by "eight member" structure of the Board.

5.5.1.1. Decision of the State Council on Quorum Issues

In fact, State Council Chamber 13 recently ruled[642] cancellation of Competition Board's decision subject to the legal action, saying:

> "Article 3 of Law No. 5388, which amends Law No. 4054 and gets into effect on July 13, 2005, provides that Competition Board shall be formed of seven members in total, one of which to be Chairperson and another one of which to be Vice-Chairperson, and article 5 therein amends, in article 47 of Law no 4054, the wording "7" as "four", and, in first paragraph of article 51, the wording "8" as "five" and "6" as "four", and it further provides, by provisional article 4 added to Article 4, that no election or appointment will be made for the vacant member positions until the number of the Board decreases to seven",

holding that:

> "It is seen, viewing these rules together, that the legislator decreases the number of Board members to seven, re-specified the quorums for meeting and decision, and takes into account the fact that number of Board members is still greater than seven, therefore it regulates the prohibition to make election or appointment for vacant membership positions until the number of the members decreases to seven, whereas it makes no regulation regarding meeting and decision quorums during such period of time"

and ruling that:

> "In the case, it is seen that Competition Board's decision, being subject of the legal action, was adopted in presence of eight members. Taking into consideration the fact that Competition Board decisions, which have the character of a collective proceeding, are, under Law no 4054, established by attendance of more than one wills at the end of discussion of parties' allegations and defenses, the evidence put forth and the opinions and dissenting opinions by those who form the Board upon evaluation, in meetings and negotiations, of the information and documentation obtained in accordance with the procedure setting, in detail, the procedures that must be followed by the Board in inspection and surveys, it is and essential requirement, for formality of the proceeding, that the number of Board members

[642] State Council Chamber 13, Decision 2006/313E dated 12.12.2006

> must not be unclear, the minimum and maximum number of members required for meeting and for giving decision must comply with the statutory requirements. For this purpose, since article 7 of Law No. 5388 provides that this Law gets into effect on the date it is published, it is not lawful for the Board, which has been formed of seven members since July 13, 2005 when the Law got into effect, to give decision by reaching meeting and decision quorums by a number higher than that."

As a conclusion, being formed of eight members (for a period), the structure of Competition Board was clearly against the Law with regard to formal invalidity affecting power and essence, since it is against fundamental principles of Law No. 4054 and the administration law. This fact, though, was underlined through carbon copy dissenting votes by ÇAKIN and SONGÖR during the period in which the Board was formed of eight members.

5.5.2. Fines

The majority of the dissenting votes in issues questioning fines are arguing that the Board has no authority to impose administrative fines for transactions that are notified "by the parties" after they are closed. This argument is held by mostly SONBAY and also ATASAYAR and ASLAN.

According to the dissenting votes, Sections 10/2, 11 and 12 of Law no 4054 mentions "notification to the Board" of mergers and acquisitions, and Article 11 further provides that the Board shall impose penalty for failure to notify when the Board is informed of the transaction in anyway ("conducted ex-officio", in other words). Section 16/1-c in the Law states that a penalty shall be awarded in case of failure to notify the merger or acquisition, and the Law does include an express provision for imposition of penalty in case of failure to notify the merger or acquisition before execution of the transaction, nor provides for a certain time limitation for notification of mergers and acquisitions. Here the objecting members argue that the wording "within due time" at the end of the sentence in Section 16/1-c refers to the time mentioned in first paragraph of

article 10 regarding notification of agreements, concerted actions and decision to the Board within one month from date of their execution.

The members further argue that the inspections (as to whether the merger or acquisition is governed by first paragraph of Article 7) to be made by the Board in case of notification of a merger and in case of failure to notification of the same (where the Board gets informed about the transaction in anyway) have the same characteristic, because at the end of both situation, the Board will permit the merger or acquisition when it finds that the transaction is not subject to Article 7. At such stage, penalty for failure to make notification shall, in addition, be awarded to the relevant parties under Section 11(a) of the Law. If penalty for failure to make notification is awarded in the case that due notification was made, Article 11(a) of the Law will become pointless, in other words, that would remove the differences between the cases where due notification is made and is failed.

The members conclude that in cases where the Board makes inspection upon a notification made by a relevant party (in other words, the Board does not make an ex-officio inspection); a penalty which is designed for failure to notify cannot be awarded where the transaction is permitted, already.

In decisions of the Board where an administrative fine is awarded for late notifications the decision is grounded based on the Article 11 of Law and article 7 of Communiqué 1997/6. Article 11 titled "Notification of Mergers and Acquisitions to Board" says

> "Where a merger and acquisition transaction whose notification to the Board is compulsory, is not notified to the Board, the Board shall deal with the merger or acquisition under examination on its own initiative, when it is informed about the transaction anyway. As a result of the examination; … it allows the merger or acquisition in case it decides that the merger or acquisition does not fall under the first paragraph of Article 7, but imposes fines on those concerned due to their failure to notify".

Also, paragraph 4 of Article 7 titled "Mergers and Acquisitions" in Communiqué 1997/6 provides that

> "Mergers and acquisitions which have not been notified although they are subject to permission and for which the permission of the Board has not been obtained shall be examined by the Board, in accordance with Article 11 of the Law. If the Board decides that the mergers and acquisitions concerned fall within the scope of the Article 7, paragraph 1 of the Law upon conclusion of the examination, the Board, as well as imposing fines, shall decide on the termination of this operation concerning the merger and acquisition which is unlawful, and on taking other measures. If the Board concludes that the merger or acquisition concerned does not fall within the scope of Article 7 paragraph 1, the Board shall impose fines on the parties concerned for their failure to notify a merger or an acquisition which comes under the Communiqué".

As seen clearly, these articles that Competition Board bases upon for the administrative fines it awarded, provide for the consequence of mergers and acquisitions that were not notified to the Board though they are subject to permission. However, what happens if the transaction is notified by the parties after it is closed? We concluded that the condition requiring Competition Board to award an administrative fine on such matters does not exist in the legislation. It is because; the Board does not conduct the inspection by itself (ex-officio). Thus, both the Law and the Communiqué expressly state that such administrative fine shall be awarded for mergers and acquisitions that are not notified. Acceptance of an interpretation otherwise would render Section 11/(a) of the Law and Section 7/4 of the Communiqué pointless, as the dissenting votes also argue. In such a case, there would be no difference between making notification and failing to make notification.

Another component of the problem should be the notification timing. We have the strong intention that the Board bases its judgments on such fines to timing issues and considers a late notification as a failure to notify. Such an argument that the administrative fine was awarded since the transaction was not notified in due time, is, according to our opinion, baseless. So as in Law No. 4054, the expression "within due time" placed in the wording *"(.....) liras in case of failure to notify agreements, concerted actions and decisions covered by Merger or acquisition or governed by article 4"* in subparagraph (c) of article 16 titled "Fines" specifying fines to be awarded by the Board, only refers to actions governed by article 4, though it might cause confusion as it is an inverted sentence. Besides, first paragraph of article 10 titled "Notification of Agreements, Mergers and Acquisitions to Board" in the Law, requires agreements, concerted actions and decisions

governed by article 4 to be notified to the Board within one month from the date they are executed. Second paragraph of the same article provides for the procedure of notification of mergers and acquisitions but nothing in respect of the time limitations for notification of mergers and acquisitions were provided unlikely with the first paragraph. In other words, the Law does not provide for any time limitation about mergers and acquisitions. In this regard, the allegation that the transactions subject to fines were not notified within due time has no basis.

Another possible argument that the fines were awarded due to the fact that the transactions were executed without obtaining permission, does not make any sense in legal aspect. Even though paragraph 2, Article 7 of Communiqué 1997/6 saying *"any merger and acquisition subject to Competition Board's permission must be notified to our Board an appropriate period (preferably 30 days) before execution of the transaction, and obtaining permission from the Board is required."* states that permission must be obtained from the Board before execution of a merger or acquisition transaction, neither Law nor Communiqué does not include a provision in respect of awarding fine in case permission is taken from the Board after the execution. As we mentioned above, imposition of fine only applies to cases of failure to notify to the Board, and inspected by the Board ex-officio.

In conclusion, as expressed in the dissenting votes, the fine provided for in article 11 of Law No. 4054 and Article 7 of Communiqué 1997/6 can only be enforced against merger and acquisition transactions that are not notified to the Board. Law and communiqué does not provide for any fine in respect of notification processes of merger or acquisition transaction, other than this. In other words; legislator punishes the transactions that are not notified to the Board, on such ground, whereas does not make any distinction between the transactions that are notified to the Board late or on time. We think that the Law's wording on this matter is express. Moreover, acceptance of an interpretation otherwise would encourage subjects of this rule, to not make notification, at all, in respect of a merger or acquisition transaction.

However, since our conclusion is mostly based on the wording contained in the legislation, the other side of the coin worth discussed anyway. The proper functioning of

the notification mechanism requires the transactions to be made known by the Authority before they are closed. Accordingly, obtaining permission by notification must take place before the conclusion of the transaction, so that Competition Authority, as an authority responsible from enforcement of the Law, will have the opportunity to prevent unrecoverable damages caused by any transaction, before the damages are incurred. It is true that the arguments exposed above are applicable to those transactions that are permissible. Otherwise, the Board, when it is informed ex-officio or through a notification by the parties that the subject transaction is not permissible, the Law foresees a de-merger and heavier fines. Therefore imposition of administrative fines upon parties of a merger and acquisition transaction, which was notified after the execution, should also be subject to administrative fines with regard to general objectives of competition law and special objectives of merger and acquisition transactions.

5.5.2.1. Decision of the State Council on Fines

Further to the Board decisions imposing fines for late notification of the transactions, the parties brought their case before the State Council. The chamber in duty handled the matter and suspended the execution of the Board decision on fines, confirming the arguments contained in the dissenting votes.

The Court held that:

> "paragraph 1 of article 11 states that, in case of failure to notify the Board about a merger or acquisition transaction, which must have been notified, the Board shall initiate inspection on the merger or acquisition automatically as it is informed, in any way, about the transaction, and that the Board shall permit the merger or acquisition in case the Board finds that the merger or acquisition is not governed by first paragraph of Article 7 in the Law, however it shall impose fine on those involved, as they failed to make notification.
>
> Article 4 of Communiqué 1997/1 on Mergers and Acquisitions Requiring Competition Board's Permission issued in accordance with Article 7 of the mentioned Law specifies the mergers and acquisitions subject to permission, and paragraph 2 in Article 7 of Communiqué 1997/6 regarding Rights and Obligation of Undertakings and Associations of Undertakings Under Law No. 4054, issued after formation of Competition Authority Organization, requires any merger and acquisition subject to Competition Board's permission to notify the Board an

> appropriate time (preferably 30 days) before execution of the transaction, and to obtain permission from the Board therefore.
>
> Section 16/1(c) providing for administrative fine in Law No. 4054, states that a failure to notify a merger or an acquisition, or an agreement, concerted action and decision governed by article 4 in due time, shall be cause for imposition of fine, by the Board, upon real and juridical persons having the nature of undertakings, and associations of undertakings and/or members of such associations.
>
> From aforementioned provisions of legislation, it is inferred that, in case the Board is informed, in anyway, about merger or acquisition agreement, which is required to be notified, administrative fine can be imposed under section 16/1(c) of the Law, and permission applications, made by the parties to the Board under article 10 of the Law, for merger and acquisition agreements, which were notified by the parties, cannot be imposed administrative fine for failure of notification, since a time limitation for notification is not anticipated in the Law. Administrative fine, provided for in section 16/1(c) of the Law cannot be imposed, legally, upon plaintiffs' transaction …, as they made application for permission under paragraph 2, article 10 of the Law ..."

5.5.3. Internal Procedure

In our classification of dissenting votes calling for lacks of internal procedure we faced decisions[643] where the objecting votes claim that the transaction is made without regard to the requirements of the Communiqué 1998/3, especially its Article 3 and Article 4 regulating the preliminary requirements.

5.5.3.1. Privatization of Samsun Gübre: A Question Mark on Procedural Issues

As a general example to such dissenting votes, we will analyze the claims of AYTAÇ and ÜNAL in the privatization transaction of Samsun Gübre Sanayi[644]. In the dissenting vote, the members argue that the privatization operation, which is subject to "preliminary notification" under provisions of Competition Board's Communiqué 1998/4, involves transactions incompatible with the regulations. Incompatibilities occur during the

[643] Decision No 05-30/373-92 dated 05.05.2005; Decision No 05-41/578-146 dated 28.06.2005; Decision No 05-52/797-217dated 17.08.2005; Decision No 05-59/876-235 dated 22.09.2005
[644] Decision No 05-30/373-92 dated 05.05.2005

stage before permission, and these mistakes and deficiencies in transaction were dealt in Competition Board's "opinion-establishing" decision 05-19/227-M dated 25.03.2005 as well as Profession Chamber's Information Note dated 24.03.2005.

Coming to the details, application for privatisation through block sale of 100% of government-owned shares in Samsun Gübre Sanayi AŞ was made by preliminary notification 4667 dated 02.06.2003. The relevant Profession Institution's opinion about the transaction was submitted on 19.05.2003, all of which were basis for the "Board's Opinion" declared by Board Decision 03-46/538-M dated 30.05.2003. This Decision exactly states that *"Samsun Gübre Sanayi AŞ.'s acquisition by Toros Gübre ve Kimya Endüstrisi AŞ or Bandırma Gübre Fabrikaları AŞ./Ege Gübre Sanayi AŞ (BAGFAŞ) would create a dominant position"*, and it was emphasised that the evaluation for dominant position would be made at the permission stage[645]. The point that must be underlined in Board's Opinion establishing Decision is its opining that 'a dominant position would be created in case Samsun Gübre Sanayi A.Ş. is acquired by Toros Gübre ve Kimya Endüstrisi AŞ'. The Board Decision 04-27/317-72 dated 22.04.2004, in respect of tender transactions, finalized permission proceedings. However, these tenders were cancelled as bidders failed to fulfill their obligations.

This time, a preliminary notification was made by Privatization Administration's application of 03.01.2005, for allowance of privatization through block sale of 100% of government-owned shares in Samsun Gübre Sanayi AŞ. The relevant Profession Institution Opinion on this transaction was sent with letter no. 341, dated 07.02.2005, to Head Office of Privatization Administration. It is understood that tender was called before the Head Office of Privatization Administration receives this opinion. It is because Head Office's letter no. 3386 dated 22.03.2005 implies that a tender was called with the announcement made beginning from 04.02.2005. The fact that tender was called without obtaining this opinion is inferred from the Information Note by Competition Authority First Chamber's Head Office as well as Board's Opinion establishing decision 05-19/227-M dated 25.03.2005. Profession Institution's Opinion states that in case Samsun Gübre Sanayi AŞ is

[645] See also Section "4.4.2.5.3. Clearance of a Confirmed Dominant Position" for different aspects of this transaction.

acquired by Toros Gübre ve Kimya Endüstrisi AŞ., the facts (namely, the fact that a dominant position would be created) asserted in Board's Opinion-establishing Decision 03-46/538-M dated 30.05.2003 would still apply, due to change in the control.

After 18.03.2005, the deadline for bidding, Profession Chamber's Opinion was responded on 22.03.2005 upon the warning by Competition Authority officers, and even the bids received were sent to the Authority with this letter, and it was seen that Notification Form Envelope of Toros Gübre ve Kimya Endüstrisi A.Ş. was also included.

Profession Chamber Head Office's Information Note was handled in Board Meeting in order to establish Board's Opinion, where it was held, on 25.03.2005, that the Board could not establish opinion since the stage for requesting Board's Opinion before the tender pursuant to articles 3 and 4 in Communiqué 1998/4 was passed as it was seen that the tender was called as of 04.02.2005 without having Competition Board's Opinion. Afterwards, upon application of 04.04.2005, the decision of permission, no. 05-03/373-92 dated 05.05.2005 was adopted unanimously.

As seen in the operation explained above in details and chronological order, acquisition procedure was not implemented in compliance with Articles 3 and 4 in Communiqué 1998/4, demonstrating that the Competition Board's Profession Chamber's Opinion and the Competition Board's Opinion are not obtained before calling and implementing the tender. Moreover, measures before the tender against creation of a dominant position were not taken since the opinions were not obtained, although such fact was emphasised in former opinions, and this fact was disregarded when receiving the bids. Therefore, the decision of permission is based on proceedings that do not comply with the Communiqué. In this regard, the Members think the decision of permission is incompatible with the legislation, in aspect of procedure.

5.5.3.2. The Reasoning behind the Preliminary Notification

Communiqué No. 1998/4 on Procedure and Substance Regarding Preliminary Notifications and Permission Applications to Obtain Legal Validity for Acquisitions

through Privatization was issued regarding the transfer of undertakings controlled by the State.

Comparing Communiqués 1997/1 and 1998/4, the most significant difference of the latter from the former is the addition of a stage of "preliminary notification". If there weren't this stage, all undertakings attending the tender would have to make notification and obtain permission since the winner of the tender is not known. Considering that such a practice would cause many unnecessary proceedings, it was preferred to enact a special procedure for mergers and acquisitions through privatization. According to the preliminary notification procedure, the Privatization Administration will notify the Competition Board about the planned privatization before the tender, wherefore the Competition Board will declare its opinion on such privatization considering the possible post-privatization market conditions. The Board will also state requirements for the privatization, if any, and these will be set forth in tender conditions. As a nature of course, it is not possible to fix the requirements for undertakings by such stage, since the undertakings to attend are not known yet. At that rate, the Board can state "objective requirements" that apply to all undertakings. However, these requirements can be stated in the second stage as different requirements may apply to each undertaking in permission stage. Requirements to be stated in permission stage are individual requirements because they will differ depending on each undertaking. Board's fixation of objective requirements in stage of preliminary notification, does not prevent it from fixing individual requirements therefore.

In a general view, it must be assumed that Competition Board decision made after the preliminary notifications will be a basis for the tender conditions, so possible competition law problems to arise in "permission" stage will be lessened.

Laws do not necessarily require for mergers and acquisitions of private sector undertakings to call a tender to determine the other party of the transaction. Whereas, calling tender for transferring an undertaking under public control to private sector, whether by privatization or any other method, is required by imperative rules of law, for

increasing the revenue to be derived thereof by determining the party to the transaction in a competitive way, whereby public benefit will be provided.

Adding to tender conditions, the measures to be taken for elimination of the problems which are known during preliminary notification is important for preventing in advance any possible challenge that may ultimately cause re-calling the tender. Let us assume that the preliminary stage is not applied and that three undertakings, which are known to be collectively dominant in the relevant market, attend the tender and appear as three bidders ready to pay the three highest prices. In such instance Competition Board, in compliance with express provision of Article 7 of the Law, will not permit this transaction and re-calling the tender will come to the agenda. As a result, requiring preliminary notification for acquisitions through privatization renders transaction costsless, contributes determination of tender condition in a sounder manner, and as final point, allows solid operation of the proceeding by increasing the legal clarity for those attending the tender.

Not all transactions executed by privatization are subject to preliminary notification. Article 3 of the Communiqué 1998/4, regulating this matter, is as follows:

> "In proceedings of acquisition by privatization governed by this Communiqué; If the undertaking or the unit producing goods or services have a market share higher than 20% or a turnover exceeding TL 20 trillion, or in case these thresholds are not exceeded, if the undertaking to be privatized has legal or actual privileges, then it is required to make a preliminary notification to Competition Board in order to have Competition Board's Opinion, which will be a basis for preparation of tender conditions, and in where it will the dealt with the matters such as the possible effects of such privatization in the relevant market and the post-privatization status of the legal and actual privileges, if any, of the undertaking to be privatized."

As seen, the Communiqué sets forth three thresholds for determining whether a privatization is subject to preliminary notification or not. If any of these conditions is met, it is inferred that the privatization proceeding will be subject to preliminary notification.

On the other hand, Article 5 of the Communiqué No 1997/1 provides for that if parties to an acquisition transaction, made by way of privatization requiring preliminary

notification, or made free of preliminary notification but still by way of privatization governed by the Communiqué, hold a market share more than 25% of the total market for the relevant product, or have a turnover higher than TL 25 trillion, then they have to obtain permission from Competition Board in order to render the acquisition proceedings legally valid. This application for permission must be made in separate files for each bidder to be included in the draft decision by Privatization Board to be submitted by Privatization Administration to Privatization Board after conclusion of the tender proceeding but before Privatization Board's decision on acquisition of the undertaking or the unit producing goods or services. Permission will be granted to the winner of the tender or one of three undertakings with the highest bids.

During the preliminary notification stage, the Privatization Administration and the entrepreneurs interested in the transaction expect Competition Authority to fix, and include in tender documents the objective requirements to be based on in permission stage. Otherwise, an undertaking which wins the tender, but would not be able to make the acquisition due to competition rules, will have made many proceedings for nothing, since Competition Board did not set forth such rules in preliminary notification stage. If this undertaking is a joint venture, cost of the proceedings would be much higher.

In its preliminary notification opinions regarding the Savings Deposit Insurance Fund's sale of Telsim Mobil Telekomünikasyon A.Ş.[646] and privatization of Türk Telekomünikasyon A.Ş.[647], the Competition Board set forth such objective requirements clearly. Owing to such approach, privatization of Turk Telekom for instance, wherein many complicated proceedings were required and many lawsuits for annulment of it were filed in past, was completed without any problem with regard to competition rules, and Competition Board was able to make its permission decision immediately, by checking whether its requirements set forth in preliminary notification stage were met. However, the preliminary notification process in the privatization of ports was subject to heavy criticism

[646] See: <http://www.rekabet.gov.tr/word/gorus/telsimgorusu.doc>.
[647] See: <http://www.rekabet.gov.tr/pdf/ttasozellestirmesi.pdf>.

in the sense that the competition concerns could not be reflected to the opinions in a technical manner.

For preliminary notification, the legislation anticipates a period of 40 days in principle, or a period of 60 days in total if it is extended, whereas it anticipates an examination period of 30 days, the most, for mergers and acquisitions. It is considered that anticipation of such a long period aims to provide a time sufficient for Competition Board to examine all market conditions, to create scenarios regarding potential purchasers, and to fix objective requirements based thereon.

5.5.4. Legal representation

In this exceptional case for inconvenient legal representation, a transaction is notified to the Competition Authority co-signed by an ex-competition expert and a legal representative whereby the holders of the dissenting votes in this decision[648] question the right of representation of the ex-competition expert due to the requirements that is allegedly thought to be binding for such ex-officers to represent companies before the Authority for two years after the release. This requirement is grounded on Law No 2531. However, as also claimed within the dissenting votes there are uncertainties whether this law covers the competition experts. In order to clarify the situation, the Authority brought the case to jurisdiction through a criminal complaint.

5.5.5. Insufficient Examination

We have determined only one transaction for which a dissenting vote signed by three Board Members call for claims of insufficient examination.

[648] Decision No 06-44/549-147 dated 15.06.2006

The decision[649] concerns the acquisition of 50% shares of Adana Kağıt Torba San. T.A.Ş. by Adana Çimento San. T.A.Ş. establishing a change from sole to joint control. The focus is on a disagreement between the Reporters and the Board, where the Board dismisses the opinion of the Reporters that the transaction is not a concentration but an anti-competitive agreement caught by Article 4 of the Law. The basic reasoning of the Reporters is that, Adana Çimento which previously was not present in the relevant product market of craft paper bag production for cement industry was refraining from a planned investment in this area of business but preferred to join Adana Kağıt Torba holding a 60% market share. Accordingly, it is alleged by the Reporters that Adana Çimento, in order to increase the output through new investment was entering into an anticompetitive agreement through a cooperative JV agreement with the market leader to create a vertical integration which may possibly impede competition toward its competitors who mostly acquire their craft paper bag from Adana Kağıt Torba. The Board disagreed with the Reporters and cleared the transaction while also rejecting the Reporters requirement to initiate an investigation. The dissenting vote of EROL, PARLAK and KARACEHENNEM draws attention to the fact that a further analysis would give way to a clearer and sounder decision.

5.5.6. Negative Clearance

In another exceptional decision[650], the Board while clearing a joint-venture transaction revokes the negative clearance previously granted to one of the parties within the same decision. The transaction concerns the establishment of a joint venture in consumer financing and banking services between a subsidiary of Boyner Holding A.Ş., namely Benkar Tüketici Finansmanı ve Kart Hizmetleri A.Ş. and Fiba Bank A.Ş.

[649] Decision No 99-35/334-205 dated 13.07.1999
[650] Decision No 01-44/433-111 dated 18.09.2001

The dissenting vote of SONBAY and ATASAYAR argue that the Board is not authorized to revoke a negative clearance within a merger decision and such a transaction requires a separate proceeding according to Article 13 of the Law.

5.5.7. Notification Timing

In the cleared decision[651] concerning the acquisition of control of Van Et Entegre Et San. Tic. A.Ş. by a shareholder named Galip ÖZTÜRK, the Board imposed fine for late notification of transaction. However, as we learn from the decision, Galip ÖZTÜRK first held 30 % shares of Van Et from the privatization of the company and increased its shares to 43.47 %. The second acquisition was made to the Authority's knowledge through a notification. However, although the Board considers Galip ÖZTÜRK as holding a controlling share when it first acquired the shares from the privatization, it also states that the control was instituted following the appointment of Galip ÖZTÜRK as the chairperson of the board of directors during the ordinary general shareholders' meeting held right after the second acquisition of shares by him.

The dissenting vote of KALDIRIMCI argues that since the control is instituted further to the board decision, a prior notification could not be placed since the decision of the board could naturally not be known whether the change of control would take place or not. Accordingly, the undertaking in question notified the change of control right after the appointment of Galip ÖZTÜRK as the chairperson.

[651] Decision No 06-36/459-121 dated 26.05.2006

6. POLICY PROPOSAL FOR TURKEY

Discovering on which principles the national legislation of a country which is candidate for membership to the EU has to be built should not be a difficult task. In fact, it becomes easier when the area of legislation is related to merger control regime, one of the primal policies of the EU competition law incorporating multi-jurisdictional aspects and cross-border capital movements. Save that almost half of the transactions notified to the Turkish Competition Authority are foreign to foreign concentrations that involve notifications and assessments in at least more than one jurisdiction worldwide.

After all, the activities under focus are simply the acquisitions, mergers or establishment of joint-ventures by previously independent undertakings in vertical, horizontal or conglomeral structures. Moreover, the arrangement consist of the selection of the set of rules to determine which transactions have to be controlled under which assessment criteria and based on which procedure. Yet, the purpose sought is to render such control as efficient as possible so as to cover transactions that really should be reviewed rendering an optimum allocation of resources. Naturally, as a country in way of integration with the EU, Turkey follows and will follow the EU principles in establishing and further improving its merger control regime. This describes a legislative harmonization through policy transfer, the rules of which are laid down in agreements reflecting the bilateral understanding of the parties.

However, a legislative harmonization should always provide room for adjustments that takes into account the nature of the subjects of the legislation. In terms of competition law, the *nature of the subjects* can be described as the surrounding economic environment, the competitive structure of the markets and the established level of the competition culture. Accordingly, different legislative environments may be designed based on the

same principles[652]. This on the other hand describes the architecture of a legislation which involves adjustments through consideration of different impetus.

Accordingly, there exist two distinct dynamics which help shape the merger legislation that has to be implemented by Turkey. First is the implementation of the basic principles of the EU, and second is the consideration of specific adjustment needs. In fact, as previously pointed out, we reckon the EU principles. However, what we tried to achieve with this thesis is to bring value to the national adjustment criteria. For doing so, we have made use of three different sources.

The first one is a ready to use input which is the amendment proposal of the Competition Authority which is made public in 2005 following a public consultation through questionnaires.

The second source is the results of the Dissenting Vote Analysis, simply reflecting the self-criticism of the Competition Board itself. We will further evaluate the results of the Dissenting Vote Analysis that was subject to case analysis in ithe previous section.

The third source is our own additional proposals shaped by a deduction from the EU merger control regime.

Accordingly, in order to determine the problem areas and further proposals in jurisdictional, substantive and procedural issues, we will compare the EU Merger regime's legislative and non-legislative elements with the conclusions of Dissenting Vote Analysis (First column in Table 17) and the Competition Board's amendment proposals (Second column in Table 17). From there, we will try to identify the remaining components of our policy proposal composed of rules and regulations, which were either entered into effect in the EU by Merger Reform or discussed during the reform process and must, in our opinion, be absolutely taken into account in the Turkish side of the legislation (Third column in

[652] In United Kingdom for example the national rules regulating competition are based on the very principles of the European Union, while still no requirement is sought for the control of concentrations.

Table 17). In this context, we did not deprive our analysis from comments on problem areas that are designed to trigger further discussions.

To put it in a simpler form, at the end of this chapter we will end up with a combined table of policy proposal of the following structure.

Table 17

Structure of the Policy Proposal

THE POLICY PROPOSAL			
	Dissenting Vote Analysis	**2005 Proposal of the Competition Authority**	**Problem Areas and Further Proposals**
Jurisdictional Issues	Calls for implementations in jurisdictional issues	Evaluation s related to jurisdictional issues	Our further proposals in jurisdictional issues
Substantive Issues	Calls for implementations in substantive issues	Evaluation s related to substantive issues	Our further proposals in substantive issues
Procedural Issues	Calls for implementations in procedural issues	Evaluation s related to procedural issues	Our further proposals in procedural issues

6.1. Jurisdictional Issues

Being formed of 27 Member States, EU's supra-national structure attaches more importance to jurisdictional aspects of the merger control, because, as mentioned in previous parts of the thesis, one of the most important problems of EU merger control regime was to fix firmly a mechanism that implements one-stop-shop principle fully. There is a two-step threshold mechanism, in effect, for selecting which mergers must be examined by the EU Commission. As for the context of Merger Reform, such threshold mechanism was maintained exactly, though it was handled in many discussions during the reform process. However, a "pre-notification referral mechanism" and the increase of the

National Authorities' responsibilities in merger control allowed an easier determination of the relevant jurisdiction.

When it is about Turkey, jurisdictional issues have to be considered in a different perception. Thus, it would suffice to speak about the power of one unique national authority which is the Turkish Competition Authority. However, in our analysis we have tried to broaden the scope of the jurisdictional issues and included instances and discussions where the competence of the Competition Authority is questioned. Furthermore, we have also counted occasions and included them within the jurisdictional issues where the overuse, misuse and under use of the powers of the Authority were put at stake.

6.1.1. Jurisdictional Issues and the Dissenting Vote Analysis

The DVA helped us discover three important areas of problem on Competition Authority's power in controlling mergers and acquisitions. The first came into question as practical hitches caused by the legislation terminating, by Law on Banking, Competition Authority's power regarding the review of mergers and acquisitions taking place in banking industry. This has been discussed above and we will herewith depict our conclusions and possible remedies of overcoming such conflicting instances.

Secondly, majority of other dissenting votes we have seen were about critics on failure of the Board decisions to meet the basic assessment requirements for notification of the transactions. These dissenting votes were either questioning the determinations on existence of a change in control and on relevant product market or were alleging that the examined transactions were not subject to notification, or the transactions, qualified as not subject to examination, were subject to examination actually. Whereas, some decisions were dissented on ground that transaction were insufficiently examined, or the decisions were only based on the information and documentation provided by the parties in the notification form. All these dissenting votes drew attention to practice deficiencies more than legislative gaps in respect of mergers and acquisitions. At that rate, it would not be wrong to say that the mentioned dissenting votes questioned Competition Authority's

deficiencies in jurisdictional examination. It is therefore opined that such discussions on the most primary elements of mergers and acquisitions can be minimized or eliminated by investing in Competition Board's capacity of examination rather than patching the legislation. However, it is also thought that a study for enrichment of the legislation would also serve eliminating such hitches. Therefore, we will draw attention to the benefit of issuance of explanatory notices that will make it easier for undertakings, party to concentration transactions, to determine whether Competition Authority have to examine such transactions. Therefore, dissenting votes lead us to the conclusion that they draw attention to the need for the implementation of guidelines and notices similar to those in EU showing direction to the relevant parties on how Competition Board will perceive the basic concepts of the jurisdictional matters set forth by the Law.

The third point we inferred from the dissenting votes points out the need for a legislative amendment that will enable prior notification of transactions to the Competition Board when parties set out their irrevocable will on implementation of the transaction.

6.1.1.1. Banking Sector Decisions Calling for Stronger Legal Assessment

There is no doubt that Turkish Competition Authority is competent for authorizing mergers and acquisitions according solely to their impact on competition. Sectoral independent regulatory agencies, on the other hand, evaluate mergers and acquisitions based on their likely impact on the development of the respective sectors. Therefore the overlap of mandates should not cause a conflict of competences. Indeed paragraph (b) of Article 8 of Law No. 4628 on the Electricity Market[653] as amended by Law No. 4646 on the Natural Gas Market[654] explicitly states that the right of the Competition Authority to issue authorizations under Law No. 4054 is reserved. A similar provision is also included in Law No. 406 on Telegram and Telephone[655] as amended last time by Law No. 4502[656] which establishes the Telecommunication Board: According to the Article 4 the provisions

[653] Official Journal no. 24335 of 3rd of March 2001.
[654] Official Journal no. 24390 of 2nd of May 2001.
[655] Official Journal no. 50 of 21st of February 1924.
[656] Official Journal no. 23948 of 29th of January 2000.

of the Law No. 4054 are reserved[657]. However, as the source of the jurisdictional conflicts in banking sector transactions, Article 19 of Law No. 5411 on Banks *de jure* excludes banking mergers and acquisitions and thus *de facto* excludes concentrations in the sector from the competence of Competition Board without any persuasive justification. As a result a dual jurisprudence, consisting of a vertical sphere and a limited horizontal sphere, exists for mergers and acquisitions control in Turkey. This is a weakness of the Turkish regime that needs to be corrected by amending the Banking Law in a way that would ensure parallelism with other sectoral regulation laws. It should be underlined that the harmonious operation of the Competition Authority with the sectoral independent regulatory agencies is essential for the well-being of the economy[658]. The priority given to a sectoral provision over general rules on competition can only be explained by the lack of a sufficiently strong competition culture in Turkey.

In a more general context, the EU criticizes the lack of allocation of duties among the regulatory authorities by stating that

> "the sector regulatory authorities such as the Energy Market Regulatory Authority, the Telecommunication Authority, the Banking Regulatory and Supervision Authority, do not ensure efficient cooperation and use of

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[657] There is one exceptional case that should be mentioned: The merger of GSM 1800 mobile telephone service companies AYCELL Haberleşme ve Pazarlama Hizmetleri A.Ş. (Aycell) and İŞ-TİM Telekomünikasyon Hizmetleri A.Ş. (Aria). Aria was an Italian-Turkish joint venture that incurred significant losses, some of them caused by roaming disputes with the established undertakings of the market. The Italian Prime Minister of the period actively lobbied to the Turkish government for the rescue of the company via a merger with the then state owned Aycell. As a result the following Temporary Article 7 was added to Law No. 406 on Telegram and Telephone by Article 17 of Law No. 4971 (Official Journal no. 25200 of 15th of August 2003) in order to specifically allow this merger:

> "Aycell Haberleşme ve Pazarlama Hizmetleri Anonim Şirketi, which was established by Türk Telekom for the provision of GSM 1800 mobile telephone services, may merge with another operator providing services under GSM 1800 concession agreement through the mediation of a new company to be established in accordance with the principles of the Turkish Code of Commerce. All necessary licence arrangements and transactions following this merger shall be carried out by the Authority."

Aslan argues that the permission of the Competition Board (Decision No. 03-81/870-399 of 18th of December 2003) was thus merely a formality. See: Aslan, *op cit*., p. 271. If this interpretation was true it would be possible to speak of derogation from the Turkish merger control regime. However Temporary Article 7 provides a possibility, not an obligation. It does not derogate from Article 4 either. Therefore the Competition Board could have prohibited the merger if it came to the conclusion that it was not permissible according to Article 7 of the Law No. 4054.

[658] Tanrıkulu, A. K. In: *AB Rekabet Hukukunda Son Gelişmeler ve Türk Rekabet Hukukuna Muhtemel Yansımaları*. Ankara, 2003: pp. 13-14.

> consultation mechanisms with the Competition Authority in order to prevent any competition distortions in their respective regulated markets yet".[659]

On the other hand, accepting the banking law with its exclusionary aspects, the decisions of the Competition Board and the related dissenting votes pointed a wide inconsistency in interpreting the requirements of the legislative environment. Accordingly, apart from our comment above, the fact of exclusion of bank transactions being accepted, the Authority should be called to enforce its assessment on its jurisdictional powers in such conflicting instances through the establishment of its position followed by an in-depth legal assessment. An internal mechanism of referral to the legal team for each such transaction in order to confirm its compliance with the position of the Competition Authority would at least minimize conflicting and time consuming practice, the creation of an inconsistent case-law and uncertainties in the minds of the parties to future transactions in the same relevant market. Accordingly, we take note of legal deficiencies in jurisdictional assessments of the Authority as an outcome of the DVA.

6.1.1.2. Need for Jurisdictional Notices and Guidelines

While analyzing the Turkish competition legislation and its approximation with EU in the light of the recent developments in mergers and acquisitions, it is significantly important to underline the reason for EU's implementation of different notices and guidelines in this field. Obviously, the main reason for the Commission to develop such explanatory tools is to provide legislative back force in its judgments.

While analyzing the dissenting votes, we have seen that, whether they are correct or erroneous, they mostly questioned the basic elements of the jurisdictional issues, namely, the concept of undertaking, control and relevant market. Although dissenting votes have more of a case specific aspect, the questions underlined by the dissenting members should and could be eliminated in the presence of a model text underlying the perception of the Authority *vis-à-vis* such concepts. Accordingly, in order to be discussed in different

[659] Commission of the European Communities. COM(2005) 561 final. Turkey 2005 Progress Report, pp. 68, 69-70.

decisions, majority of such occurrences could be eliminated in early stages of the review. Furthermore, making public the approach of the Authority would also certainly create an assessment discipline both for the notifying parties and for those who review the transactions.

To be more precise, notices on jurisdiction issues should be introduced as guidelines in addition to the legislation; within which the major concepts of jurisdictional issues are clearly defined. In that respect, we consider the relevant dissenting votes calling for a single combined jurisdictional notice as in the EU[660]. The purpose of the EU notice is described as to provide guidance to jurisdictional issues under Merger Regulation No 139/2004. It is therefore designed to enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations. The Commission underlines in the Draft Notice that the interpretations are without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

6.1.1.3. Introduction of a Prior-Notification Mechanism

After evaluating a total of 63 dissenting votes raised based on different jurisdictional concerns, we came to the conclusion that the main areas which are questioned by the Board Members concentrate on the arguments based on overuse or misuse of powers of the Authority, change of control, concept of undertaking and competence. We observed only three dissenting votes by two members of the Board in two different cases both calling for the implementation of a prior notification of the transactions before they are concluded. Holders of the votes KALDIRIMCI and ERSİN did not explicitly based their arguments on the changes brought by the new EU Merger Regulation in its Article 4. They put their own reasoning and leave no trace on whether they are inspired by the new ECMR or not.

[660] The Commission published for comments on 28 September 2006 a Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings replacing the previously published in separate texts the Notice on the concept of concentration, the Notice on the concept of full-function joint ventures, the Notice on the concept of undertakings concerned and the Notice on calculation of turnover.

Article 4 of the new ECMR titled "Prior notification of concentrations and pre-notification referral at the request of the notifying parties" is designed to provide a possibility to the parties of a transaction for prior notifications. The article states that

> "concentrations … shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension"[661].

This finding explains the very reasoning behind the DVA which helped us determine a topic that can be considered as a call for a revision and is directly based on a factual need and not on a direct inspiration from the originating EU legislation.

Accordingly, introduction of a prior notification mechanism into the Turkish legislation may be a useful tool for undertakings engaging in transactions which represent serious competition concerns in order to take appropriate measures before they sign their contract. However, it is our opinion that the prior notification in the EU is primarily designed to help the parties of a transaction to determine the right jurisdiction to notify in order to minimize the period of review and clearance.

Erdem, in that respect is "persuaded that the possibility of notification before the conclusion of a binding contract and before the realization of the concentration operation, as foreseen by the EU Regulation, would be necessary for Turkish competition law not only to facilitate the procedure adopted by the Competition Board but also to permit the parties to understand whether the contract and the negotiation is contrary or not to the merger legislation, before they assume definitive engagements"[662].

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[661] ECMR Article 4
[662] Erdem, *op cit.,* p. 30.

6.1.2. Jurisdictional Issues and the 2005 Proposal of the Competition Authority

The Competition Authority does not bring a proposal regarding the jurisdictional issues. The Draft Proposal notifies that The Board will issue communiqués to announce which transactions are concentration transactions, which transactions require permission by prior notification to the Board, and the procedure and substance of the notification. Accordingly, it leaves the door open for its future jurisdictional amendments. However, if it can be considered as part of jurisdictional issues, we will refer to the terminology used in the Draft Proposal and the structure of the articles that regulate mergers.

Accordingly, the first amendment made to the article is using the expression "concentrations" instead of "mergers and acquisitions". This would contribute formation of a competition law terminology on one hand, and eliminate, in particular, the confusion between the merger and acquisition definitions provided for in Turkish Code of Commerce and the competition law practice. Indeed, this terminology change would also be beneficial in sense of legislative adaptation, as EU legislation refers to this terminology.

Furthermore, collecting the dispersed clauses in the Law governing concentrations under one single article would definitely create a more understandable and user-friendly structure.

6.1.3. Problem Areas and Further Proposals

Although not mentioned within the dissenting votes nor included in the Competition Authority’s proposal, the possible injection into the Turkish legislation of issues that are discussed and implemented into the EU merger legislation requires further consideration. Within this framework, three issues are of major importance.

Firstly, we have determined three areas where the jurisdictional powers and the autonomy of the Competition Authority were (or still are) at stake. We will draw attention to these areas.

Secondly, the issue of revision of the jurisdictional thresholds of the Turkish merger legislation should be discussed. This has been a matter of debate during the reform process of the EU but the EU thresholds remained unchanged.

Thirdly, an amendment that has taken place in the EU consisting of the nature of the change of control should be discussed. This amendment was undertaken by the EU in order to align the legislation with the practice. It consists of identifying the nature of the change of control which should be "on a lasting basis". Accordingly, the amendment involved no structural changes in the assessment of the mergers in the EU. However, we have considered the application of a parallel approach by the Turkish legislation in order to eliminate future confusions.

6.1.3.1. Challenges against the Autonomy of the Competition Authority

By virtue of its Article 20, the Competition Law establishes an administrative and financial autonomy to the Competition Authority[663]. Accordingly, the Turkish Competition Authority should be considered as an independent regulatory agency despite the contrary arguments that question the existence of such agencies within Turkish administrative law at an abstract level[664]. Independent regulatory agencies are public authorities with independence from other branches of the state, autonomy and regulatory competence that

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[663] "No organ, authority and person may give commands and orders to influence the final decision of the Authority." Law No: 4054 on the Protection of Competition, Article 20.

[664] Akıncı, *op cit*., pp. 11-14 Karacan, A. İ. Özerk Kurumların Özerkliği. *Rekabet Dergisi* 8, 2002: p. 9; Öztürk, E. *Türk İdare Sisteminde Rekabet Kurulunun Yeri ve Diğer Bağımsız İdari Otoritelerle Karşılaştırılması*. Ankara, Rekabet Kurumu, 2003: pp. 37-39. The other independent regulatory agencies in Turkey are the Banking Regulation and Supervision Authority, the Capital Markets Authority, the Energy Market Regulation Authority, the Public Procurement Authority, the Radio and Television Supreme Council, the Savings Deposit Insurance Fund (that was previously a branch of the Banking Regulation and Supervision Authority), the Telecommunication Authority and the Tobacco, Tobacco Products and Alcoholic Beverages Markets Regulation Board. The Sugar Authority and the Restructuring Board can also be conceived as independent regulatory agencies.

operate in sensitive spheres of public life[665]. Their existence is justified by the complexity of certain regulatory and supervisory tasks that require expertise[666], the need for rapid implementation of public authority in certain sectors as well as the drawbacks of political interference in the operation of markets[667], all of these grounds being relevant to the protection of competition. European Commission has observed that, while the enactment of competition laws -as part of their accession process to the EU- was not controversial in Central and Eastern European Countries, once their application began, the national competition authorities faced objections and resistance from the relevant actors[668].

The Competition Authority itself draws the attention to its autonomy and links this position with general international application while also focusing on the duties of Turkey towards EU. The Authority points out that such an autonomy possessed by the agency is in compliance with the international general understanding:

> "Furthermore, the Competition Authority's operating as an autonomous agency is also very important as regards the legislative alignment in the area of competition policy with the *Acquis Communataire*. As a matter of fact, this point was also importantly underlined in the Progress Report prepared by the EU Commission."[669]

The independence of the Turkish Competition Authority, which is ensured by the rules governing the appointment of its members, their terms of duty, personnel management and financial resources[670], has definitely had a positive impact on its performance. The Authority managed to deal with the twin tasks of processing a large number of applications and developing the necessary secondary legislation despite its stretched human resources in the first years of its operation[671]. It also carried out several activities including informative and scientific meetings, training programs and publications

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665 Öztürk, *op cit*., pp. 14-18.

666 Karacan states that these agencies should focus on the regulatory tasks which are vital and strategic instead of the supervisory ones which are subordinate and therefore could be transferred or even outsourced. Karacan. *ibid*: pp. 5-7.

667 Eğerci, *op cit*., pp. 64-65; Öztürk, *op cit*., p. 10.

668 Develleves, *op cit*., pp. 14-15.

669 Rekabet Kurunu 6. Yıllık Rapor. Ankara, Rekabet Kurumu, 2005

670 Öztürk, *op cit*., pp. 30-34.

671 Mumcu, A. & Zenginobuz, Ü. Competition Policy in Turkey. *Proceedings of the ERF's Eight Annual Conference,* 2002.

for supporting the burgeoning of a competition culture in Turkey[672]. İnan notes that initiatives for the enforcement of competition provisions without the lodging of complaints, such as sectoral competition reviews would consolidate such efforts as the related undertakings would feel it necessary to discipline themselves and so internalize competition rules[673]. According to an OECD peer review, Competition Authority has been successful in the enforcement of competition law including the implementation of mergers and acquisitions rules and has established itself as an effective agency with an outstanding reputation[674]. The study also finds that there is room for some simplification and improvement in Turkish merger control regime and that following the EC merger reform a number of differences have arisen between the Turkish system and its European counterpart which has served as a model in the past and needs to be adopted again in the future because of Turkey's accession process to the EU[675].

Competition Authority can be considered as the only competent body for the authorization of mergers and acquisitions in Turkey. However, there are three instances where the absolute national authority of the Competition Authority in merger control regime is under question.

6.1.3.1.1. Overlapping Duties of the Ministry of Industry and the Competition Authority

Although never came into question nor discussed, one may argue that there is an overlap of duties –in definition- between the Competition Authority and the General Directorate of Consumer and Competition Protection of the Ministry of Industry and Trade. Article 14/A of Law No. 3143 on the Organization and Tasks of the Ministry as amended by Statutory Decree No. 494 provides that the duties of General Directorate include cooperation and coordination with other bodies for the development of policies for

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[672] Parlak, M. In: *Rekabet Hukukunda Güncel Gelişmeler Sempozyumu II.* Ankara, Rekabet Kurumu, 2004: pp. 5-6.
[673] İnan, N. In: *AB Rekabet Hukukunda Son Gelişmeler ve Türk Rekabet Hukukuna Muhtemel Yansımaları*. Ankara, 2000: p. 47.
[674] OECD. (2005), *op cit*., pp. 7.
[675] OECD. (2005), *op cit*., pp. 24-28.

creating a healthy competitive environment, monitoring the activities and especially price developments in markets for goods and services, carrying out examinations and research with a view to eliminate factors that prevent the formation of prices according to competitive conditions, take measures against agreements, practices and decisions that prevent, distort or remove competition, the abuse of dominant positions and mergers, acquisitions and hostile takeovers that significantly decrease competition in a way that would cause monopolization[676]. However the General Directorate is not equipped with the means necessary to apply and enforce these provisions. The efforts for the preparation of a competition law were resurrected in 1992 and the General Directorate of Consumer and Competition Protection was established in the following year. Therefore it is sensible to assume that the political authority of the period first planned to keep the matter of protection of competition under its direct political supervision through the Ministry of Industry and Trade. In practice the General Directorate's activities related to protection of competition has been limited to policy-making efforts and assisting the organization of the Competition Authority. It has concentrated on the protection of consumers since the establishment of the Authority and has not really participated with a meaningful manner to the development of competition policies as required in Article 14/A[677]. However, although silent, the competition-related provisions of the Article are still in force and provide a window of opportunity to the political authority for circumventing the independence of the Competition Authority. Even though in such a case it would be possible to apply to the competent administrative court for the annulment of the Ministry's actions based on the argument that Law No. 4054, being a law enacted subsequently to and more specific in scope implicitly annulled the provisions in question, the mere attempt of their application would damage the integrity of Turkish competition policy. Another drawback is that the General Directorate's mandate can be utilized to reduce the Competition Authority's role in a legislative drafting process for the amendment of competition law to just giving

[676] The objective of Article 14/A of Law No. 3143 vis-à-vis mergers and acquisitions is narrower than Article 7 of Law No. 4054 since the former seeks to prevent monopolization through concentration. This difference is probably caused by a misreading of Article 167 of the Constitution by the drafters of Law No. 3143 that categorized agreements, practices and decisions that prevent, distort or remove competition as the causes of cartels and mergers and acquisitions as those of monopolization.

[677] For instance it was not represented in the Competition Law and Policy Special Expertise Commission, that was founded during the preparation of Eight Five Year Development Plan. See: . See: Devlet Planlama Teşkilatı. Sekizinci Beş Yıllık Kalkınma Planı Rekabet Hukuku ve Politikaları Özel İhtisas Komisyonu Raporu. Ankara, 2000: p. vi.

opinions instead of drafting the original amendment draft and so setting the agenda. Therefore Law No. 3143 should be amended in order to explicitly abolish the relevant paragraphs of Article 14/A. Certainly, none of the above interference by the General Directorate (or the Ministry) would serve for the proper functioning of the Turkish competition regime that is aligned with the EU requirements. However, it will be noteworthy to better underline the role of the Ministry and that of the Competition Authority. The autonomous character of the Authority makes it intact from political pressure. However, it is true that politics, in a more institutionalized evaluation, shape the direction of the governing system in a country. And this should find its place in a ministry. Accordingly, it is not surprising to see a ministerial body equipped to assist the competition policies. This is not a co-habitation neither a symbiotic presence. This is the political reflection of a regulated area. Conformingly, the Article 20 of the Law which establishes the autonomous character of the Authority also creates a link between the two bodies by stating that the Ministry to which the Authority relates is the Ministry of Industry and Trade (as also defined in Article 3 of the Law). The legal grounds of the Article clearly defines that "there is a need for an institution which operates independently, has administrative and financial autonomy and is able to take its decisions away from the influence of any organ, authority, body and person, and freely, to carry out transactions relating to the legal regulations as well as the measures, regulations and supervisions aimed at the protection of competition, provided for by this Law. The Competition Authority has been formed based on this need." The grounds of the Article 20 clearly position the relation of the Authority with the Ministry by underlining that this relation is in administrative terms.

In terms of the application of the law, the Ministry has both a voice in the decision taking body and a recommending role strengthened within different Articles of the Law. First, Article 22 as amended by the Law No. 5388 dated 02.07.2005 orders the appointment of a member of the Board (out of a total of seven members) from the Ministry of Industry and Trade. Second, Article 9 of the Law establishes that one of the grounds for action against the infringements of the Law is the "request of the Ministry". According to the Article, if the Board, upon informing, complaint or the request of the Ministry or on its own initiative, establishes that articles 4, 6 and 7 of the Law are infringed, it notifies the

undertaking or associations of undertakings concerned of the decision encompassing those behaviour to be fulfilled or avoided so as to establish competition and maintain the situation before infringement. Surprisingly, the ground of the article is not detailed and passes over the definition of the "act of requesting". If we interpret the act of requesting as "ordering for action" we will end up by concluding that the Ministry is at least able to trigger an investigation against alleged violations of the law, or more specifically, against merger and acquisition transactions that allegedly harm the competition in the market.

6.1.3.1.2. Overlapping Duties of the Privatization Law and Competition Law

Competition policy acquires a special function in the context of developing countries: ensuring that the market dynamics following deregulation, privatization and inflows of foreign direct investment do not erode away the competitive process[678]. Especially the privatization of natural or legal monopolies would entail significant costs to the consumers if there are no competition rules[679].

However while Law No. 4054 makes no reference to acquisitions that take place via privatization, Law No. 4046 of 27th of November 1994 Concerning Arrangements for the Implementation of Privatization and Amending Certain Laws and Decrees with the Force of Law[680] takes into consideration competition concerns[681]. Article 2 of the Law No. 4046 lists "preventing the negative effects resulting from a monopolistic structure that may occur" among the principles of privatization implementations. Article 16 titled "Protection of Competition following the Privatization Process" goes much further:

> "As a result of the privatization process in accordance with the provisions of this Law and with regards to the protection of the health and security as well as the economic benefits for consumers in accordance with the operation of the goods and

[678] Aktaş, *op cit*., pp. 46-51; Singh, *op cit*., pp. 8-9.
[679] Öz, G. Özelleştirme Sürecinde Rekabet Kurumunun Yeri. In: *Rekabet Politikası ve Özelleştirme Sempozyumu*. Ankara, Rekabet Kurumu, 1998, p. 48.
[680] Official Journal no. 22124 of 27th of November 1994.
[681] Erdem, E. *Birleşme ve Devralmalar*, İstanbul, Beta, 2003, p.105.

> services markets, economic necessities and public benefits, including monopolies within the boundaries of the Republic of Turkey, the following shall be prohibited:
>
> a) Dividing up of good and services markets and sharing and/or controlling every type of market resources and units,
>
> b) Creation of barriers or limitations for the activities of competitors or the prevention of new players from entering into the market,
>
> c) Applying different conditions on contestants with equivalent status for equal rights, obligations and liabilities,
>
> d) Obliging buyers to purchase other goods and services in conjunction with certain goods and services, or to make compulsory the sale of certain goods and services demanded by wholesalers or intermediaries on display of other goods and services or to place forth conditions for the resale of certain goods and services already supplied.
>
> Necessary precautions are taken by the Ministry of Industry and Commerce safeguarding against the existence of any type of legal operations and acts in the form of mergers or takeovers through certain agreements, applications and decisions in a manner directly or indirectly, seriously preventing, disrupting or restricting competition and causing creation of monopolies, are observed.
>
> The procedures and principles for the application of this Article are determined through the regulations prepared by the Ministry of Industry and Commerce and approved by the Council of Ministers. Exemptions and legal and criminal sanctions applicable to circumstances mentioned in paragraphs (a), (b), (c) and (d) of this Article are subject to provisions of the relevant Legislation."

The contradictory situation resulting from the inclusion of such detailed competition provisions in the Law No. 4046 seems to be intentional since this Law was adopted merely two weeks before the Law No. 4054. Of course such an intention had no legal backing since competition law is not interested in the legal or formal qualifications of concentrations, but their economic effects. Anyway the opinion of the Court of State was asked in order to determine which law was to be used in privatizations. In its decision No E.995/13-K.995/153 of 14.07.1995 the First Chamber of the Court of State determined that Law No. 4054 had implicitly annulled Article 16 of the Law No. 4046[682]. Thus, a potential threat to the integrity of Turkish competition regime was proactively averted.

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[682] Tan, T. Özelleştirme Sürecinde Rekabet Kurumunun Yeri. In: *Rekabet Politikası ve Özelleştirme Sempozyumu*. Ankara, Rekabet Kurumu, 1998: pp. 27-28.

An efficient operation of competition aspects of privatization proceedings can only be achieved by the establishment of necessary coordination between the Competition Authority and the Privatization Administration and other public authorities carrying out privatizations[683]. Indeed Tamer Müftüoğlu, an ex-president of the Competition Board has stated that the experience of the Authority reveals that the actions of public authorities are likely to distort competition at least as those of the private sector[684].

6.1.3.1.3. Draft Commercial Law and the Institutional Autonomy of the Competition Authority

With reference to the long debated definition of "mergers" and "acquisitions" within the triangle of Competition Law, Banking Law and the Commercial Law, another exclusionary derogation is on its way with a definition clause within the new Draft Commercial Law[685]. Inan argues that the Draft Commercial Law narrows the definition of mergers and acquisitions to an unacceptable point with regard to merger and acquisition law[686].

According to Article 136 of the Draft Law companies can merge either by the formation of a new entity or by acquisition of a company of another one by disappearing the legal entity of the latter. Article 134 (2) of the same Law saves the provisions of the Competition Law No: 4054 and the Privatization Law No: 4046 which are not in contradiction to the specified section of the Draft Law (Articles 134 to 194). The problem here is that, as Inan argues, the Draft Law proposes only two ways for transactions to be legally defined as mergers and acquisitions. However, the Competition Law has a much

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683 Öz, *op cit*., p. 52.

684 Müftüoğlu, T. In: *Rekabet Politikası ve Yoğunlaşmaların (Birleşme/Devralmaların) Kontrolü Sempozyumu*. Ankara, Rekabet Kurumu, 2003: p. 4.

685 The Draft Law is submitted by the Government to the Turkish Grand National Assebly.

686 İnan, N. Önemli ve Tehlikeli Bir Sorun: Yeni Ticaret Kanunu Taslağı ve Rekabet Mevzuatında Birleşme – Devralma Kuralları. In: *Rekabet Forumu* 28, 2006, p. 3.

wider definition and forms for mergers and acquisitions which is simply formulated as "change of control" embracing joint ventures, change of control in a single entity, transfer of rights and other possible forms falling outside the definition contained in the Draft Commercial Law.

Inan draws the attention to the fact that as the definition of mergers and acquisitions in the Draft Law is narrower that that of the Competition Law, a multitude of forms of mergers and acquisitions will fall outside the scope and their consideration shall be excluded from the Competition Law since they will be in contradiction with the Article 134 of the Draft Commercial Law. Inan also notes that this controversy can be dealt through a series of interpretation which, in its turn, will create unnecessary application problems and administrative law burdens.

However, despite the criticism of Inan, Aslan[687], in its consideration of a similar clause contained within the currently applicable Commercial Code, takes the view that the two legislations are concentrating on different aspects of the matter. According to Aslan, Turkish Commercial Law does not concern the legal aspect of the process. Aslan defines that under section 146/1 of the Commercial Law, two forms of mergers are mentioned. First of them is; two companies merging within the framework of a new company; and the second is; one of the companies loses its juridical personality and unites under the other company's juridical personality, which is called acquisition. Consequently, according to Aslan, in order to consider a transaction a merger, there must be two separate commercial companies presently existing, at least juridical personality of which must end thereupon. In case of merger, juridical personality of both will and a new commercial company forms. In case of acquisitions, juridical personality of one of the companies ends, whereby juridical personality of the other maintains.

Aslan underlines that the Competition law is primarily concerned with the economic aspect of the transaction which is the generation of a new and stronger economic power by an undertaking uniting its economic power with another undertaking, no matter whether it

[687] Aslan, *ibid*.

is implemented through legal ways set out in Turkish Code of Commerce, or through factual situations, or between natural or juridical persons. Therefore, Aslan argues that the Competition Law focuses on the economic integration or concentration which is a relatively more comprehensive term covering merger and acquisition operation and the legal pattern of economic concentration does not bear so much importance in sense of competition law, indeed.

6.1.3.2. Proposal for a Complete Restructure of the Thresholds

The complicated turnover threshold test in the EU is used as a primary tool to define the competent jurisdiction of transactions. This can either be the Commission or a single or a set of national competition authorities. However, in Turkey's case, except from the unidentified procedure created within the Customs Union Decision for transactions affecting trade within the Customs Union, there is only one authority authorized for the clearance of the mergers and acquisitions, the Turkish Competition Authority.

During the reform process, of the EU merger legislation, the threshold levels which are a major jurisdictional issue were subject to long discussions. The main purpose behind this discussion was whether to review the threshold levels in order catch the most transaction which fall within the jurisdiction of different member states but still not reaching the EU level. The EU did not change its threshold levels but remedied the situation by introducing new referral mechanisms which are subject to strict time limits. In that regard, although not raised in dissenting votes, for the sake of getting the most from the EU Merger Reform, and since a referral mechanism cannot be introduced to Turkish merger legislation based on the existence of only one competent authority, we felt the necessity to ask ourselves whether Turkey should anyways revise its thresholds towards a laxer regime (by increasing the thresholds) in order to reduce the number of the cases which may be assumed to create a bureaucratic burden, or towards a tighter regime (by decreasing the thresholds) in order to catch more transactions and strengthen its control over mergers.

Article 4 of the Communiqué No 1997/1 lays down those transactions that require authorization from the Competition Board. Other mergers and acquisitions, while fitting the definition of concentration, are not expected to create a significant decrease in competition in a given market. According to the Article, those transactions where the "total market share of the undertakings that carry out the merger or acquisition exceeds 25 % of the market in the relevant product market[688] 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[689]," needs to be authorized. The Merger Communiqué thus adopts a dual or twin-track approach that is two different criteria for determining the scope of merger control: the combined market share threshold criterion and the combined turnover threshold criterion.

The turnover threshold criterion has two important features. First, since the Law defines undertakings with an economic perspective and therefore is not interested in the legal personalities, the combined turnovers of the merging, acquiring or joint venturing parties and those undertakings that are economically dependent to them are taken into consideration. This principle is also valid for the market share threshold criterion[690]. Second, the Communiqué mentions the total turnover, i.e. not only the turnover obtained in the relevant product market[691].

The calculation of turnover is a complex technical matter of accountancy, however less so compared to the practice in the Community merger control regime which needs to deal with multiple jurisdictions[692]. According to the Merger Communiqué, turnover "shall comprise the net sales achieved in the preceding financial year, in accordance with uniform scheme of accounts" excluding the sales of the relevant undertakings between

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[688] The 25 % market share threshold in the relevant product market is assessed to be too small for creating significant market power. Aslan therefore argues that the Competition Board's actual motive for setting this threshold is the desire to monitor developments of a certain magnitude in the markets for goods and services. See: Aslan, *op cit*., p. 270; Sanlı, *op cit*., p. 447.

[689] The threshold of TL ten trillion in the original text of the Communiqué was amended by Communiqué No. 1998/2.

[690] Aslan, *op cit*., p. 272.

[691] Aslan, *op cit*., p. 275.

[692] See: Kulaksızoğlu, *op cit*., pp. 79-125.

themselves[693]. If the concentration is the result of a partial acquisition only the turnover of the transferred part is excluded from the turnover base.

Coming to the original issue, we felt the need to ask ourself what criteria a jurisdiction has to take into account when determining the thresholds. The answer may generally be framed as it should be set according to the desired level of the policy strictness and the economic realities. The International Competition Network (ICN) specifies a set of advice for its members for their application of reasonable thresholds[694]. The Principles set by the ICN's Recommended Practices require the thresholds to be principally determined based on the local nexus criteria (the transaction should be next to the jurisdiction) and on the activities of each of at least two of the undertakings and/or the acquired business. The ICN also recommends the threshold requirements to be clear and understandable, to be based on objectively quantifiable criteria and finally to be based on information that is readily accessible.

First of all, Turkey meets the local nexus criteria by taking into account the parties' figures generated within Turkey. However, in Turkey "minimum of at least two of the undertakings having activities within the jurisdiction" is not set as a pre-requisite. Accordingly, the thresholds may be met by one of the parties. For other criteria of the ICN, the application and the wording of the legislation show that the threshold requirements are clear and understandable in terms of internationally accepted accounting rules[695]. However, the share based test is usually criticized due to its nature of being subject to difficulties of defining markets and lack of objective reliable sources for market share data[696]. The criterion for being based on information that is readily accessible is also met for the turnover thresholds since they are based on official accounting data.

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[693] The Merger Communiqué was supplemented with detailed rules for the calculation of the turnovers of financial institutions by Communiqué No. 1998/6.

[694] International Competition Network Recommended Practices for Merger Notification Procedures

[695] However, due to the wording of the article it is not clear whether the statement "in the relevant product market" also referred to the turnover requirement. Interestingly, in the first periods of its activity, the Authority itself interpreted the article both ways and has issued decisions based on the whole turnover of the parties including the entities' turnovers that they were controlling notwithstanding their field of activity.

[696] Reeves, T. & Russell, H. European Merger Thresholds vs the ICN. *Global Competition Review* 24 (4):, 2005, p. 24.

6.1.3.2.1. A Statistical Study on Thresholds

We have conducted a study with 426 merger decisions taken between the years 1998-2006 where we determined from the texts of the decisions whether they met only the

Table 18

Decisions Number by Satisfied Thresholds

Passing Test	# of Decisions	%
Turnover Threshold	189	44
Market Share Threshold	125	29
Turnover and Market Share Threshold	112	26
TOTAL	**426**	**100**

turnover threshold, market share threshold or both.

It was interesting to see that 74 % of the transactions could be caught by the legislation even if there were no market share threshold test. We also determined that none of the transactions which are caught by meeting only the market share threshold are prohibited. Furthermore, around 70 % of such transactions are foreign-to-foreign transactions. It would also be beneficial to combine this information with the fact that out of a total of 623 transactions caught by the thresholds there are only 3 prohibitions and 19 conditional clearances. Accordingly, we believe that the abandonment of the market share test by the Turkish merger legislation as ICN strongly advises[697] should be included in the short-term agenda of the Competition Authority[698].

[697] OECD recommends the abolition of the dual criteria approach and gives predominance to turnover thresholds. OECD, 2002, *op cit*., p. 12. Furthermore, although the Turkish merger control regime takes its EC counterpart as a model, the EU member states' applications are far from reflecting uniformity with the EU.

[698] A thorough analysis of other facts such as the market conditions in which parties to transactions satisfying only the market share threshold are operating would provide with a sounder decision in deciding whether to abolish the market share based test or not.

6.1.3.2.2. A Comparative Study on Thresholds

In a second study we compared the threshold mechanism designed by the Turkish competition law to that of a set of selected EU Member States' in order to see whether there might be a necessity for a revision. In order to be able to do so, we have gone through the merger legislation of those Member States and gathered their currently used thresholds and test mechanisms. We have minimized the figures[699] in order to compare only the general combined turnover and market share requirements to at least see whether we can end up with rational figures depending on the size of the economies. We also introduced the figures of Turkey in order also to be able to comment on a possible adjustment.

Table 19

Turnover Thresholds and Test Used in Selected Countries

	Combined Worldwide Turnover (€)	Combined National Turnover (€)	Market Share Test
Austria	300.000.000	15.000.000	
Cyprus		3.400.000	
Estonia	32.000.000		
Germany	500.000.000		
Hungary		40.000.000	
Iceland	11.500.000		
Ireland	40.000.000		
Lithuania		9.000.000	
Malta		1.500.000	
Norway		2.400.000	
Poland	50.000.000		
Denmark		510.000.000	
Greece		150.000.000	35%
Italy		411.000.000	
Latvia		411.000.000	40%
Portugal		150.000.000	30%
Slovak Republic	30.000.000		
Slovenia		33.000.000	40%
Spain		240.400.000	25%
TURKEY		**13.700.000**	**25%**

[699] We did not include multiple tests and conducted the analysis with the general conditions to meet as combined worldwide or national thresholds or market share thresholds.

First of all, we have to note that the 25 million YTL turnover threshold is implemented by Turkey in 26.03.1998 by the Communiqué No 1998/2 replacing the 10 million YTL threshold which was initially implemented by the Communiqué No 1997/1. In order to come to a sounder analysis, we strongly advice to consider the foreign cuurency value of such thresholds since, at those times Turkey was a high inflation country and the value of its currency was depreciating steadily against foreign currencies. Accordingly, the below table reflects the EURO value of the thresholds at the time of their introduction and as of the end of the year 2006. It is clear that the current threshold level is way below the level set in time of the making of the legislation.

Table 20

Evolution of Thresholds in Turkey

Date	Threshold in YTL	Threshold in €
12.08.1997	10.000.000	57.877.068
26.03.1998	25.000.000	96.450.617
31.12.2006	25.000.000	13.528.138

We have observed that, despite the general application of the Commission for merger transactions calling for its review, the Member States designed their threshold mechanism based on their national market structures, needs and the motivation level for implementing a relaxed regime or not. Bearing in mind that, mergers and acquisitions are the deriving forces of a dynamic economy and should not be perceived as transactions within the territory of a single state, encouraging policies are also introduced in competition regimes to welcome foreign direct investments. A good way of doing this can be the establishment of low thresholds in order to minimize bureaucratic burdens, induce savings on the sources of the authorities (money and time) and encourage capital inflow. However, after reviewing the threshold applied in most of the EEA countries we have observed that in many of the member states the turnover thresholds are relatively low and can easily be triggered. In some member states, worldwide turnover thresholds at easy-to-reach levels are introduced (e.g. Estonia, Iceland, Ireland, Poland and Slovak Republic with worldwide turnover thresholds between 11-50 million euros). The International Competition Network (ICN) also criticizes these thresholds and calls for increases or

abandonment of such low thresholds. Another criticism by the ICN is related to the inexistence in some countries of the minimum national turnover requirement for each of at least two parties. In avoiding the thresholds to be met by one party alone, the ICN requires the introduction of minimum national turnover requirement for each of at least two parties and abandon the share-based test.

Below, for demonstrative purposes, we tried to depict some of the EU member states that apply "at least two parties" conditionality. As the figures show, we were unable to observe a correlation based on the size of the economies. However, except from Austria, Norway and Portugal, relatively small economies implemented tests ranging between 500.000-2.000.000 Euros.

Table 21

"At Least Two Parties" in Selected Countries

Jurisdiction	"At least two parties" conditionality
Austria	At least two parties each have worldwide turnover of €2 million.
Denmark	At least two parties each have Danish turnover of approx €40 million
Greece	At least two parties each have Greek turnover of €15 million
Hungary	At least two parties each have Hungarian turnover of approx. 2 million
Iceland	At least two parties each have worldwide turnover of approx. € 570,000
Lithuania	At least two parties each have Lithuanian turnover of approx. €1.5 million.
Norway	At least two parties each have Norwegian turnover of approx. €580,000.
Portugal	At least two parties each have Portuguese turnover of € 2 million;
Slovak Republic	At least two parties each have Slovak turnover of approx.€ 9 million
Spain	At least two parties each have Spanish turnover of €60.1 million

6.1.3.2.3. Threshold Mechanism Proposal for Turkey

In conclusion, we noticed that Turkey have to abandon the market share test, introduce the "at least two of the parties" conditionality and increase the turnover requirement not only because the ICN and OECD recommend it so, but based on (i) the fact that the Turkish currency is drastically depreciated since the first introduction of the thresholds, (ii) the analysis that show that only 30 % of the cases are caught by market share threshold and cleared by the Board.

Accordingly, the Authority used its financial and human resources for those cases the majority of which are foreign to foreign mergers. We believe that the above adjustments will result for the divergence of those resources to the enforcement of other anti-competitive practices such as cartel formations and abuses of dominance.

6.1.3.3. Duration Criteria for the Change of Control

The ECMR has introduced the conditionality of change of control on a lasting basis, a concept which was *de facto* applied by the Commission but inexistent in the jurisdiction. The ECMR therefore does not deal with transactions resulting only in a temporary change of control.

In that respect, we strongly advise the Turkish legislation to introduce this wording in order to overcome discussions in agreements that are entered into for a definite period of time. Such agreements may be considered as concentrations if they are renewable or, even in cases in which agreements foresee a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned. Furthermore, such an amendment will also clarify the situation of several operations occurring in succession, where the first transaction is only transitory in nature.

6.2. Substantial Issues

Substantial issues are the most controversial matters in merger control because the decision of whether a transaction should be cleared or not derives from an assessment structured on substantial issues. Furthermore, substantial issues not only determine the destiny of a transaction through its clearance or not but also incorporate criteria that create circumstances in which transactions are cleared subject to conditions.

6.2.1. Substantial Issues and the Dissenting Vote Analysis

We have determined 74 dissenting votes on substantial issues. In classifying the dissenting votes we have surprisingly observed to see the concentration on ancillary restraints, an area less discussed in the EU when compared to the latest years' topics related with competition concerns in the horizontal mergers such as the dominance test, collective dominance and unilateral or coordinated behaviors. Accordingly, as the major concern, there are 29 dissenting votes, almost all putting at stake the permissible periods of non-compete obligations and other restrictions such as confidentiality clauses.

The second most frequented issue with 22 dissenting votes was the creation of dominant position where the holders of the dissenting votes argue in most decisions that the transaction in question may lead to the creation of dominant position and by that means lessen the competition significantly. However, in three different prohibition cases concerning the sale by the state of cement factories previously owned by Uzan Group, dissenting votes questioning the competition concerns of the Authority are interesting in their approach to the "purpose" of the competition policy. Among those three decisions the sale of Ladik Çimento is striking in its nature of being the sole prohibition decision raising concerns on post-merger collusion among the competitors. In that respect we analyzed whether the dissenting votes on dominance issues call for a possible introduction of the SLC Test or for remedying an alleged legislative gap excluding the prohibition of collective dominance.

The third subject consist of the criticism in dissenting votes on (i) the assessment of privatization transactions (ii) insufficient examination of the facts allegedly leading to assessment errors, (iii) the assessment of joint-ventures and (iv) determination of relevant market. We concluded that those critics call for the establisment of an economics department and the appointment of a Chief Economist within the Competition Authority for a sounder and reliable assessment of the transactions.

Finally, as a result of the Dissenting Vote Analysis for the substantial issues, we have concluded that the criticism in dissenting votes on the follow-up of conditions imposed as remedies call for a separate guideline on the application and securing the realization of such conditions and remedies.

6.2.1.1. No More Separate Assessment of Ancillary Restraints

Ancillary restraints are of great economic importance for the parties to a transaction. Accordingly they have to be handled with careful analysis of all the facts surrounding the transactions. Although it may be argued that the Board has produced a small, but coherent[700] and clear[701] body of decisions on ancillary restraints[702], the dissenting votes in different cases, however, complain about the inability of the Authority to establish a consistent approach to ancillary restraints. We especially draw attention to the dissenting votes of ERSİN and KALDIRIMCI in that respect claiming continuously during the year

[700] Gülergün, *op cit.*, p. 64.

[701] Aslan, *op cit*., p. 302.

[702] Decision on the acquisition of Meges Boya Sanayi ve Ticaret A.Ş. by SKW Bauchemie Holding A.G. (Decision No 91/736-153 dated 19.11.1998) was the first decision where ancillary restraints were taken into consideration. While the parties had applied for a negative clearance the Board granted an individual exemption to the acquisition with the condition that the duration of non-competition clause included in the contract be limited with three years instead of an indefinite time period. In a decision on the acquisition of Vateks Tekstil San. A.Ş. by PGI Nonwovens B.V. (Decision No 99-12/94-36 dated 03.03.1999) the Board examined the non-competition obligation with reference to EU application: "Court of Justice of the European Community (ECJ) has reached the verdict '(…) bringing forth, by an undertaking acquiring another undertaking, of a prohibition of competition in the relevant markets for the undertaking that is bought is not incongruous with Article 85 with the condition that the duration is established' in its decision on Remia vs. Commission. To sum up in the Community practice ancillary restraints are accepted subject to the conditions that they are mandatory, objective and reasonable". The Board's reference to the EC practice should be carefully dealt with since members of the Board criticize the automatic application of the EU approach to ancillary restraints while underestimating conditions specific to the transactions under review.

2006 that non-compete obligations should not be intervened by the Authority and should be cleared as notified[703] with special reference to the economic and management efficiencies. We also observe other dissenting votes in different cases claiming that the cleared restrictions should be limited or decreased in terms of period since they either lacked transfer of know-how or the grounds for such transfers are thought to be unjustifiable[704]. Conformingly, Gülergün argues that the Board has not discussed certain issues of importance for ancillary restraints such as the question of proportionality, the appropriateness of the length with respect to the agreements under consideration and whether or not the scope of restraints overlap with the scope of the operations of the acquired undertakings[705].

The EU Merger Reform brought an end to the separate assessment of the ancillary restraints in merger decisions. The new ECMR requires the ancillary restraints to be evaluated as part of the transaction under review and calls for the clearance or prohibition of them as part of the transaction under general competition law. In its recital, the ECMR clarifies that

> "Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such (ancillary) restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision."[706]

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[703] Decision No 06-11/130-32dated 09.02.2006; Decision No 06-16/188-48 dated 02.03.2006; Decision No 06-20/257-64 dated 23.03.2006; Decision No 06-59/780-229 dated 24.08.2006; Decision No 06-59/774-227 dated 24.08.2006;

[704] Decision No 04-81/1156-289 dated 23.12.2004; Decision No 05-05/24-12 dated 13.01.2005; Decision No 05-36/450-103 dated 26.05.2005; Decision No 05-40/557-136 dated 17.06.2005

[705] Gülergün, *op cit.*, pp. 68-69.

[706] Council Regulation (EEC) No 139/2004 Recital 21

The Competition Board welcomes the new approach of the Commission in its Decision clearing the acquisition of Sabancı Telekom by Koçnet[707] with explicit reference to the ECMR No 139/2004.

Further to the analysis of the criticism in many dissenting votes and the assessment in other decisions with unanimity, we strongly recommend the amendment of the Turkish legislation parallel to the EU application in the new ECMR in order to finalize the discussions on the automatic application of the old EU assessment and provide room for sounder economic analysis with grounded justifications based on the Turkish market and focusing on the transaction itself. The implementation of this amendment will then introduce a principle of self-assessment of ancillary restrictions and the decisions of the Board declaring concentrations compatible with Turkish market will automatically cover such restrictions without the Authority having to assess such restriction in individual cases.

From this perspective, as initially proposed by Erdem, it would also be beneficial for the Turkish Competition Authority to publish a notice on ancillary restraints with the intention of reflecting the essence of its practice and sets out principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints. Erdem opines that ancillary restraints should be regulated under a separate communiqué issued by the Competition Authority which will not only provide considerable clarity and legal security, but will also result in a considerable decrease of Competition Board's workload[708].

[707] Decision No 06-41/520-140 dated 07.06.2006
[708] Erdem, *ibid*.

6.2.1.2. Dominance Test vs. SLC Test under Shadows

6.2.1.2.1. Collective Dominance Problem under the Shadow of the SLC Test

An issue of major importance in the dominance is the fact that undertakings can be in a dominant position on their own or collectively. In the former case the anti-competitive effects of the concentration are described as unilateral and in the latter case as coordinated[709]. Sole or single firm domination is almost always observed in horizontal mergers and acquisitions[710]. The examination of coordinated behavior that constitutes collective dominance requires greater care. It is a controversial topic in competition law and policy[711]. The controversies arise from the difficulty of differentiating concerted actions from collective dominance[712]. The yardstick of evaluation should be the market structure. If the market structure constitutes an incentive pattern that necessarily channels the behavior of undertakings to anti-competitive practices then it may be possible to observe a collective dominance. If the prevalence of anti-competitive practices is not necessarily dictated by the market structure, but occurs as a deliberative strategy of the undertakings that may be enabled by the characteristics of the market then there is a case of tacit collusion.

The difficulty of differentiating between the possibility of prohibition of the "creation of a collective dominance through a concentration" and prohibition of an "abuse through collective dominance" has not been dealt within the Competition Law or within the Communiqué No 1997/1. Article 6 of the Law states that *"the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole*

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[709] In fact the terms unilateral and co-ordinated effects originate from the 1992 US Merger Guidelines while sole and collective dominance are used in EC merger control regime. Both sets of terms refer essentially to the same phenomena. See: Kulaksızoğlu, *op cit.,* pp. 66, 70.

[710] Öztunalı, A. *Yatay Yoğunlaşmalarda Tek Teşebbüs Hakimiyeti, 4054 Sayılı Rekabetin Korunması Hakkında Kanun ve AB Mevzuatı Uygulamaları*. Ankara, Rekabet Kurumu, 2003: p. 20.

[711] The basic reason is that collective dominance is a legal term without a clear projection in economic theory. The concept of mutual dependence used in industrial organization literature covers collective dominance; but it does not differentiate it from concerted action. See: Sabuncu. *ibid*: pp. 11-17, 26-27.

[712] There is no difference betwen collective dominance and the terms "joint dominance" and "oligopolistic dominance". However "collective dominance" is more widely used since the ECJ has preferred it. See: Sabuncu, H. *Birlikte Hakimiyet Kavramının Birleşme ve Devralmalar Açısından Değerlendirilmesi*. Ankara, Rekabet Kurumu, 2003: p. 26.

or a part of the country on their own or through agreements with others or through joint conduct, is illegal and prohibited". It is clear that the article refers to cases where more than one undertaking may be in abusive conduct through the market power they hold which may classify both undertakings as being collectively in dominant position. However, neither Article 7 of the Law nor the Merger Communiqué includes a provision that might remedy this situation in the field of concentrations. However, it is also a fact that the Law defines dominant position as the power of one or more undertakings to determine economic parameters by acting independently of their competitors and customers. Accordingly, the collective dominance is included in the definition of dominant position. Therefore, since mergers that create dominant position are prohibited, this prohibition should normally be expected to prohibit the cases of collective dominance as well. However, the wording of Article 7 of the Law is surprisingly defining the prohibition area as the dominant position where only the parties to the transaction are subject.

As for the case of the EU, where the Turkish legislation finds its roots, the issue of collective dominance has found its place in the practice. The concept of collective dominance was first put forward in Nestlé/Perrier[713], and the discussions on whether the ECMR was allowing the use of collective dominance came to an end with approving decisions of the Court of Justice in Kali&Salz[714] in 1998 and in Gencor/Lonrho[715] in 1999.[716] Currently, the new EU merger legislation defines the concept of collective dominance and coordinated behavior especially in the Horizontal Merger Guidelines. Furthermore, the SLC Test that is adopted with the Merger Reform finalized any possible doubts on whether Dominance Test would comprise collective dominance or not.

The year 2005, on the other hand, was the marking year for the assessment efforts of the Competition Authority in terms of determination of the creation or strengthening of a dominant position through which competition may significantly be impeded. It is also striking to see the cumulated dissenting votes in 2005, after at least one year of application of the new SLC test in the EU, all discussing the transactions within the perspective of the dominance test. None of them was directly recalling to the application of the new test.

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[713] M. 190 Nestlé/Perrier
[714] Cases C-68/94 and C-30/95, France and Others vs Commission- ECR 1998, p. I-1375
[715] Case T-102/96 Gencor, ECR II-743 (1999)
[716] Selçuk, I. *Rekabet Politikası ve Yoğunlaşmaların Kontrolü*. Ankara, Rekabet Kurumu, 2003: p. 115.

However, at the closest level, we have discovered two prohibition decisions of the Board, where the subject transactions were found to have the capacity to significantly lessen competition based on risks of post-merger coordinated action through collective dominance without leading to the creation of a single dominant position. These are Ladik Çimento[717] and Şanlıurfa Çimento[718] decisions. Therefore, the focus point is still the questioned ability of the Turkish regime to prohibit a transaction where there is no creation of a single dominance but a collective dominance.

It is also to note that the collective dominance issue has found its place in two other Board Decisions[719] concerning mergers and acquisitions; however these two transactions are cleared leaving no room for an earlier discussion on collective dominance. Accordingly, Ladik Çimento and Şanlıurfa Çimento decisions are the first prohibition decisions on collective dominance. However, the Ladik Çimento decision will shed light on the assumed link between the Dominance Test and collective dominance since the decision is brought to appeal before the Council of State for grounds that the Turkish merger regime does not allow for the prohibition of a transaction that leads to collective dominance. There is a modest possibility that the decision of the Council of State will criticize whether the Board conducted a well grounded analysis of collective dominance, which should be the focal point, but it will certainly interpret and rule on whether the wording of the Law embraces the cases of collective dominance. Nevertheless, both the decision of the Board and the Council of State will have to be considered as opportunities for the clarification of the issue.

It is our observation within the framework of the DVA that the fact that Ladik Çimento and Şanlıurfa Çimento cases could be prohibited with no legislative question marks under the SLC Test is not a justifiable ground to raise a necessity for SLC Test in Turkish merger legislation. The same result would be achieved with a simple legislative amendment by clearly introducing the prohibition of creation of a collective dominance. Accordingly, we conclude that the Dissenting Vote Analysis did not come up with a

[717] Decision No 05-86/1188-340 dated 20.12.2005
[718] Decision No 05-86/1191-343 dated 20.12.2005
[719] Decision No 03-75/911-385 dated 20.11.2003; Decision No 02-57/718-287 dated 27.09.2002

dissenting vote whereby calling for an urge to switch to the SLC Test. At this stage, we can talk of a possible amendment of the Law and the Merger Communiqué and the publishing of guidelines[720] in order to clarify the issue of collective dominance with regard to Turkish merger regime.

6.2.1.2.2. Switch to SLC Test under the Shadow of the Harmonization with the EU Legislation

For several years, there has been striking controversial arguments between the authorities using the Dominance Test and the SLC Test[721]. In the EU, the numerous case of overruling by the Court of First Instance, the controversy between the Commission and the US antitrust authorities over the GE/Honeywell[722] case and the critiques of several economists triggered a long lasting debate about the comparative effectiveness of the Dominance test and the SLC test. Through a long period of investigation and examination, the Commission has concluded that these two tests have produced closely convergent outcomes. However, under the either view of EU and US, the new test provides a clearer basis for Commission challenges to mergers that do not create a dominant position but are seen likely to hinder competition through non-collusive oligopoly effects. Finally, a dual approach is adopted by the EU to honour the consequences of creating or reinforcing an existing dominant position. This was simply achieved through a perfect wording of the prohibitive sentence by placing the SLC test as the main condition for prohibition and referring the dominance issue as the leading factor that may cause the SLC.

In parallel with the previous EU legislation, Turkish Competition legislation has adopted the Dominance test. Lately, following the footsteps of the EU, Turkish competition law needed to open for discussion the legislator's preference in 1994 adopting the test of dominant position and it is a current subject of discussion whether the Turkish legislation should be amended in a way to include the SLC Test.

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[720] Sabuncu, *op cit*., pp. 67-70.

[721] The United States, Canada, and Australia applied the SLC Test, whereas the European Commission, Germany and many other European member states applied the Dominance Test.

[722] GE/Honeywell, M2220,OJ 2004 L48/1.

Taking into consideration the fact that Turkish legislation was formed on basis of EU legislation, they have common jurisprudence, and Turkish practice and jurisprudence have had their form by the test of dominant position, it is clear that one must not disregard the developments in EU. In this regard, the need for acting in parallel with the reforms in the agenda of EU cannot be ignored. However, this should not be perceived as an obligation of Turkey within the context of its accession negotiations with the EU. This would be a groundless approach since the EU members are not bound to follow the Commission's assessment technique since the transactions that fall short of the Community thresholds are subject to national treatment. In order to enforce this argument, we have gone through the national merger legislation of the EU Member States and determined that only Denmark, Ireland, Lithuania, Spain, Sweden and United Kingdom are using the SLC Test, clearly depicting the fact that Member States are not bound to apply EU principles in their national merger legislation.

It is true that, although not calling for an urge such as the CFI decisions in the EU, applying the SLC Test in Turkey would bring no inconveniences. This would allow, as the amendment reason of the EU, a sounder and fairer control of the domestic transactions on one hand, and would constitute a significant step in the sense of international adaptation, where it would allow global mergers be evaluated with the same criteria applied in the EU and the USA. In conclusion, although we did not come up with an explicit need for the application of the SLC Test in the Turkish merger legislation, we decided to focus on the issue under the legislative alignment concerns with the EU merger regime. Erdem also is for the application of the SLC Test in Turkey opining that "it could be more advantageous for a more effective control, if the criterion of "significant lessening of competition" has been put in the foreground and the creation or reinforcement of a dominant position was considered as examples of this criterion"[723].

[723] Erdem, *op cit.,* p. 29

6.2.1.3. More Economics through a Chief Economist

One of the most prominent movements in the structural reform of the European Commission is the newly created office of the Chief Competition Economist (CCE) which is active since 2003. The simple reason for such an establishment is that principles of economics and the competition policy are non separable since, in the simplest formula, competition policy is a tool to reinforce the health of an economy. Indeed, antitrust and merger analysis have been based on economic theory. From this perspective, we believe that, the Turkish competition law should also take into account the importance of economic factors in its assessment, as the deficiencies in this area are disclosed in different dissenting votes.

One of the major functions of the Chief Economist is to provide guideline on methodology issues of economics and econometrics in the applications of EU competition rules in general and is a decisive value element in the decisions making process of the court. Evidently, recent Court of First Instance's judgments have proven that there is increased need to justify the economic reasonings towards competition policy. Furthermore, there is an increased need for evidence which is based on economics, in order to establish a reliable post-merger scenario to assess the alleged anti-competitive effects. Yet, these are the main factors in determining the driving force for the European Commission amendments of its competition legislation to be fairer and more concrete.

Though, especially with the purpose of eliminating controversies in transactions in concentrated oligopolistic markets, the Turkish Competition Authority should consider the importance of economic analysis in the assessment of concentration transactions, as well as in the assessment of competition infringements. Accordingly, we strongly recommend the increase of the use of the economics based analysis in merger assessments through the establishment of an economics department within the Competition Authority.

6.2.1.4. Introduction of Specific Rules for Remedies

We consider that a functioning system of remedies is a life saver for complicated transactions where competition problems can be detected in advance through coordination with the authority and can be eliminated at its best, without either, in extreme cases, causing the merger deal to blow, or, generally without involving unexpected costs and delays.

The Competition Board, in cases where serious competition concerns have to be eliminated, orders, within its final decisions, for conditions that the parties have to apply for obtaining a clearance. These are mostly concerning the duration of non-compete clauses or other ancillary restraints that go, according to the Competition Authority, beyond the necessary limits of the transaction in question. Another form of remedy can be classified as the conditions that are disclosed by the Authority prior to the privatizations. However, this is not a remedy that applies to parties to a specific transaction but mostly reflects the assessment policy of the Competition Authority for a specific privatization transaction in order to provide a guideline to the candidate bidders allowing them to pre-assess their possibility of acquiring the asset subject to privatization with regard to competition law.

Remedies, as perceived in the EU merger legislation, are not based on specific rules and regulations in Turkey. Furthermore, it is under discussion whether the regime allows for such an application. In the practice of the Authority, the power to decide on the permissibility also includes the power to permit the transaction subject to certain conditions. However, whether or not the Authority is allowed to give such conditional permissions is a controversial issue. The main reason behind the controversy is the fact that the Law No. 4054 does not include any provisions with that view; while it explicitly states in Article 5 that the exemption decisions “may be subjected to the fulfillment of particular terms and/or particular obligations”.

Although there is no explicit provision in the Law allowing the Board to grant conditional clearances for mergers and acquisitions, reading the Law's Article 9, paragraphs 1 and 3 together, it can be deemed that the Board can declare in writing to the parties to a merger incompatible with Article 7 the way to remove incompatibilities related to the establishment of a competitive post-merger environment. Furthermore, in Article 52, providing for matters that must be contained in decisions, it is thereby acknowledged that parties may be allocated some duties in the decisions, saying that "the decision and the duties imposed and the rights conferred on the parties shall be written in an explicit manner in order not to cause any doubts and hesitation." Here, as Aslan also suggests[724], the word "duties" can be interpreted as conditions and obligations. Finally, The Board introduced with Communiqué 1997/1 that: *"The Board can grant permission to a notified merger and acquisition on the condition that other measures that the Board finds necessary are taken, and that [the parties] comply with some obligations"*. However, it should be questionable whether a power not laid down in the Law itself can be brought into existence with an administrative operation. As Tan states, Ankara Sixth Administrative Court has criticized the Board's exercise of conditional permission in its Decision no. E: 1998/773 of 14.10.1998 on the privatization of POAŞ. According to the Court the existence of conditions injures integrity of the permission; so conditional permissions cannot be accepted as permissions[725]. Ulu attracts attention to another provision of the Law, Article 2, which states that "transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition fall under this Law" and argues that the word "measures" do cover conditional permissions. He also adds that Article 20 of the Law lays down that the Competition Authority is "established in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment" and that the operation of giving conditional permissions should be deemed to be a part of this mandate[726]. İnan believes that this situation is not appropriate and the Law should be amended for the sake of legal clarity[727].

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[724] Aslan, *op cit*., p. 296.

[725] Tan, *op cit.,* pp. 37-42. Tan believes that the Authority should be able to give conditional decisions; but cannot find a suitable legal basis.

[726] Ulu, H. *Birleşme ve Devralmalarda Ortaya Çıkan Rekabet Sorunları ve Koşullu İzin*. Ankara, Rekabet Kurumu, 2004, p. 64.

[727] Inan, N. Birleşme ve Devralma Kurallarının Temel Sorunları. *Rekabet Bülteni* 2, 2000, p. 22.

Even though the controversy has not been solved within the doctrine or by case law, the Competition Board has given many decisions where permissions are made conditional. Therefore, it is important to determine whether or not these decisions are legally valid. For this purpose one has to refer back to Aslan's reasoning which was reliable. The questionable aspect of the reasoning is that it makes an inter-power comparison (a comparison between two different powers) while the comparison should be said to be intra-power, that is within the boundaries of the power to decide on the permissibility of a merger and acquisition. Since the Authority is given the power to prohibit a concentration and since prohibition is a greater measure in degree than that of making subject to certain conditions (in which case it is not compulsory for the parties to carry on the transaction) it can safely be argued that the lawmaker has implicitly granted the Authority the power to permit conditionally. A precedent for this interpretation can be found in Turkish public law in the sphere of constitutional law. In Decision No. 1993/40-1 of 21st of October 1993 the Constitutional Court ruled for the first time, and so annulled the previous case law, to suspend the application of Statutory Decree No. 509 of 20th of August 1993 on the Establishment of the Turkish Telecommunications Corporation even though neither the Constitution nor the Law No. 2949 on the Organization and the Duties of the Constitutional Court provided such a power. The decision was a reflection of the views expressed by well-known constitutional law scholars such as Özbudun, Soysal and Teziç that since the Court had the power to annul a law it can also suspend its application which is a lesser measure[728].

Finally, as a number of dissenting votes criticizes, the Turkish merger legislation has to be amended in a way to regulate the imposition of the remedies and discussion of possible remedies with the parties before implementing a decision. Such an amendment shoul not only establish the power of the Authority to regulate, order or discuss the remedies, but also introduce a guideline reflecting the major principles of the EU Notice on

[728] Kaboğlu. İ. Ö. *Anayasa Yargısı: Demokrasi Kavramının Dönüşümü Üzerine*. Ankara, İmge Kitabevi, 1994: pp. 96-101.

Remedies[729] which will provide guidance on modifications to concentrations, including commitments to modify concentrations.

6.2.2. Substantial Issues and the 2005 Proposal of the Competition Authority

The Proposal of the Competition Authority implements the SLC test straightforward, without reference to the dominance issues. Accordingly, if the consent through a switch to the SLC test is established by the Competition Authority, it would be beneficial to stick with the wording of the EU Merger Regulation and include the criteria of creation or strengthening of a dominant position as a major deriving force for the significant lessening of competition. This would not only permit the use of the previous Turkish, as well as the EU case-law on assessment of dominance, but also preserve the dotted line between the dominance concept referred to in Article 6 of the law prohibiting abuse of dominant position and an a posteriori simulation of dominance and its consequences in concentration transactions.

6.2.3. Problem Areas and Further Proposals

6.2.3.1. Introduction of Horizontal/Non Horizontal Merger Guidelines

Although the Competition Board followed the EU assessment principles in rewieving the notified transactions, the existence of guidelines and notices on how horizontal and non-horizontal merges would be assessed could lessen the degree of controversies among the Board Members and could allow for guidance on companies in assessment of their transactions. Accordingly, a possible switch to the SLC Test may be considered as an opportunity to issue such guidelines.

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[729] Commission Notice No. 2001/C 68/03 on Remedies Acceptable Under Commission Regulation EC No. 447/98.

Nonetheless, in April 2007 the Authority issued the Draft Guidelines to Define Relevant Market and reflected its approach towards such explanatory texts as a means of increase in transparency which would provide undertakings to be more prepared against possible competition concerns to be set out by the Board in a query. This will allow undertakings to act with awareness of such possibility, when considering a decision on entering into a certain agreement, establishing a joint venture or implementing a merger/acquisition. According to the Authority, issuance of these guidelines also aims a better comprehension by the undertakings, as regards the type of information that the Board finds valid for defining a market.

6.3. Procedural Issues

6.3.1. Procedural Issues and the Dissenting Vote Analysis

The outcome of the DVA in procedural issues represents a fallacy in the level of importance of the topics covered. Such that, since our analysis is based on the number of dissenting votes on certain pre-defined categories of concerns, the quorum issue was the most visited category thanks to the dissenting votes by ÇAKIN and SONGÖR[730]. Their objection's consistency paid itself as a confirmation by the Council of State. However, although it is an outcome of the DVA, the problem was of a temporary nature. Accordingly, the quorum issue should not be considered as the major procedural problematic of the Authority. Yet, although we have no further elaboration other that what

[730] Decision No 05-58/855-231 dated 15.09.2005; Decision No 05-67/949-256 dated 13.10.2005; Decision No 05-67/950-257 dated 13.10.2005; Decision No 05-67/952-258 dated 13.10.2005; Decision No 05-74/996-278 dated 27.10.2005; Decision No 05-74/990-276 dated 27.10.2005; Decision No 05-74/1009-283 dated 27.10.2005; Decision No 05-74/1008-282 dated 27.10.2005; Decision No 05-74/991-277 dated 27.10.2005; Decision No 05-76/1030-287 dated 31.10.2005; Decision No 05-79/1083-271 dated 24.11.2005; Decision No 05-79/1088-314 dated 24.11.2005; Decision No 05-79/1087-313 dated 24.11.2005; Decision No 05-79/1084-310 dated 24.11.2005; Decision No 05-80/1108-319 dated 01.12.2005; Decision No 05-80/1107-318 dated 01.12.2005; Decision No 05-88/1226-356 dated 29.12.2005; Decision No 05-88/1229-358 dated 29.12.2005; Decision No 05-88/1227-357 dated 29.12.2005

we contributed within the DVA section of the thesis concerning the quorum issue, we nevertheless cannot disregard the irrationality behind a series of persistent and "right" dissenting votes of two Board members that are not taken into account by the rest of the Board members. Our simple deduction has left us with two possibilities: either the issue has become a matter of political discussion among the Board members, or insufficient legal support led the majority of the Board Members cast illegitimate votes. In either way, we strongly consider the situation as a legal deficiency of the Authority calling for a stronger legal assessment of procedural issues. Accordingly, we take note, in addition to the banking sector decisions in jurisdictional issues, of another legal assesment deficiency, this time in procedural issues as an outcome of the DVA.

The second most visited issue was the administrative fines. This subject, though, is is also comprehensively tackled within the DVA section. Our conclusion is that the dissenting votes highlighting the legislative gap in application of fines for transactions notified after the closing which are also backed by the Council of State decisions call for a legislative amendment which is already referred in the Porposal of the Competition Authority so as to provide for necessary legal ground for imposing fines for late notifications. The implemented amendment proposal is as follows:

> "In case the Board is informed, in any way, of a concentration transaction, which is subject to permission, put into effect without permission, then it shall directly handle the transaction in final investigation and relevant parties shall be imposed the fine, set forth in first paragraph of Article 16".

The third most visited subject in the DVA was the "internal procedure" tackling issues concerning the procedure that applies to the privatizations. Similar to other procedural issues in the DVA, the procedural issues that apply to privatizations through the Communiqué 1998/4 are being dealt in detail in previous section. However, as a concluding mark and a reminder, the dissenting votes were claiming that the procedural requirements set forth within the Communiqué No 1998/4, and especially those applicable to the requirement to issue a preliminary notification of the Authority are not followed either in a timely manner or disregarded in certain transactions. Adding such procedural deficiencies in privatization transactions to those of substantial deficiencies in the same

area (i.e. privatization of ports), we can conclude that the privatization transactions created problematic outcomes in most of the occurences. Accordingly, it is our belief within the context of the DVA that the dissenting votes claiming procedural deficiencies in the application of the privatization legislation highlights another prerequisite for a stronger legal assessment of procedural issues.

6.3.2. Procedural Issues and the 2005 Proposal of the Competition Authority

In the Proposal of the Competition Authority we observed that, the notification responsibility for the acquiring party is introduced; a separate and faster procedure is introduced with 30 Days+3 Months with stop-the-clock provision in place of 15 Days+6 months (extendable up to another 6 months); the performance of the conditions/undertakings is secured through invalidity sanction of the transaction; a hearing Session is introduced providing formal bargaining contacts with the Authority and the rules governing the closure of transactions without permission is clarified and released from the confusions related to fines.

In the current version of the Law, according to Article 10, following the notification of a merger or acquisition agreement first a preliminary examination should be performed by the Authority within a period of 15 calendar days. However this period does not commence until a complete and correctly prepared notification file is submitted[731]. The Board should then either decide to permit the agreement or open a preliminary inquiry or direct investigation thus postponing the decision to the "final examination"[732]. In the latter case those concerned should be duly notified with a preliminary objection letter of the fact that the transaction is suspended until the final decision. If the Board does not respond or takes no action within due time the transaction becomes legally valid following 30 calendar days after the date of the notification. Some authors argue that the Board should

[731] The Authority frequently needs to demand missing information, especially with respect to potentially anti-competitive transactions. See: OECD. (2005), *op cit*., pp. 27-28.
[732] Also referred to as "Phase II Investigation" as a direct inspiration from the Commissions practice.

give its decision within the period of 15 days[733]; however the wording of the Article is open to discussion.

Draft Article 7, proposed by Competition Authority, is capable of eliminating the current deficiencies, in part. The most important point here concerns the time limitations. Procedure of "permission pursuant to preliminary investigation", which was 15 days previously, is proposed to be amended as 30 days. Present practical experiences show that Competition Board makes determination on a thumping majority of the notified transactions in phase of preliminary investigation before conducting final investigation. However starting this 15 day limitation from the date of receiving the full and complete delivery of the notification file automatically renders the procedure last 30 days. It is because Competition Authority, in practice, requires submission, to itself, of various information and documentation just before the end of the 15 day period, and upon receipt of such information and documentation it gains additional time, wherein it completes the preliminary investigation by the end of these periods. Time matters a lot in acquisition transactions since possible delays in investigations cost so much for the parties to the transaction and for the national economy in many cases. Changing the time limitation for permission pursuant to preliminary investigation as 30 days should not increase the actual time limitation for permission to a maximum of 60 days.

Subjecting the final investigation to a procedure with time limitation of 3 months, instead of subjecting it to article 40 to 59 of Law, would also be a positive development.

A requirement to hear the parties' opinions on the matter before decisions of prohibition or granting a conditional permission would bring into question the inclusion, inside the Law, of a mechanism similar to pre-merger contacts with the Commission, for the first time. However this would cause new ambiguities. The Authority, to which parties will submit their opinions on the matter, must be specified clearly.

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[733] See: Bolatoğlu, *op cit*., p. 37; OECD. (2005), *op cit*., pp. 27-28; Sanlı, *op cit*., p. 446. It is interesting to see that Bolatoğlu corrects his mistake on page 39.

It is also important, in sense of enactment of an actual practise, to conduct such a mechanism in line with the requests of the parties in course of preliminary investigation instead of bringing it into question only before making decisions of prohibition or conditional permission. This procedure would allow the aforementioned time limitations become shorter. In order to remedy such possible problems in the course of the contacts with the Authority, we will propose the introduction of a best practice guideline in the following section. On the other hand, as the proposed amendments of the Authority shortly regulates the main legal framework for the commitments/conditions imposed or proposed by the parties with respect of procedure, we have tackled different aspects of the issue in the substantial outcomes of the DVA under the terminology usually referred in the EU: "remedies".

6.3.3. Problem Areas and Further Proposals

6.3.3.1. Possible Introduction of a Simplified Notification Procedure

Up to this part of the policy proposal, some of our suggestions, if not all of them, were directly related to decreasing the bureaucratic burden before the mergers, while also providing an efficient use of the resources of the Authority through for example amending the thresholds so as to catch less number of transactions. A complementary tool to introduce for the same means can be the implementation of a simplified notification procedure for transactions that may represent an insignificant degree of competition concerns. Our direct inspiration for such an instrument is the Commission of the EU's own application.

The Commission Notice[734] regulating such a simplified procedure provides a set of simplified rules towards the control of concentrations on the basis that such transactions do not raise competition concerns or any substantive doubts. The purpose of this Notice is to

[734] Commission Notice on a Simplified Procedure For Treatment of Certain Concentrattions Under The Council Regulation (Ec) No. 139/2004

draw a range of conditions under which the Commission usually adopts a short-form decision towards concentrations pursuant to the simplified procedure and to provide guidance in respect to the procedure itself. With this procedural outline, the Commission aims to make the Community merger control "centrally focused" and more effective.

First, the Notice provides categories of concentrations suitable for treatment where there were four distinct types of eligible concentration in the context of simplification of procedures. The simplified procedures apply to cases where i) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no negligible actual or foreseen activities within the territory of the EEA; ii) none of the merging parties are engaged in the same business activities in the same product and geographical market; iii) horizontal mergers of undertakings do not exceed the combined market share of 15%, and vertical mergers of undertakings where none of individual or combined market shares exceed 25%; iv) undertakings over which it already has joint control.

In its assessment, Commission ensures that all relevant facts are sufficiently clarified. The key elements of its assessment is the definition of market and notifying parties should provide full information about market alternatives as well as relevant product and geographic markets on which it might have certain impact on. If there exist difficulties in defining the market and determining parties' market shares, and assumption of concentration can raise serious copetition concerns, Commission will not apply simplified procedure but may revert to a normal phase of merger procedure.

Competition concerns would be raised where "the former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the discipline constraints exercised by the potentially diverging incentives are removed and its strategic market position could be strengthen". In such a case, Commission may also revert to a normal first phase of merger procedure.

Under the procedural provision, pre-notification contacts between notifying parties and Commission were viewed as significantly beneficial. Candidates for simplifying procedures may raise complex issues which could be solved prior to the notification. Such

contacts enable Commission and the notifying parties to precisely determine the amount of information need to be provided in a notification. Therefore, notifying parties are strongly encouraged to engage in pre-notification contacts where it would create ground for the Commission to decide that operation does not raise competition concerns. And of course, full information about the notification shall be published on the Official Journal of the EU where interested parties could have a chance to submit their observations.

Last but not least, under the framework of ancillary restrictions, the simplified procedure does not apply to cases where undertakings concerned request an express assessment of restrictions which are directly related to the implementation of the concentrations.

As shortly outlined above, the implementation of a system similar to the Commission's simplified procedure should be considered as a very good instrument to attain a more efficient and time consuming merger control regime by the Turkish Competition Authority.

6.3.3.2. Introduction of a Best Practice Guideline

Also inspired by the EU practice, the introduction of a Best Practice Guideline would lead to a more transparent merger control regime in Turkey; since, as the EU experience shows, the principle aim of the Best Practice Guideline is to provide guidance for the parties to a transaction on the day to day conduct of the applicant authority's proceedings. The existence of such a guideline would also help to foster and build upon a spirit of co-operation and better understanding between the Competition Authority and the legal business community. Best Practice seeks to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the review process. Experiences gained from the EU showed that the Best Practice makes the short time available in the procedures as efficient as possible for all parties concerned.

In relation to the Community law, Best Practice should be conjunct with the legislation, interpretation and administration measures of the Community merger control and it should not create or alter any rights or obligations as set out in the Treaty of EC, the Merger Regulation as amended time to time and as interpreted by the case law of the Community Courts.

DG Competition viewed pre-notification as an important phase of the whole review of the procedural process since it is useful to have pre-notification contacts with the parties even in seemingly non-problematic cases. The purpose of the pre-notification contacts is to provide DG Competition and the notifying parties with the possibilities, prior to notification, to discuss jurisdictional and other legal issues, to identify the key issues and possible competition concerns at an early stage. It intends to provide opportunity to involved parties to discuss as regards the concentration informally and in confidence prior to notification. Additionally, it ensures that notification forms are complete from the outset so that declarations of incompleteness are avoided as far as possible. Pre-notification discussions are held in strict confidentiality. As can be seen, our concerns on the possible extension of the initial review period of cuurently 15 days (and proposedly 30 days) to doublings could also be prevented with the help of cooperation sought at the pre-notification phases.

As advised in the EU guidelines, pre-notification contacts should be initiated at least two weeks before the expected date of notification. It is advised to make contact with the DG Competition as soon as possible as this will help to facilitate the planning of the case. Pre-notification should be launched with a submission that allows the selection of a case-team. The pre-notification contacts should include all information about the transactions; the parties may even choose to submit a draft form CO as a basis for further discussion. This further, according to the Commission, is expected to contribute to a more fruitful discussion about the proposed transaction. It is also advised that notifying parties should systematically provide a complete draft Form CO before filling a formal notification.

Obviously, notifying parties are advised to fully and openly provide information related to the potential market effects and the probability (even if very little) that can raise market concerns, plus, elements demonstrating that the merger can leads to efficiency gains. This submission allows for an early market testing of alternatives that are in question as well as the DG can extensively analyze the transaction and consider the positive externalities in its assessment. Moreover, according to the DG Competition experience, this approach minimizes surprise submission from third parties at a late stage of the procedure. Therefore, it is strongly recommended to the parties to submit all market-related internal documents as early as possible in pre-notification phase, since this helps to provide the Commission the possibility to review the information and identify its potential competitive impact.

Parallel to the Turkish application, since a notification is not considered as officially received until the information to be submitted in Form CO is complete; the notifying parties are advised to ensure that all information contained in the Form CO is carefully prepared, verified with no misleading information. In principle, where a final draft is provided to the attention of the Commission, it will confirm and identify the draft of notification and in what respects the Form CO is incomplete. If the Commission discovers omissions in the Form CO, notifying parties might be, in certain cases, given opportunity to urgently amend the Form CO before a declaration of incompleteness is adopted; a system that certainly eliminates bureaucratic correspondances which may take place after the notification[735].

One of the main priorities of the Best Practice is to enhance transparency in handling merger cases, and also to ensure good communication among the DG Competition, the merging parties and the third parties. Therefore, DG Competition enforces the parties to endeavor in frank discussions through *state of play meetings*. These meetings, which operate properly and carefully prepared on the basis of an agenda agreed

[735] In its fact findings for assessing, the Commission takes into account all necessary information from different sources of undertakings and its investigation process is mainly conducted in the form of written Requests for information to customers, suppliers, and relevant parties. For the investigation to be more efficient, DG may also consult the notifying parties and other involved entities on methodological issues regarding the data information in the relevant economic sectors.

in advance, is established to the quality and efficiency of the decision making process; further ensuring that the mutual exchange of information is appropriate and transparent. Since this is the only occasion to exchange information between the Commission and the notifying parties, parties are advised to take this opportunity to inform as regards any important procedural or substantive developments that may be of relevance for the assessment of the proposed transactions. Such development may also include proposals of the remedies that the notifying parties may offer in order to facilitate co-ordination of the timing and substance of such remedy proposals[736].

According to the Community merger control law, third parties that are considered as having "sufficient interest", contribute an important role in the Commission's procedure in implementing the Regulations. Third parties contribute to the Commission's investigation through means of replies to request for information within which they are welcomed to express their view on transactions and related possible competition concerns. It is essential that they should be communicated as early as possible to DG Competition so that they can be verified and taken into account properly. Third parties should provide information to DG in non-confidential manners to ensure the transparency characteristic for the benefit of the decision making process.

In certain circumstances, DG Competition may decide to invite the third parties and the notifying parties to a "triangular meeting" where it is believed to be desirable in order to hear views of different parties and helps for the fact-finding investigation procedure. Such meeting helps the DG Comp. to reach more informed conclusion as to the relevant market characteristic and to clarify issues of substance before deciding on the issue of an SO. No doubt, this triangular meeting will include a mutual exchange of non-confidential submissions between the parties to guarantee the transparency and effectiveness. Such a practice is also applied by the Turkish Competition Authority as well.

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[736] Detailed guidance on remedies is provided in the Commission Notice on Remedies No. 2001/C 68/03. Though it is for the notifying parties to formulate suitable remedies proposals, DG Competition is to provide guidance to parties as to general appropriateness of their draft proposal in advance of submission. This feature is in contradiction with the Turkish Competition Authority's current application where the remedies are mostly designed by the Authority and proposed to the parties as part of the final decision on the transaction as conditions for clearance.

According to Community law, notifying parties have the right to access into the Commission's file after it has issued the Statement of Objections and other documents up until the consultation of the Advisory Committee. However, access to the file will be provided to the legitimate interest of the protection of the third parties' business secrets and other confidential information[737].

Within the context of our proposals for amendments and implementations to the Turkish merger control regime, the preparation and issuance of a Best Practice Guideline is of ultimate importance since it will pack up most of the non-written practice which already incorporates most of the issues tackled within the EU Guideline disclose them to public knowledge providing equal treatment opportunities to those who are not normally aware of them. This is the very reason why we jumped into detail to the Commissions Best Practice application.

6.3.3.3. Increased Use of the Investigative Powers

There are many examples of insufficient examination concerns, as the dissenting votes on jurisdictional, substantial and procedural issues argue, where the Board decisions are clear-cut, straightforward and shallow in the analysis of the facts. For the jurisdictional matters, we observe that decisions with such dissenting votes are mostly on transactions where the parties already accept that they are passing the thresholds and where the change of control is evident. Accordingly, we may be led to the fallacy of why the Authority should go into a deeper analysis in a transaction where the parties do not object to the review of their case. This would be a wrong reasoning since final decisions of the Board constitute the case-law and they are frequently referred either by the Board or the parties having a transaction in a market which is already "assumedly" examined by the Authority. We believe that the Authority has to verify the information supplied by the parties and the Board should not base its decisions solely on the information supplied by the parties. The

[737] Further detail is contained within the Commission's Notice on Access to file OJC 23, 23/01/97.

dissenting votes in this context are clear calls for further use of the investigative powers by the reporters. Such powers are extensively provided within the current and also the proposed legal order.

For the transactions where the insufficient examination claims are thought to cause assessment errors[738], the situation becomes more complex since such deficiencies may lead to market conditions that may contain anti-competitive elements created by the transactions.

[738] Such as in transactions concerning the privatization of ports and the sales of Rumeli Holding cement factories by the Savings Deposit Insurance Fund)

7. CONCLUSION

A liberal economist supporting a free market economy with all its balancing dynamics would be expected to conclude that the most desired level of state intervention to merger control could be established through a system where the notification of transactions are of voluntary basis and, as a disciplining counter balance heavy fines could be implemented where the post-merger anti-competitive consequences are observed. However, the first controversy in such a system would appear in determining wheter such anti-competitive consequences are clearly the outcomes of the merger transaction or not. The second controversy will appear, in cases where, it is supposedly determined that the uncontrolled merger caused such anti-competitive consequences and it has to be divested, subject to a de-merger, as the best remedy available at that moment. Last but not least, the major side effect of such a lax system could be expected as an abundant number of petitions from competitors active within the same market of subject transaction claiming that the competition would be expected to be harmed once the concentration is implemented, or which is recently already been implemented. This final supposition may, at its maximum level, create such a workload to the authorities that may worse off the positive externalities expected from a voluntary notification system since the applications from third parties would require a certain level of time consuming cross check investigations.

After all, when the subject matter is Turkey, the establishment of the above system would also certainly require a perfect understanding of the concept of competition by the business environment, which is not exactly the situation, as also claimed by the current President of the Competition Authority Mustafa PARLAK in its following statement in May 2007[739]:

[739] See: <http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=6461671&tarih=2007-05-05>.

> "Competition is different from misleading advertising or counterfeiting a brand or a product. Such things does not constitute violation of competition but unfair competition practices aiming fraud. We receive great numbers of complaints on such issues. They send their complaints to us. We constitute a wrong address for the consumers. We could not explain what is competition infringment and unfair competition."

A more theoretical approach for the weak possibility of adoption of such a voluntary system lies beneath the legal order in which Turkey is attached to. This is the EU law where the interventionist culture is placed at the very heart of the operations of the markets, the undeniable excuse being the ultimate purpose of establishing a common market of 27 member states pending from different social, economic and legal backgrounds.

Therefore, as a candidate country in phase of accession talks with this entity, Turkey should be accepted as tracing its path towards the order of the EU. Therefore, this is where the very genetics of the Turkish merger control regime lies.

In different opportunities we have mentioned that although not questioning this policy flow, it would be possible to modify it so as to make it more application friendly for the subjects of this legislation, namely the undertakings operating in horizontal, vertical or conglomeral markets who decided to realize merger or acquisition transactions for one reason or another and which would affect the Turkish markets.

The above reasoning is the departing point of this thesis which can be seen as a quest for determining elasticity limits of the Turkish merger control legislation using a series of data. Nested into a quasi-comparative study, this data consisted of the theory and application of the EU merger control regime with special emphasis to the relevant reform, the legislative grounds and proposed destination of the Turkish regime draw by its enforcement authority and finally, a study we named as the Dissenting Vote Analysis reflecting the practice of the Turkish merger control regime limited into the framework of transactions decided with qualified majority. The striking element being the DVA, we have made our determining deductions from the observations we gathered from the analysis of the cases along with the dissenting votes.

Within this framework, we have tried to classify and analyze the merger decisions of the Competition Board containing dissenting votes[740]. Our motivation in doing so was to try to determine whether arguments objecting to the majority in decisions concerning transactions above a certain size were calling attention to the possible deficiencies of the current system. Certainly, those dissenting votes were not altering the decisions for the related transactions. Correspondingly, they were not even able to make other Board members revise their opinion in the course of the decision sessions, save the fact that they possibly added other members hold the minority opinion. However, we strongly believed that this should not automatically classify those dissenting opinions as erroneous. This would be an effortless approach. As a matter of fact, we have seen consequences where some of the dissenting votes were containing elements of a more effective merger control regime[741]; even though some of these arguments wished to be recorded by their holders could not be applicable by the simple fact that the current legislation did not permit their implementation[742]. In other instances, mostly in procedural issues, we have seen how correct the insistently held dissenting votes in each relevant decision were.

In consequence, if the EU reform is shaped by a series of necessities, it would not be a wrong reasoning to expect similar necessities to reveal in the application of the Turkish merger regime. The very purpose of the Dissenting Vote Analysis, though, was to determine whether such necessities are raised by the Board Members or not.

Finally, what we have determined so far demonstrated us how fruitful was our study. The confirming fact for such an argument can be depicted from the starting point of our expectation which was modestly limited with the determination of few useful -but not

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[740] Since we objectively refer to the names of the Board Members of the Turkish Competition Board where we deemed necessary, along with our declaration that none of such occurrences has personal or institutional hidden meanings, we hereby consider every effort from them as an honorable task for the better application of the Turkish merger legislation in particular, and the Turkish competition legislation in general.

[741] Reference is primarily made to the dissenting votes of KALDIRIMCI in cement decisions concerning the Savings Deposit Insurance Fund sales of Uzan Group cement factories.

[742] Reference is made to the joint dissenting vote of ERSİN and KALDIRIMCI in Decision No 05-40/559-138 dated 17.06.2005 and the dissenting vote of KALDIRIMCI in Decision No 05-28/320-82 dated 25.04.2005 criticizing the reluctance of the Board in reviewing transactions with the simple fact that they are notified prior to the signing of the agreements constructing the subject concentrations.

as much as we finally ended up with-proposals in parallel to the EU legislation. As thoroughly disclosed in the policy proposal section of the thesis, in addition to the legislative amendment proposals, an extensive number of policy implementation suggestions drained from the combination of the lessons drew both from the EU and Turkish application.

In conclusion, as we have gathered up the entire policy proposal into a demonstrative table below, we consider this study as a recipe for the future shaping of the Turkish merger regime incorporating its performance until the end of the year 2006.

We also strongly advice to those who would consider to make use of this study to further question the applicable basis of our proposals, in terms of both economic and legal perspectives and to not to deprive us of their possible critics attached to their own proposals which will lead the Turkish economy subject to the most efficient merger control regime.

Table 22

Consolidated Table of Policy Proposal

THE POLICY PROPOSAL IN JURISDICTIONAL ISSUES			
	Dissenting Vote Analysis	**2005 Proposal of the Competition Authority**	**Problem Areas and Further Proposals**
Jurisdictional Issues	Jurisdictional assessment deficiencies in banking sector decisions calling for (i) **stronger legal assessment** and (ii) an internal **referral mechanism to the legal department** before establishing the decisions.	The proposal does not specify any jurisdictional arrangement but **only refers to the secondary legislation** which shall define which transactions are concentration transactions, which transactions require permission by prior notification to the Board, and the procedure and substance of the notification.	There are **overlap of duties or conflicting legislations which puts the autonomy of the Competition Authority at stake**: (i) General Directorate of Consumer and Competition Protection of the Ministry of Industry and Trade, (ii) Draft Commercial Law and the definition of mergers and acquisitions causing conflict, (iii) Law No. 4046 Concerning Arrangements for the Implementation of Privatizations.
	Jurisdictional assessment deficiencies in major jurisdictional concepts such as definition of undertaking, change of control, relevant market calling for the **introduction of jurisdictional notices and guidelines**.		**The jurisdictional thresholds should be revised**: (i) Market share test should be abandoned in order to conform with ICN requirements (ii) "aggregate turnover" threshold should be incresed in order to catch an optimum number of transactions and (iii) "at least two of the parties turnover" threshold requirement should be introduced in order to catch transactions that have significant effect in Turkey.
	Dissenting votes and the EU application call for the **introduction of a prior notification mechanism**		A legislative amendment regulating and defining **"Change of Control on a Lasting Basis" should be introduced**.

Table 22
Consolidated Table of Policy Proposal (Cont)

THE POLICY PROPOSAL IN SUBSTANTIAL ISSUES			
	Dissenting Vote Analysis	**2005 Proposal of the Competition Authority**	**Problem Areas and Further Proposals**
Substantial Issues	Conflicting decisions and separate assessment of ancillary restraints call for a **legislative amendment allowing ancillary restraints to be assessed as part of the related transaction**.	**SLC Test is introduced different from the EU wording** without reference to the creation or strengthening of a dominant position as a major cause for the significant lessening of competition.	**Implementation of Horizontal/ non horizontal merger guidelines** will help eliminating erroneous or questioned assessment.
	Whether the concerns on the (i) assessments under the dominance test and especially the decision on Ladik Çimento privatization decision call for a **possible introduction of the SLC Test** should be clarified within the context of (ii) **remedying the alleged legislative gap excluding the prohibition of collective dominance**.		
	Criticism in dissenting votes on (i) the assessment of privatization transactions (ii) insufficient examination of the facts allegedly leading to assessment errors, (iii) the assessment of joint-ventures and (iv) determination of relevant market call for the **establisment of an economics department and the appointment of a Chief Economist** within the Competition Authority.		
	Criticism in dissenting votes on the follow-up of conditions imposed as remedies call for a separate **guideline on the application and securing the realization of conditions and remedies**.		

Table 22
Consolidated Table of Policy Proposal (Cont)

THE POLICY PROPOSAL IN PROCEDURAL ISSUES			
	Dissenting Vote Analysis	**2005 Proposal of the Competition Authority**	**Problem Areas and Further Proposals**
Procedural Issues	**Quorum issues concerning the number of members in decisions represent no direct relevance with merger legislation** and is a temporary problem.	**Notification responsibility for the acquiring party** is introduced	A **simplified procedure** may be introduced for fast-track rewiev of transactions representing less thread on competition in connection with the revision of the thresholds
	The dissenting votes highlighting the **legislative gap in application of fines** for transactions notified after the closing which are also backed by the Council of State decisions **call for a legislative amendment which is already referred in the Porposal of the Competition Authority.**	A **separate and faster procedure is introduced** with 30 Days+3 Months with stop-the-clock provision in place of 15 Days+6 months (extendable up to another 6 months).	
		Performance of the conditions/undertakings is secured through invalidity sanction of the transaction.	**Best Practice guidelines should be introduced** in order to create transparency and guidance in the clearance process for the parties
	Dissenting votes claiming procedural deficiencies in **the application of the privatization legislation call for a stronger legal assessment** of procedural issues.	**Hearing Session is introduced** providing formal bargaining contacts with the Authority	
		Closing without permission is clarified and released from the confusions related to fines	**Investigative powers of the Authority should be used further** in the collection of the market data or other facts.

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M.1220, Alliance Unichem/Unifarm, EC Commission Decision of 23 July 1998.

M.1225, Enso/Stora, EC Commission Decision of 25 November 1998, OJ [1999] L 254/9.

M.1245, Valeo/ITT Industries, Commission Decision of 30 July 1998, OJ [1998] C 288/5.

M.1293, BP/Amoco, EC Commission Decision of 11 December 1998, OJ [1999] C 112/33.

M.1328, KLM/Martinair, EC Commission Decision of 25 May 1999.

M.1346, EDF/ London Electricity, EC Commission Decision of 27 January 1999, OJ [1999] C 092/10.

M.1383, Exxon/Mobil, EC Commission Decision of 29 September 1999.

M.1397, Sanofi-Synthélabo, EC Commission Decision of 17 May 1999, OJ [2000] C 023/4.

M.1442, MMP/AFP, EC Commission Decision of 3 March 1999, OJ [1999] C 76/13 .

M.1447, Deutsche Post/ trans-o-flex, EC Commission Decision of 5 May 1999.

M.1464, Total/PetroFina, EC Commission Decision of 26 March 1999, OJ [2001] C 325/12.

M.1510, BT/AT & T, EC Commission Decision of 19 July 1999.

M.1517, Rhodia/Donau Chemie/Albright & Wilson, EC Commission Decision of 13 July 1999, OJ [1999] C 248/10.

M.1524, Airtours/ First Choice, EC Commission Decision of 22 September 1999, OJ [2000] L 93/1.

M.1532, BP Amoco/ARCO, EC Commission Decision of 29 September 1999, OJ [2001] L 18/1, 4 CMLR 774.

M.1616, Antonio de Sommer Champalimaud/Banco Santander Central Hispanoamericano, EC Commission Decision 3 August 1999, OJ [1999] C 306/37.

M.1628, TotalFina/Elf, OJ [2001] L143/1

M.1684, Carrefour/Promodes, EC Commission Decision of 25 January 2000, OJ [2000] C 164/5.

M 1834, Hitachi/Nec-Dram/JV, no decision.

M.1841, Celestica/IBM, EC Commission Decision of 25 February 2000, OJ [2000] C 341/2.

M.1845, AOL/Time Warner, EC Commission Decision of 19.06.2000, OJ [2001] L268/28.

M.1852, Time Warner/EMI, EC Commission Decision of 15 October 2000, OJ [2000] C256

M.1882 Pirelli/BICC, OJ [2003] L170

M.1863, Vodafone/BT/Airtel JV, EC Commission Decision of 18 December 2000, OJ [2001] C 42/11.

M.1915, The Post Office/TPG/SPPL, EC Commission Decision of 13 March 2001.

M.2033, Metso/Svedala, EC Commission Decision of 24 January 2001.

M.2060, Bosch/Rexroth, EC Commission Decision of 4 December 2000.

M.2097, SCA/Metsä Tissue, EC Commission Decision of 31 January 2001, OJ 2002 L 057.

M.2187, CVC/Lenzing, EC Commission Decision of 17 October 2001.

M.2220, GE/Honeywell, EC Commission Decision of 3 July 2001.

M.2227, Goldman Sachs/Messer Griesheim, EC Commission Decision of 20 March 2001, OJ [2001] C 127/12.

M.2243, Stora Enso/AssiDoman/JV, EC Commission Decision of 22 December 2000, OJ [2001] C 49/5.

M.2283, Schneider/Legrand, EC Commission Decision of 10 October 2001, OJ 2003 C 029.

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M.2368, Gilde/Capvis/Soudronic, EC Commission Decision of 16 March 2001, OJ [2001] C 105/32.

M.2416, Tetra Laval/Sidel, EC Commission Decision of 13 January 2003, OJ 2003 C 137.

M.2498 Norske Skog/Parenco/WalsumI, OJ [2002] L233/38

M.3333 Sony/BMG, Commission Decision of 19 July 2004, OJ [2007] C29

M.3544 Bayer Healthcare/Roche, EC Commission Decision of 19.11.2004, OJ [2004] C248

M.3916, T-Mobile Austria/Telering, EC Commission Decision of 26.04.2006, OJ [2006] C 239

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Kaysersberg SA v Commission, Case T-290/94, CFI [1997] ECR II- 2137, [1998] 4 CMLR 336.

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RJB Mining v Commission, Case T-156/98, [2001] ECR II-337.

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Adana Çimento/Adana Kağıt Torba (13.07.1999, 99-35/334-205)

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Akzo Nobel Coatings/Balakom (15.06.2006, 06-44/549-147)

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Beğendik/Migros (14.05.2002, 02-28/313-128)

Benkar/Fiba Bank (18.09.2001, 01-44/433-111)

BNET/COMNET (27.09.2001, 02-57/717-286)

Bomsaş Mukavva/Tire Kutsan Oluklu Mukavva (11.07.2002, 02-43/503-208)

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Carclo/NV Bekaet SA (17.06.2005, 05-40/559-138)

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Ereğli Demir Çelik (24.11.2005, 05-79/1083-271)

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Horoz Kargo/Aras Grubu (20.05.2004, 04-36/408-101)

ISS Grubu/Proser (31.03.2005, 05-20/229-67)

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Koç Grubu/Bilkom Bilişim (09.01.2001, 01-03/10-3)

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Konya Şeker/Çumra Şeker (25.11.2002, 02-74/872-356)

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Novartis AG/Hexal AG (26.05.2005, 05-36/450-103)

OFIC SA/AAC France 2005 A & AAC France 2005 B & Astorg III (23.03.2006, 06-20/257-64)

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Sabancı Holding/Dupont Polyester (04.11.2004, 04-70/1006-245)

Samsun Gübre (05.05.2005, 05-30/373-92)

Sanofi SA/AG /Sanofi Doğu İlaç & Sanofi Difaş & Medifarm & Synthelabo & Pierre Fabre (30.01.2001, 01-06/52-15)

Sebit/Siemens Business Services (20.11.2003, 03-75/921-387)

Sentim Bilişim/Indeks (27.09.2002, 02-57/719-288)

Sodexho Restoran Servisleri/Yemek Servisleri International (31.07.2001, 01-37/365-97)

Sollac Mediterranee/Borçelik (26.06.2001, 01-29/282-83)

Standart Alüminyum/Assan (22.09.2005, 05-59/876-235)

Star TV (25.10.2005, 05-73/984-272)

Süd-Chemie AG/Rockwood Specialties Group (29.12.2005, 05-88/1229-358)

Tansaş/Migros & Koç Holding (31.10.2005, 05-76/1030-287)

Tekstil Bank/GSD Holding (13.06.2002, 02-38/419-177)

Tepe Knauf Alçıpan/Knauf International (20.07.1999, 99-36/368-235)

Thyssen Polymer/Deceuninck NV (27.05.2003, 03-35/414-181)

TUI/CP Ships (13.10.2005, 05-67/950-257)

Turbomach/Caterpillar Overseas & Magnet 37 VV (26.05.2004, 04-38/426-106)

TÜMOSAN (29.04.2004, 04-30/348-85)

TÜPRAŞ (21.10.2005, 05-71/981-270)

TÜPRAŞ (29.01.2004, 04-09/77-19)

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Vestelnet/DkNet (19.06.2003, 03-44/502-222)

Waw Auslands/Rotopak Grubu (28.06.2001, 01-29/282-86)

YTB/Arıkanlı (27.10.2005, 05-74/991-277)

Yurtiçi Kargo/Geopost (26.05.2004, 04-38/427-107)

LIST OF DECISIONS WITH DISSENTING VOTES

Rank	Date/No	Subject of Transaction	Name(s)	J/S/P	Sub Category	Detail	1997/1	Counts
1	18.02.1999 /99-8/65-22	Pharmacia & Upjohn Sağlık Ürünleri Tic. Ltd. Şti. (Pharmacia)'nin parenteral beslenme alanındaki etkinliklerinin Fresenius İlaç San. ve Tic. Ltd. Şti. (Fresenius) tarafından devralınması işlemine izin verilmesi talebi.	ELÇİ	S	Dominant Position	Risk of dominant position in one of the markets	Y	1
1	18.02.1999 /99-8/65-22	Pharmacia & Upjohn Sağlık Ürünleri Tic. Ltd. Şti. (Pharmacia)'nin parenteral beslenme alanındaki etkinliklerinin Fresenius İlaç San. ve Tic. Ltd. Şti. (Fresenius) tarafından devralınması işlemine izin verilmesi talebi.	BENGÜ	S	Dominant Position	Risk of dominant position in one of the markets	Y	2
1	18.02.1999 /99-8/65-22	Pharmacia & Upjohn Sağlık Ürünleri Tic. Ltd. Şti. (Pharmacia)'nin parenteral beslenme alanındaki etkinliklerinin Fresenius İlaç San. ve Tic. Ltd. Şti. (Fresenius) tarafından devralınması işlemine izin verilmesi talebi.	UZUN	S	Dominant Position	Risk of dominant position in one of the markets	Y	3
2	13.07.1999 /99-35/334-205	Adana Çimento San. T.A.Ş'nin, Adana Kağıt Torba San. T.A.Ş.'nin %50 hissesini devralması işlemine izin verilmesi talebi.	EROL	P	Fines	Obstruction of investigation	Y	4
2	13.07.1999 /99-35/334-205	Adana Çimento San. T.A.Ş'nin, Adana Kağıt Torba San. T.A.Ş.'nin %50 hissesini devralması işlemine izin verilmesi talebi.	SONBAY	P	Fines	Obstruction of investigation	Y	5
2	13.07.1999 /99-35/334-205	Adana Çimento San. T.A.Ş'nin, Adana Kağıt Torba San. T.A.Ş.'nin %50 hissesini devralması işlemine izin verilmesi talebi.	EROL	P	Insufficient Examination	Phase II Required	Y	6
2	13.07.1999 /99-35/334-205	Adana Çimento San. T.A.Ş'nin, Adana Kağıt Torba San. T.A.Ş.'nin %50 hissesini devralması işlemine izin verilmesi talebi.	KARACEHENNEM	P	Insufficient Examination	Phase II Required	Y	7
2	13.07.1999 /99-35/334-205	Adana Çimento San. T.A.Ş'nin, Adana Kağıt Torba San. T.A.Ş.'nin %50 hissesini devralması işlemine izin verilmesi talebi.	PARLAK	P	Insufficient Examination	Phase II Required	Y	8
3	20.07.1999 /99-36/368-235	Tepe Knauf Alçıpan Pazarlama Sanayi ve Ticaret A.Ş. hisselerinin % 49.975'inin Knauf International Gmbh'ye devredilmesi işlemine izin verilmesi talebi.	GENCER	S	Relevant Market	Wrong determination, should not rely only on the data provided by the parties	Y	9
4	03.08.2000 /00-29/307-174	Temel Ticaret ve Yatırım A.Ş., Türk Demir Döküm Fabrikaları A.Ş., İzocam Tic. ve San. A.Ş. ve Demir Export A.Ş.'nin Garanti Koza İnşaat San. ve Tic. A.Ş.'deki toplam % 49.177096 oranındaki hisselerini Balfour Beatty Overseas Ltd'ye devretmeleri işlemine i	KARACEHENNEM	S	Joint Ventures	Both parents should not be active in JV's market	Y	10
5	09.01.2001 /01-03/10-3	Koç Grubu sirketlerinden; Koçnet Haberlesme Teknolojileri ve Iletisim Hizmetleri A.S., Temel Ticaret ve Yatirim A.S., Zer Madencilik Dayanikli Tüketim Mallari Pazarlama A.S., Nazar Dayanikli ve Dayanikşiz Sinai Mallar Pazarlama A.S.'nin Bilkom Bilisim Hiz	EROL	P	Fines	Should apply fines for failure to notify	Y	11
5	09.01.2001 /01-03/10-3	Koç Grubu sirketlerinden; Koçnet Haberlesme Teknolojileri ve Iletisim Hizmetleri A.S., Temel Ticaret ve Yatirim A.S., Zer Madencilik Dayanikli Tüketim Mallari Pazarlama A.S., Nazar Dayanikli ve Dayanikşiz Sinai Mallar Pazarlama A.S.'nin Bilkom Bilisim Hiz	GENCER	P	Fines	Should apply fines for failure to notify	Y	12
6	30.01.2001 /01-06/52-15	Sanofi SA/AG'nin, S… A…, D… A…, E… M…,T… M…, N… A… K… ve A… R… K…'ın, Sanofi Doğu İlaç A.Ş., Sanofi Difaş Kimyevi Maddeler Pazarlama A.Ş., Medifarm İlaç Sanayi ve Ticaret A.Ş., Synthelabo İlaç Ticaret A.Ş. ve Pierre Fabre İlaç A.Ş.'deki hisselerinin tama	KARACEHENNEM	S	Ancillary Restraints	Ancillary restraints should also be applied for transactions below thresholds	Y	13
7	26.06.2001 /01-29/282-83	Usinor Grubu'na bağlı Sollac Mediterranee S.A.'nın hisse devralması suretiyle Borusan Grubu'na bağlı Borçelik Çelik Sanayi Ticaret A.Ş.'nin ortak girişime dönüştürülmesine izin verilmesi talebi.	EROL	S	Joint Ventures	Risk of coordination. Independence of JV at stake. Regular info request from the JV should apply	Y	14
7	26.06.2001 /01-29/282-83	Usinor Grubu'na bağlı Sollac Mediterranee S.A.'nın hisse devralması suretiyle Borusan Grubu'na bağlı Borçelik Çelik Sanayi Ticaret A.Ş.'nin ortak girişime dönüştürülmesine izin verilmesi talebi.	KARACEHENNEM	S	Joint Ventures	Risk of coordination. Independence of JV at stake. Regular info request from the JV should apply	Y	15
7	26.06.2001 /01-29/282-83	Usinor Grubu'na bağlı Sollac Mediterranee S.A.'nın hisse devralması suretiyle Borusan Grubu'na bağlı Borçelik Çelik Sanayi Ticaret A.Ş.'nin ortak girişime dönüştürülmesine izin verilmesi talebi.	CANTÜRK	S	Joint Ventures	Risk of coordination. Independence of JV at stake. Regular info request from the JV should apply	Y	16
7	26.06.2001 /01-29/282-83	Usinor Grubu'na bağlı Sollac Mediterranee S.A.'nın hisse devralması suretiyle Borusan Grubu'na bağlı Borçelik Çelik Sanayi Ticaret A.Ş.'nin ortak girişime dönüştürülmesine izin verilmesi talebi.	AYTAÇ	S	Joint Ventures	Risk of coordination. Independence of JV at stake. Regular info request from the JV should apply	Y	17
8	28.06.2001 /01-29/293-86	Vaw Auslands Gmbh tarafından hisse devralınmasıyla Rotopak Grubu şirketlerinin ortak girişime dönüştürülmesine izin verilmesi talebi.	EROL	S	Ancillary Restraints	Non-compete obligation should not be restricted to the life of the JV since they already accept 5 years. What if the control changes before 5 years period.	Y	18
8	28.06.2001 /01-29/293-86	Vaw Auslands Gmbh tarafından hisse devralınmasıyla Rotopak Grubu şirketlerinin ortak girişime dönüştürülmesine izin verilmesi talebi.	SONBAY	S	Ancillary Restraints	Non-compete obligation should not be restricted to the life of the JV since they already accept 5 years. What if the control changes before 5 years period.	Y	19
9	31.07.2001 /01-37/365-97	Sodexho Restoran Servisleri A.Ş. ve Yemek Servisleri International A.Ş. tarafından kurulacak ve söz konusu teşebbüslerin hizmetlerinde kullanacakları akıllı kart alt yapı hizmetlerini yerine getirecek olan ortak girişime izin verilmesi talebi.	EROL	J	Relevant Market	Wrong determination, should also take into account the markets of the parents	N	20
9	31.07.2001 /01-37/365-97	Sodexho Restoran Servisleri A.Ş. ve Yemek Servisleri International A.Ş. tarafından kurulacak ve söz konusu teşebbüslerin hizmetlerinde kullanacakları akıllı kart alt yapı hizmetlerini yerine getirecek olan ortak girişime izin verilmesi talebi.	KARACEHENNEM	J	Relevant Market	Wrong determination, should also take into account the markets of the parents	N	21
10	18.09.2001 /01-44/433-111	Boyner Holding A.Ş.'ne bağlı Benkar Tüketici Finansmanı ve Kart Hizmetleri A.Ş. ile Fiba Holding A.Ş.'ne bağlı Fiba Bank A.Ş. arasında tüketici finansmanı ve bankacılık hizmetleri alanında kurulacak işbirliğine izin talebi.	SONBAY	P	Negative Clearance	Negative clearance cannot be drawn back with a merger decision. It should be decided separately	Y	22
10	18.09.2001 /01-44/433-111	Boyner Holding A.Ş.'ne bağlı Benkar Tüketici Finansmanı ve Kart Hizmetleri A.Ş. ile Fiba Holding A.Ş.'ne bağlı Fiba Bank A.Ş. arasında tüketici finansmanı ve bankacılık hizmetleri alanında kurulacak işbirliğine izin talebi.	ATASAYAR	P	Negative Clearance	Negative clearance cannot be drawn back with a merger decision. It should be decided separately	Y	23
11	27.09.2001 /02-57/717-286	BNET Iletisim Hizmetleri A.S.'nin COMNET Iletisim Hizmetleri ve Ticaret A.S. hisselerinin tamamini devralmasi islemine izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	24

11	27.09.2001 /02-57/717-286	BNET Iletisim Hizmetleri A.S.'nin COMNET Iletisim Hizmetleri ve Ticaret A.S. hisselerinin tamamini devralmasi islemine izin verilmesi talebi.	ATASAYAR	P	Fines	Should not apply fine for a late notification	Y	25
12	23.10.2001 /01-51/512-125	"Medya Holding Sabah Yayıncılık A.Ş.'de sahip olduğu hisselerin bir kısmının Penyelüks Tekstil Sanayi ve Ticaret A.Ş., Park Marina İşletmeciliği Turizm Denizcilik ve Ticaret A.Ş., Park Savunma Sanayi Otomotiv Tekstil Gıda İnşaat Ziraat Tıbbi ve Kimyevi Ma	PARLAK	J	Control	Control did not change through only the changes in the Board of Directors. The shares remain	Y	26
13	02.04.2002 /02-18/207-88	Mete Grubu'nun Metesan Lexel Elektrik Malzemeleri Sanayi ve Ticaret A.Ş.'deki hisselerinin Lexel A/S tarafından devralınması işlemi.	GENCER	J	Insufficient Examination	Market shares should be examined further	N	27
13	02.04.2002 /02-18/207-88	Mete Grubu'nun Metesan Lexel Elektrik Malzemeleri Sanayi ve Ticaret A.Ş.'deki hisselerinin Lexel A/S tarafından devralınması işlemi.	GÖKMEN	J	Insufficient Examination	Market shares should be examined further	N	28
14	14.05.2002 /02-28/313-128	Beğendik Mağaza İşletmeleri Ticaret ve Sanayi A.Ş. (Beğendik)'nin Bakırköy Carousel ve Bahçelievler Kadir Has Center'de yer alan mağazalarının Migros Türk T.A.Ş. (Migros) tarafından devralınmasıyla Ataköy, Bakırköy ve Bahçelievler'i kapsayan bölgede Migro	SONBAY	J	Control	Transfer of renting rights should be considered as a change in control	N	29
15	28.05.2002 /02-32/366-152	Parilti Toplu Yemek Üretim ve Hizmet A.S.'nin % 30 ve Damak Hazir Yemek Üretim ve Hizmet A.S.'nin %50 oranindaki hisselerinin Sofra Yemek Üretim ve Hizmet A.S. tarafindan devralinmasi islemine izin verilmesi talebi.	KARACEHENNEM	J	Control	There is change of control so the transaction should be considered as a concentration	N	30
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	AYTAÇ	P	Fines	Should apply fines for failure to notify	Y	31
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	ÜNAL	P	Fines	Should apply fines for failure to notify	Y	32
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	GENCER	P	Fines	Should apply fines for failure to notify	Y	33
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	ATASAYAR	J	Competence	According to the Banking Law Competition Authority is not competent for banking M&As	Y	34
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	KARACEHENNEM	J	Competence	According to the Banking Law Competition Authority is not competent for banking M&As	Y	35
16	13.06.2002 /02-38/419-177	Tekstil Bank A.S. (Tekstil Bank)'nin %35.45 oranindaki hissesinin GSD Holding A.S. (GSD Holding) tarafindan devralinmasi islemine izin verilmesi talebi.	PARLAK	J	Competence	According to the Banking Law Competition Authority is not competent for banking M&As	Y	36
17	11.07.2002 /02-43/503-208	Bomsaş Mukavva Sanayi ve Ticaret A.Ş.'nin Tire Kutsan Oluklu Mukavva Kutu ve Kağıt Sanayi A.Ş. tarafından tüm aktif ve pasifleriyle birlikte devralınması suretiyle iki şirketin birleşmesi işlemine izin verilmesi talebi.	GENCER	J	Insufficient Examination	Relied only on info. Provided by the parties. Control changes so should be considered as a concentration	N	37
18	08.08.2002 /02-47/588-241	Beğendik Mağaza İşletmeleri Ticaret A.Ş. (Beğendik)'nin Ankara ili Etlik ve Akköprü semtlerinde bulunan mağazalarındaki demirbaşlarının Adese Alışveriş Merkezleri ve Ticaret A.Ş. (Adese)'ye satışı ve mülk sahipleri ile Adese'nin yeni kiracılık sözleşmeler	SONBAY	J	Control	Transfer of immovables should be considered as a change in control	N	38
19	27.09.2002 /02-57/719-288	Sentim Bilişim Teknolojileri Sanayi ve Ticaret A.Ş. (Sentim) ile İndeks Bilgisayar Sistemleri Mühendislik Sanayi ve Ticaret A.Ş. (İndeks)'nin "Dell" markalı ürünleri pazarlamak amacıyla Decodo Bilgisayar Dağıtım ve Ticaret A.Ş. (Decodo) unvanlı ortak giri	SONBAY	P	Fines	Should not apply fine for a late notification	Y	39
19	27.09.2002 /02-57/719-288	Sentim Bilişim Teknolojileri Sanayi ve Ticaret A.Ş. (Sentim) ile İndeks Bilgisayar Sistemleri Mühendislik Sanayi ve Ticaret A.Ş. (İndeks)'nin "Dell" markalı ürünleri pazarlamak amacıyla Decodo Bilgisayar Dağıtım ve Ticaret A.Ş. (Decodo) unvanlı ortak giri	ATASAYAR	P	Fines	Should not apply fine for a late notification	Y	40
20	04.10.2002 /02-61/759-307	Parilti Toplu Yemek Üretim ve Hizmet A.S.'nin % 20 oranindaki hisselerinin Sofra Yemek Üretim ve Hizmet A.S. tarafindan devralinmasi islemine izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Transfer of know-how does not occur so ancillary restraints are not convincing	Y	41
21	11.10.2002 /02-62/774-316	Mikes Mikrodalga Sanayi ve Ticaret A.S hisselerinin %72'sinin Aselsan Elektronik Sanayi ve Ticaret A.S., %3'ünün T.C. Milli Savunma Bakanligi Savunma Sanayii Müstesarligi tarafindan devralinmasi islemine izin verilmesi talebi.	EROL	P	Fines	Should apply fines for failure to notify	Y	42
21	11.10.2002 /02-62/774-316	Mikes Mikrodalga Sanayi ve Ticaret A.S hisselerinin %72'sinin Aselsan Elektronik Sanayi ve Ticaret A.S., %3'ünün T.C. Milli Savunma Bakanligi Savunma Sanayii Müstesarligi tarafindan devralinmasi islemine izin verilmesi talebi.	GÖKMEN	P	Fines	Should apply fines for failure to notify	Y	43
21	11.10.2002 /02-62/774-316	Mikes Mikrodalga Sanayi ve Ticaret A.S hisselerinin %72'sinin Aselsan Elektronik Sanayi ve Ticaret A.S., %3'ünün T.C. Milli Savunma Bakanligi Savunma Sanayii Müstesarligi tarafindan devralinmasi islemine izin verilmesi talebi.	GENCER	P	Fines	Should apply fines for failure to notify	Y	44
22	25.11.2002 /02-74/872-356	Konya Şeker Fabrikası A.Ş. (Konya Şeker A.Ş.)'nin Çumra Şeker Sanayi ve Ticaret A.Ş. (Çumra Şeker A.Ş.)'deki hisse oranını %92,8'e çıkarması ve devamında Çumra Şeker A.Ş.'nin infisah ederek Konya Şeker Fabrikası A.Ş. bünyesine iltihak etmesi işlemine izin	KARACEHENNEM	J	Concept of Undertaking	Risk of SLC because of the jurisdictional determination. Should be considered as a concentration	N	45
22	25.11.2002 /02-74/872-356	Konya Şeker Fabrikası A.Ş. (Konya Şeker A.Ş.)'nin Çumra Şeker Sanayi ve Ticaret A.Ş. (Çumra Şeker A.Ş.)'deki hisse oranını %92,8'e çıkarması ve devamında Çumra Şeker A.Ş.'nin infisah ederek Konya Şeker Fabrikası A.Ş. bünyesine iltihak etmesi işlemine izin	EROL	J	Concept of Undertaking	The acquired company is an undertaking	N	46
22	25.11.2002 /02-74/872-356	Konya Şeker Fabrikası A.Ş. (Konya Şeker A.Ş.)'nin Çumra Şeker Sanayi ve Ticaret A.Ş. (Çumra Şeker A.Ş.)'deki hisse oranını %92,8'e çıkarması ve devamında Çumra Şeker A.Ş.'nin infisah ederek Konya Şeker Fabrikası A.Ş. bünyesine iltihak etmesi işlemine izin	GÖKMEN	J	Concept of Undertaking	The acquired company is an undertaking	N	47

22	25.11.2002 /02-74/872-356	Konya Şeker Fabrikası A.Ş. (Konya Şeker A.Ş.)'nin Çumra Şeker Sanayi ve Ticaret A.Ş. (Çumra Şeker A.Ş.)'deki hisse oranını %92,8'e çıkarması ve devamında Çumra Şeker A.Ş.'nin infisah ederek Konya Şeker Fabrikası A.Ş. bünyesine iltihak etmesi işlemine izin	SONBAY	J	Concept of Undertaking	The acquired company is an undertaking	N	48
22	25.11.2002 /02-74/872-356	Konya Şeker Fabrikası A.Ş. (Konya Şeker A.Ş.)'nin Çumra Şeker Sanayi ve Ticaret A.Ş. (Çumra Şeker A.Ş.)'deki hisse oranını %92,8'e çıkarması ve devamında Çumra Şeker A.Ş.'nin infisah ederek Konya Şeker Fabrikası A.Ş. bünyesine iltihak etmesi işlemine izin	GENCER	J	Concept of Undertaking	The acquired company is an undertaking	N	49
23	26.12.2002 /02-81/946-392	Konya Çimento Sanayii A.S. tarafından Anadolu Çimento Sanayi ve Ticaret A.S.'ye ait bazi varliklarin devralinmasina izin verilmesi talebi.	MÜFTÜOĞLU	J	Concept of Undertaking	The acquired company has no activity nor turnover so it is not an undertaking	Y	50
23	26.12.2002 /02-81/946-392	Konya Çimento Sanayii A.S. tarafından Anadolu Çimento Sanayi ve Ticaret A.S.'ye ait bazi varliklarin devralinmasina izin verilmesi talebi.	KARACEHENNEM	S	Ancillary Restraints	Non compete clause is not reasonable since the acquired has no portfolio	Y	51
23	26.12.2002 /02-81/946-392	Konya Çimento Sanayii A.S. tarafından Anadolu Çimento Sanayi ve Ticaret A.S.'ye ait bazi varliklarin devralinmasina izin verilmesi talebi.	ÜNAL	J	Concept of Undertaking	The acquired company has no activity nor turnover so it is not an undertaking	Y	52
23	26.12.2002 /02-81/946-392	Konya Çimento Sanayii A.S. tarafından Anadolu Çimento Sanayi ve Ticaret A.S.'ye ait bazi varliklarin devralinmasina izin verilmesi talebi.	GENCER	J	Concept of Undertaking	The acquired company has no activity nor turnover so it is not an undertaking	Y	53
24	20.02.2003 /03-11/124-58	"Budget" markası altında gerçekleştirilen oto kiralama işi ile ilgili bazı maddi ve gayrimaddi malvarlıklarının Avis Europe plc. (Avis) tarafından bizzat ve/veya iştirakleri aracılığı ile devralınması işlemine izin verilmesi talebi.	SONBAY	J	Control	Transfer of trademark should be considered as an acquisition	N	54
25	03.04.2003 /03-22/247-108	Pfizer Inc.'in iştiraki olan Warner Lambert şirketinin şekerli mamüller alanında iş departmanı olan Adams'ın iştiraklerinin ve mal varlığının, Cadbury Schweppes tarafından devralınmasına izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Restriction on provoking the labor force is a beyond necessary ancillary restraint	Y	55
26	27.05.2003 /03-35/414-181	ThyssenKrupp AG grubuna ait şirketlerden Thyssen Polymer GmbH, Vinyl Building Products Inc. ve Thyssen Polymer Polska Sp.zo.o'nun hisselerinin Deceuninck NV. tarafından devralınması işlemine izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Restriction of having up to %5 shares in other competing undertakings should not be considered as an ancillary restraint. Still no consistent assessment of ancillary restraints.	Y	56
27	19.06.2003 /03-44/502-222	Vestelnet Elektronik Sanayi ve Ticaret A.Ş.'nin Vestelnet Elektronik İletişim ve Bilgilendirme A.Ş.'deki %97.6 oranında hisselerinin DkNet Elektronik İletişim ve Teknolojik Yatırımlar Ticaret A.Ş.'ye devredilmesi işlemine izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	57
27	19.06.2003 /03-44/502-222	Vestelnet Elektronik Sanayi ve Ticaret A.Ş.'nin Vestelnet Elektronik İletişim ve Bilgilendirme A.Ş.'deki %97.6 oranında hisselerinin DkNet Elektronik İletişim ve Teknolojik Yatırımlar Ticaret A.Ş.'ye devredilmesi işlemine izin verilmesi talebi.	ATASAYAR	P	Fines	Should not apply fine for a late notification	Y	58
28	26.06.2003 /03-45/519-230	Kipa Kitle Pazarlama Ticaret ve Gida Sanayi A.S.'nin çogunluk hisselerinin Tesco Plc tarafindan devralinmasina izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Restriction of having up to %5 shares in other competing undertakings should not be considered as an ancillary restraint. Still no consistent assessment of ancillary restraints.	Y	59
29	21.08.2003 /03-58/674-307	Exel International Holdings (Netherlands 2) B.V. (Exel International) ve Exel Lojistik Hizmetleri A.Ş. (Exel Lojistik) tarafından Transbeynak Uluslararası Nakliyat ve Ticaret A.Ş. (Transbeynak)'nin tüm hisselerinin devralınması işlemine izin verilmesi tal	GENCER	J	Powers of the Authority	The Law does not provide for "conditional" negative clearance. The Board is not given the authority to address undertakings how they have to correct the unlawfullness.	N	60
30	09.10.2003 /03-66/796-357	Ümit ARIKAN, İbrahim ARIKAN, Ebru ARIKAN TURGUT ve Eda ARIKAN tarafından R. L. Lojistik Dağıtım Kurye Anonim Şirketi (R. L. Lojistik)'nin %75 hissesinin devralınması işlemine izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	61
31	23.10.2003 /03-69/831-361	Comsat İletişim Hizmetleri Ticaret A.Ş. ve Comsat Digital Hizmetleri Ticaret A.Ş. hisselerinin, Comsat International Inc. tarafından devralınmasına izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	62
32	20.11.2003 /03-75/921-387	Sebit Eğitim ve Bilgi Teknolojileri A.Ş. hisselerinin tamamının Siemens Business Services Sistem Hizmetleri A.Ş.'ye devredilmesi ve Sebit Eğitim ve Bilgi Teknolojileri A.Ş.'nin Siemens Business Services Sistem Hizmetleri A.Ş. ile birleşmesi işlemlerine iz	SONBAY	P	Fines	Should not apply fine for a late notification	Y	63
33	15.12.2003 /03-79/965-396	Tütün, Tütün Mamulleri, Tuz ve Alkol İşletmeleri A.Ş. (TEKEL A.Ş.)'nin %100 oranında hisselerine sahip olduğu Alkollü İçkiler Sanayi ve Ticaret A.Ş. hisselerinin tamamının blok satış yöntemi ile özelleştirilmesi.	SONGÖR	S	Dominant Position	Although there is potential competition there is risk of practices which may SLC. Should accept the watchdog of the Authority	Y	64
33	15.12.2003 /03-79/965-396	Tütün, Tütün Mamulleri, Tuz ve Alkol İşletmeleri A.Ş. (TEKEL A.Ş.)'nin %100 oranında hisselerine sahip olduğu Alkollü İçkiler Sanayi ve Ticaret A.Ş. hisselerinin tamamının blok satış yöntemi ile özelleştirilmesi.	AYTAÇ	J	Powers of the Authority	Court judgements on the transaction should be referred to in the decision	Y	65
33	15.12.2003 /03-79/965-396	Tütün, Tütün Mamulleri, Tuz ve Alkol İşletmeleri A.Ş. (TEKEL A.Ş.)'nin %100 oranında hisselerine sahip olduğu Alkollü İçkiler Sanayi ve Ticaret A.Ş. hisselerinin tamamının blok satış yöntemi ile özelleştirilmesi.	AYTAÇ	S	Dominant Position	Although there is potential competition there is risk of practices which may SLC. Should accept the watchdog of the Authority	Y	66
33	15.12.2003 /03-79/965-396	Tütün, Tütün Mamulleri, Tuz ve Alkol İşletmeleri A.Ş. (TEKEL A.Ş.)'nin %100 oranında hisselerine sahip olduğu Alkollü İçkiler Sanayi ve Ticaret A.Ş. hisselerinin tamamının blok satış yöntemi ile özelleştirilmesi.	ÜNAL	J	Powers of the Authority	The Board should take into account the court judgements on the transaction	Y	67
34	29.01.2004 /04-09/77-19	Türkiye Petrol Rafinerileri A.Ş. (TÜPRAŞ)'nin %65.76 hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	AYTAÇ	S	Insufficient Examination	The market conditions and the activities of the acquirors should be examined further. Risk of SLC	Y	68
34	29.01.2004 /04-09/77-19	Türkiye Petrol Rafinerileri A.Ş. (TÜPRAŞ)'nin %65.76 hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	S	Insufficient Examination	The market conditions and the activities of the acquirors should be examined further. Risk of SLC	Y	69
35	01.04.2004 /04-23/253-56	Arvin International Holdings LLC (Arvin International) tarafından kontrol edilen AP Amortiguadores S.A. (APA)'nın hisselerinin % (…)'inin Kayaba Industry Co. Ltd. (Kayaba) tarafından devralınması işlemine izin verilmesi, aksi halde bildirimin menfi tespi	GENCER	S	Ancillary Restraints	The transaction is below thresholds but is a concentration. The authority grants negative clearance although there is an ancillary restraint on confidentiality	N	70

36	29.04.2004 /04-30/348-85	Sümer Holding A.Ş.'ye ait TÜMOSAN/Türk Motor ve Traktör İşletmesi'nin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	J	Powers of the Authority	The authority cannot decide on other than the first three bidders in a privatization	Y	71
36	29.04.2004 /04-30/348-85	Sümer Holding A.Ş.'ye ait TÜMOSAN/Türk Motor ve Traktör İşletmesi'nin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	GENCER	J	Powers of the Authority	The authority cannot decide on other than the first three bidders in a privatization	Y	72
37	03.05.2004 /04-31/364-90	MB Seker Nisasta A.S.'nin %99,8 hissesinin Keskinkiliç Gida A.S. tarafindan devralinmasi islemine izin verilmesi talebi.	GÖKMEN	J	Concept of Undertaking	The acquired company should be considered as an undertaking	N	73
37	03.05.2004 /04-31/364-90	MB Seker Nisasta A.S.'nin %99,8 hissesinin Keskinkiliç Gida A.S. tarafindan devralinmasi islemine izin verilmesi talebi.	SONBAY	J	Concept of Undertaking	The acquired company should be considered as an undertaking	N	74
37	03.05.2004 /04-31/364-90	MB Seker Nisasta A.S.'nin %99,8 hissesinin Keskinkiliç Gida A.S. tarafindan devralinmasi islemine izin verilmesi talebi.	GENCER	J	Concept of Undertaking	The acquired company should be considered as an undertaking	N	75
38	13.05.2004 /04-34/382-96	Dogus Otomotiv Servis ve Ticaret A.S. tarafindan Dogus Otomotiv Holding A.S, Dogus Motor Servis ve Ticaret A.S., Dogus Agir Vasita Servis ve Ticaret A.S. ve Genpar Otomotiv Ticaret A.S.'nin devralinmasi islemine izin verilmesi talebi.	PARLAK	J	Powers of the Authority	Although not a concentration (transaction within the same undertaking) the Board should decide on negative clearance since the applicant requests	N	76
38	13.05.2004 /04-34/382-96	Dogus Otomotiv Servis ve Ticaret A.S. tarafindan Dogus Otomotiv Holding A.S, Dogus Motor Servis ve Ticaret A.S., Dogus Agir Vasita Servis ve Ticaret A.S. ve Genpar Otomotiv Ticaret A.S.'nin devralinmasi islemine izin verilmesi talebi.	SONGÖR	J	Powers of the Authority	Although not a concentration (transaction within the same undertaking) the Board should decide on negative clearance since the applicant requests	N	77
38	13.05.2004 /04-34/382-96	Dogus Otomotiv Servis ve Ticaret A.S. tarafindan Dogus Otomotiv Holding A.S, Dogus Motor Servis ve Ticaret A.S., Dogus Agir Vasita Servis ve Ticaret A.S. ve Genpar Otomotiv Ticaret A.S.'nin devralinmasi islemine izin verilmesi talebi.	ASLAN	J	Powers of the Authority	Although not a concentration (transaction within the same undertaking) the Board should decide on negative clearance since the applicant requests	N	78
39	20.05.2004 /04-36/408-101	Horoz Kargo Hizmetleri ve Ticaret A.Ş. (Horoz Kargo)'nin hisselerinin Aras Grubu tarafından devralınması işlemine izin verilmesi talebi.	ASLAN	P	Fines	The fine is applied based on the latest Communiqué. It should be lower.	Y	79
39	20.05.2004 /04-36/408-101	Horoz Kargo Hizmetleri ve Ticaret A.Ş. (Horoz Kargo)'nin hisselerinin Aras Grubu tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Fines	The fine is applied based on the latest Communiqué. It should be lower.	Y	80
39	20.05.2004 /04-36/408-101	Horoz Kargo Hizmetleri ve Ticaret A.Ş. (Horoz Kargo)'nin hisselerinin Aras Grubu tarafından devralınması işlemine izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	81
40	26.05.2004 /04-38/427-107	Yurtiçi Kargo Servisi A.S. (Yurtiçi Kargo) ile GeoPost (Central Europe) GmbH (Geopost)'nin bir ortak girisim sirketi kurmasi islemine izin verilmesi talebi.	GENCER	J	Powers of the Authority	The Law does not provide for "conditional" negative clearance. The Board is not given the authority to address undertakings how they have to correct the unlawfullness.	N	82
41	26.05.2004 /04-38/426-106	Borsig Energy GmbH'nin elinde bulunan Turbomach S.A. hisselerinin tamamının Caterpillar Overseas S.A. tarafından ve Turbomach GmbH'nin malvarlığının tamamının Magnet 37. V V GmbH tarafından devralınması işlemine ilişkin izin talebi.	GENCER	S	Ancillary Restraints	Restriction of having up to %5 shares in other competing undertakings should not be considered as an ancillary restraint.	Y	83
42	17.06.2004 /04-42/500-123	GHW Gebaudemanagement GmbH & Co. KG ile GHW Grote & Hartmann GmbH'nin hisselerinin ve GHW Engineering GmbH'ye ait bazı gayrimenkulün (bundan böyle topluca GHW) GHW Verwaltungs GmbH, Klaus HARTMANN ve Ruth MATZLER tarafından, Lear Corporation Verwaltungs	GENCER	S	Insufficient Examination	The information on the parties and their shareholding situation is not comprehensive	Y	84
43	29.07.2004 /04-49/662-166	Unilever N.V.'ye ait GIBBS markasının, taraflar arasında imzalanan "Ticari Marka Satış ve Lisans Sözleşmeleri" çerçevesinde Evyap Sabun, Yağ, Gliserin San. ve Tic. A.Ş.'ye devri işlemine izin verilmesi talebi	GENCER	S	Insufficient Examination	The information on the market shares are not taken into consideration for a sound analysis of risk of SLC	Y	85
44	04.11.2004 /04-70/1006-245	H.Ö. Sabancı Holding A.Ş.'nin %50 hissedarı olduğu DuPont Polyester Europa BV şirketindeki E.I. DuPont de Nemours and Company'e ait diğer %50 hissesini devralması işlemine izin verilmesi talebi.	GENCER	S	Ancillary Restraints	The Authority has no principles on ancillary restraints and takes inconsistent decisions. 7 years of non-compete is not acceptable and the reasons are not convincing	Y	86
45	16.12.2004 /04-79/1147-287	Fuat MİRAS, Şadan KALKAVAN, Metin KALKAVAN, Merey Gündüz KAPTANOĞLU ve Eşref Mehmet CERRAHOĞLU'nun, Ereğli Denizcilik A.Ş. unvanlı bir ortak girişim kurmaları işlemine izin verilmesi talebi.	SONBAY	P	Fines	Should not apply fine for a late notification	Y	87
45	16.12.2004 /04-79/1147-287	Fuat MİRAS, Şadan KALKAVAN, Metin KALKAVAN, Merey Gündüz KAPTANOĞLU ve Eşref Mehmet CERRAHOĞLU'nun, Ereğli Denizcilik A.Ş. unvanlı bir ortak girişim kurmaları işlemine izin verilmesi talebi.	ASLAN	P	Fines	Should not apply fine for a late notification	Y	88
45	16.12.2004 /04-79/1147-287	Fuat MİRAS, Şadan KALKAVAN, Metin KALKAVAN, Merey Gündüz KAPTANOĞLU ve Eşref Mehmet CERRAHOĞLU'nun, Ereğli Denizcilik A.Ş. unvanlı bir ortak girişim kurmaları işlemine izin verilmesi talebi.	GENCER	J	Concept of Undertaking	The definition of undertaking for the real person for the parties is not properly determined according to the Art 3 of the Act (Definitions)	Y	89
45	16.12.2004 /04-79/1147-287	Fuat MİRAS, Şadan KALKAVAN, Metin KALKAVAN, Merey Gündüz KAPTANOĞLU ve Eşref Mehmet CERRAHOĞLU'nun, Ereğli Denizcilik A.Ş. unvanlı bir ortak girişim kurmaları işlemine izin verilmesi talebi.	ÜNAL	S	Dominant Position	Risk of dominant position and SLC through coordination effects	Y	90
46	21.12.2004 /04-80/1153-288	Bayer HealthCare AG'nin Roche OTC İş Kolu'nu devralması işlemine izin talebi.	GENCER	S	Relevant Market	Wrong determinationof relevant market and the market shares of the parties	Y	91
46	21.12.2004 /04-80/1153-288	Bayer HealthCare AG'nin Roche OTC İş Kolu'nu devralması işlemine izin talebi.	AYTAÇ	S	Relevant Market	Wrong determinationof relevant market and the market shares of the parties	Y	92
47	23.12.2004 /04-81/1156-289	Yapı ve Kredi Bankası A.Ş. ve Demir Toprak A.Ş.'nin Groupe SEB İstanbul Ev Aletleri Ticaret A.Ş.'nde sahip oldukları %40 oranındaki hisselerin SEB Internationale SAS tarafından devralınması işlemine izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Transfer of know-how does not occur (since SEB is the holder of such know how) so ancillary restraints are not convincing. The EU principle of 2 years should be applied in general.	Y	93
48	06.01.2005 /05-01/7-6	One Equity Partners LLC (OEP)'nin kontrolündeki Howaldswerke-Deutsche Werft AG (HDW)'nin ThyssenKrupp AG (TK) tarafından devralınması işlemine izin verilmesi talebi.	GENCER	J	Effect Doctrine	The parties have no activity in Turkey so the transaction should not be examined by the Authority (Art 2 Scope)	Y	94
49	13.01.2005 /05-05/24-12	İTO Emniyet ve Güvenlik Sistemleri Sanayi ve Ticaret A.Ş. (ITO)'nin tüm hisselerinin IR Emniyet ve Güvenlik Sistemleri Sanayi A.Ş. (IR Türkiye) tarafından devralınması işlemine izin verilmesi talebi.	GENCER	S	Ancillary Restraints	Non compete clause is not reasonable since there is no link for tranfer of know-how. The EU principle of 2 years should be applied in general.	Y	95
50	03.02.2005 /05-07/55-22	Motorlu motorsuz kara nakil vasıtalarının zorunlu fenni muayenesi hizmetinin imtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	96

50	03.02.2005 /05-07/55-22	Motorlu motorsuz kara nakil vasıtalarının zorunlu fenni muayenesi hizmetinin imtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÜNAL	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	97
51	03.02.2005 /05-07/56-23	KOÇ Holding A.Ş. (Koç Holding), Koç Holding Emekli ve Yardım Sandığı Vakfı, Vehbi Koç Vakfı ve Rahmi M. KOÇ'un sahibi bulunduğu %51 oranındaki MAKO Elektrik Sanayi ve Ticaret A.Ş. (MAKO) hissesinin Magnetti Marelli Holding S.p.A. (MMH) tarafından devralın	GENCER	S	Ancillary Restraints	Non compete clause should not be more than 2 years in portfolio transfers and 3 years in know-how transfers as in the EU. In this case there is no know-how transfer so 2 years should apply	Y	98
52	10.02.2005 /05-10/82-31	Motorlu motorsuz kara nakil vasıtalarının zorunlu fenni muayenesi hizmetinin imtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	99
52	10.02.2005 /05-10/82-31	Motorlu motorsuz kara nakil vasıtalarının zorunlu fenni muayenesi hizmetinin imtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÜNAL	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	100
53	03.03.2005 /05-12/144-51	BNP Paribas SA (BNPP) ve Dresdner Bank AG (DB)'nin BNP-AK-Dresdner Bank A.Ş. (BADB)'de sahip olduğu toplam %60 oranındaki hissenin, bankanın diğer hissedarı Akbank T.A.Ş. (Akbank) tarafından devralınması işlemine izin verilmesi talebi.	ASLAN	J	Competence	This is not a transaction falling within the jurisdiction of Banking Law by definition. The Competition Authority should examine.	N	101
53	03.03.2005 /05-12/144-51	BNP Paribas SA (BNPP) ve Dresdner Bank AG (DB)'nin BNP-AK-Dresdner Bank A.Ş. (BADB)'de sahip olduğu toplam %60 oranındaki hissenin, bankanın diğer hissedarı Akbank T.A.Ş. (Akbank) tarafından devralınması işlemine izin verilmesi talebi.	AYTAÇ	J	Competence	This is not a transaction falling within the jurisdiction of Banking Law by definition. The Competition Authority should examine.	N	102
53	03.03.2005 /05-12/144-51	BNP Paribas SA (BNPP) ve Dresdner Bank AG (DB)'nin BNP-AK-Dresdner Bank A.Ş. (BADB)'de sahip olduğu toplam %60 oranındaki hissenin, bankanın diğer hissedarı Akbank T.A.Ş. (Akbank) tarafından devralınması işlemine izin verilmesi talebi.	GENCER	J	Competence	This is not a transaction falling within the jurisdiction of Banking Law by definition. The Competition Authority should examine.	N	103
53	03.03.2005 /05-12/144-51	BNP Paribas SA (BNPP) ve Dresdner Bank AG (DB)'nin BNP-AK-Dresdner Bank A.Ş. (BADB)'de sahip olduğu toplam %60 oranındaki hissenin, bankanın diğer hissedarı Akbank T.A.Ş. (Akbank) tarafından devralınması işlemine izin verilmesi talebi.	SONBAY	J	Competence	This is not a transaction falling within the jurisdiction of Banking Law by definition. The Competition Authority should examine.	N	104
53	03.03.2005 /05-12/144-51	BNP Paribas SA (BNPP) ve Dresdner Bank AG (DB)'nin BNP-AK-Dresdner Bank A.Ş. (BADB)'de sahip olduğu toplam %60 oranındaki hissenin, bankanın diğer hissedarı Akbank T.A.Ş. (Akbank) tarafından devralınması işlemine izin verilmesi talebi.	ÜNAL	J	Competence	This is not a transaction falling within the jurisdiction of Banking Law by definition. The Competition Authority should examine.	N	105
54	31.03.2005 /05-20/229-67	ISS Global A/S, ISS Denmark A/S, ISS Finans A/S ve ISS Venture A/S (ISS Grubu) tarafından, Proser Yönetim ve Eğitim Hizmetleri, Temizlik, Tekstil, Gıda ve Bilgisayar Hizmetleri Sanayi ve Ticaret A.Ş. (Proser) hisselerinin %70'inin devralınması işlemine iz	SONBAY	S	Ancillary Restraints	Lowering 3 years of non-compete to 2 years is not based on economic and technical justification.	Y	106
54	31.03.2005 /05-20/229-67	ISS Global A/S, ISS Denmark A/S, ISS Finans A/S ve ISS Venture A/S (ISS Grubu) tarafından, Proser Yönetim ve Eğitim Hizmetleri, Temizlik, Tekstil, Gıda ve Bilgisayar Hizmetleri Sanayi ve Ticaret A.Ş. (Proser) hisselerinin %70'inin devralınması işlemine iz	KALDIRIMCI	S	Ancillary Restraints	Lowering 3 years of non-compete to 2 years is not based on economic and technical justification. Is it just that EU says it so? (see Gencer's votes stating that exceptions may apply)	Y	107
55	25.04.2005 /05-28/320-82	Marzotto SpA ile Manifattura Lane Folco SpA aracılığıyla Verzoletto SpA tarafından kurulacak ortak girişime izin verilmesi talebi.	KALDIRIMCI	J	Powers of the Authority	The Authority should examine the JV agreement although it is not finalized. **EXCELLENT**	N	108
56	05.05.2005 /05-30/373-92	Türkiye Gübre Sanayii A.Ş. bağlı ortaklıklarından Samsun Gübre Sanayii A.Ş.'de bulunan %100 oranındaki kamu hisselerinin özelleştirilmesi yoluyla devredilmesi işlemine izin verilmesi talebi.	AYTAÇ	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	109
56	05.05.2005 /05-30/373-92	Türkiye Gübre Sanayii A.Ş. bağlı ortaklıklarından Samsun Gübre Sanayii A.Ş.'de bulunan %100 oranındaki kamu hisselerinin özelleştirilmesi yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	110
56	05.05.2005 /05-30/373-92	Türkiye Gübre Sanayii A.Ş. bağlı ortaklıklarından Samsun Gübre Sanayii A.Ş.'de bulunan %100 oranındaki kamu hisselerinin özelleştirilmesi yoluyla devredilmesi işlemine izin verilmesi talebi.	AYTAÇ	S	Dominant Position	Disregard of previous prohibition decision (oligopolistic market and creation of dominant position). The actors and the market situation did not change. So the Board shold not clear the transaction	Y	111
56	05.05.2005 /05-30/373-92	Türkiye Gübre Sanayii A.Ş. bağlı ortaklıklarından Samsun Gübre Sanayii A.Ş.'de bulunan %100 oranındaki kamu hisselerinin özelleştirilmesi yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	S	Dominant Position	Disregard of previous prohibition decision (oligopolistic market and creation of dominant position). The actors and the market situation did not change. So the Board shold not clear the transaction	Y	112
57	17.05.2005 /05-32/437-102	Türk Dış Ticaret Bankası A.Ş. (TDTB)'nin %89,34 oranındaki hissesinin Fortis Bank nv-sa (Fortis Bank) tarafından devralınması işlemi kapsamında, Dış Ticaret Finansal Kiralama A.Ş. (DTFK)'nin kontrolünün dolaylı olarak el değiştirmesi işlemine izin verilme	ÇAKIN	J	Competence	The Board should not have competence to examine this transaction since it is subject to Banking law	Y	113
58	26.05.2005 /05-36/450-103	Farmasötikler/ilaç sektöründe faaliyet gösteren Novartis AG'nin münhasıran kontrol ettiği Novartis (Deutschland) GmbH aracılığı ile yine aynı sektörde faaliyet gösteren Hexal AG şirketinin hisselerinin tümünü devralması işlemine izin verilmesi talebi.	AYTAÇ	S	Dominant Position	Risk of dominant position and SLC in a market (N5B). The undertaking by Novartis of exit from market is not secured with extra undertakings.	Y	114
58	26.05.2005 /05-36/450-103	Farmasötikler/ilaç sektöründe faaliyet gösteren Novartis AG'nin münhasıran kontrol ettiği Novartis (Deutschland) GmbH aracılığı ile yine aynı sektörde faaliyet gösteren Hexal AG şirketinin hisselerinin tümünü devralması işlemine izin verilmesi talebi.	AYTAÇ	S	Ancillary Restraints	5 years non-compete clause is longer than the usual 2-3 years application. The reasons and justifications should be examined.	Y	115
58	26.05.2005 /05-36/450-103	Farmasötikler/ilaç sektöründe faaliyet gösteren Novartis AG'nin münhasıran kontrol ettiği Novartis (Deutschland) GmbH aracılığı ile yine aynı sektörde faaliyet gösteren Hexal AG şirketinin hisselerinin tümünü devralması işlemine izin verilmesi talebi.	ÜNAL	S	Dominant Position	Risk of dominant position and SLC in a market (N5B). The undertaking by Novartis of exit from market is not secured with extra undertakings.	Y	116
58	26.05.2005 /05-36/450-103	Farmasötikler/ilaç sektöründe faaliyet gösteren Novartis AG'nin münhasıran kontrol ettiği Novartis (Deutschland) GmbH aracılığı ile yine aynı sektörde faaliyet gösteren Hexal AG şirketinin hisselerinin tümünü devralması işlemine izin verilmesi talebi.	ÜNAL	S	Ancillary Restraints	5 years non-compete clause is longer than the usual 2-3 years application. The reasons and justifications should be examined.	Y	117
59	17.06.2005 /05-40/557-136	CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş.'nin (CarrefourSA) Gima Gıda ve İhtiyaç Maddeleri T.A.Ş. (Gima) ve Endi Tüketim Malları Tic. ve San. A.Ş.'nin (Endi) kontrolünü Fiba Grubu'ndan devralması işlemine izin verilmesi talebi.	ASLAN	S	Ancillary Restraints	3 years non-compete should be 2 years as in other decisions.	Y	118

59	17.06.2005 /05-40/557-136	CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş.'nin (CarrefourSA) Gima Gıda ve İhtiyaç Maddeleri T.A.Ş. (Gima) ve Endi Tüketim Malları Tic. ve San. A.Ş.'nin (Endi) kontrolünü Fiba Grubu'ndan devralması işlemine izin verilmesi talebi.	ÇAKIN	S	Ancillary Restraints	3 years non-compete should be 2 years as in other decisions.	Y	119
60	17.06.2005 /05-40/559-138	Carclo Plc. ve Carclo Platt Netherland BV'nin kontrol ettiği ECC Platt Tarak Aksesuarları ve Makineleri İthalat İhracat ve Ticaret A.Ş., ECC Platt SA France, ECC Platt Card Clothing Limited UK, ECC (Changzhou) Ltd, ECC Card Clothing Inc., ECC Canada, ECC	ERSİN	J	Powers of the Authority	The Authority should examine the agreement although it is not signed yet.	N	120
60	17.06.2005 /05-40/559-138	Carclo Plc. ve Carclo Platt Netherland BV'nin kontrol ettiği ECC Platt Tarak Aksesuarları ve Makineleri İthalat İhracat ve Ticaret A.Ş., ECC Platt SA France, ECC Platt Card Clothing Limited UK, ECC (Changzhou) Ltd, ECC Card Clothing Inc., ECC Canada, ECC	KALDIRIMCI	J	Powers of the Authority	The Authority should examine the agreement although it is not signed yet.	N	121
61	28.06.2005 /05-41/578-146	Devlet Hava Meydanları İşletmesi Genel Müdürlüğü (DHMİ)'nün mülkiyetinde bulunan İstanbul Atatürk Hava Limanı (AHL) İç ve Dış Hat Terminali, katlı otopark ile Genel Havacılık Terminali işletim haklarının 15,5 yıllığına TAV Yatırım, Yapım ve İşletme A.Ş. (	SONGÖR	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4.	Y	122
61	28.06.2005 /05-41/578-146	Devlet Hava Meydanları İşletmesi Genel Müdürlüğü (DHMİ)'nün mülkiyetinde bulunan İstanbul Atatürk Hava Limanı (AHL) İç ve Dış Hat Terminali, katlı otopark ile Genel Havacılık Terminali işletim haklarının 15,5 yıllığına TAV Yatırım, Yapım ve İşletme A.Ş. (	ÇAKIN	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	123
61	28.06.2005 /05-41/578-146	Devlet Hava Meydanları İşletmesi Genel Müdürlüğü (DHMİ)'nün mülkiyetinde bulunan İstanbul Atatürk Hava Limanı (AHL) İç ve Dış Hat Terminali, katlı otopark ile Genel Havacılık Terminali işletim haklarının 15,5 yıllığına TAV Yatırım, Yapım ve İşletme A.Ş. (	AYTAÇ	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	124
61	28.06.2005 /05-41/578-146	Devlet Hava Meydanları İşletmesi Genel Müdürlüğü (DHMİ)'nün mülkiyetinde bulunan İstanbul Atatürk Hava Limanı (AHL) İç ve Dış Hat Terminali, katlı otopark ile Genel Havacılık Terminali işletim haklarının 15,5 yıllığına TAV Yatırım, Yapım ve İşletme A.Ş. (	ÜNAL	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	125
62	08.07.2005 /05-44/630-163	ABS Alçı ve Blok Sanayi A.Ş.'nin, SİMAŞ Siirt Maden San. ve Tic. A.Ş.'ye ait arsa ve bu arsa üzerindeki alçı üretim tesisini satın alması işlemine ilişkin izin verilmesi talebi.	AYTAÇ	S	Insufficient Examination	The information on market definition and market shares are not examined thoroughly. Accordingly, ssessment of dominant position and SLC cannot be performed	Y	126
63	12.07.2005 /05-45/665-169	Özelleştirme kapsam ve programında bulunan Eti Alüminyum A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %100 oranındaki hissenin özelleştirilme yoluyla devredilmesi işlemine izin verilmesi talebi.	AYTAÇ	S	Dominant Position	Creation of dominant position.	Y	127
63	12.07.2005 /05-45/665-169	Özelleştirme kapsam ve programında bulunan Eti Alüminyum A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %100 oranındaki hissenin özelleştirilme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	S	Dominant Position	Creation of dominant position.	Y	128
63	12.07.2005 /05-45/665-169	Özelleştirme kapsam ve programında bulunan Eti Alüminyum A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %100 oranındaki hissenin özelleştirilme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÇAKIN	S	Dominant Position	Creation of dominant position.	Y	129
64	21.07.2005 /05-48/681-175	Türk Telekomünikasyon A.Ş. (Türk Telekom)'nin %55 oranındaki hissesinin blok satış yöntemiyle özelleştirilmesine yönelik izin talebi.	ÜNAL	S	Remedies	Remedies such as separation of Kablo TV are not consistent. Insufficient analysis of the Telecom market	Y	130
65	17.08.2005 /05-52/797-217	T.C. Başbakanlık Özelleştirme İdaresi Başkanlığı'nın Kıbrıs Türk Hava Yolları A.Ş. (KTHY)'deki %50 oranındaki hissesinin özelleştirme yoluyla Ada Havacılık ve Taşımacılık A.Ş. (Ada Havacılık) veya Beşparmak Havacılık ve Taşımacılık A.Ş. (Beşparmak Havacı	ÜNAL	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4. (Other Members?)	Y	131
66	15.09.2005 /05-58/855-231	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait Mersin Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	AYTAÇ	S	Insufficient Examination	The Board did not take into consideration the previous internal reports on the risk of creation of dominant position (based on geographic market and Iskenderun Port) and opinion on the division of the port.	Y	132
66	15.09.2005 /05-58/855-231	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait Mersin Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	S	Insufficient Examination	The Board did not take into consideration the previous internal reports on the risk of creation of dominant position (based on geographic market and Iskenderun Port) and opinion on the division of the port.	Y	133
66	15.09.2005 /05-58/855-231	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait Mersin Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	134
66	15.09.2005 /05-58/855-231	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait Mersin Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	ÜNAL	S	Insufficient Examination	The Board did not take into consideration the previous internal reports on the risk of creation of dominant position (based on geographic market and Iskenderun Port) and opinion on the division of the port.	Y	135
66	15.09.2005 /05-58/855-231	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait Mersin Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	136
67	17.08.2005 /05-52/797-217; 22.09.2005 /05-59/876-235	Tasarruf Mevduatı Sigorta Fonu'nun (TMSF) kontrolünde bulunan Standart Alüminyum A.Ş. bünyesinde bulunan alüminyum fabrikası ile yardımcı tesislerin, mütemmim cüz ve teferruat niteliğindeki makina ve ekipmanların, Assan Galvaniz San. ve Tic. A.Ş. tarafınd	SONGÖR	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	137
67	22.09.2005 /05-59/876-235	Tasarruf Mevduatı Sigorta Fonu'nun (TMSF) kontrolünde bulunan Standart Alüminyum A.Ş. bünyesinde bulunan alüminyum fabrikası ile yardımcı tesislerin, mütemmim cüz ve teferruat niteliğindeki makina ve ekipmanların, Assan Galvaniz San. ve Tic. A.Ş. tarafınd	AYTAÇ	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	138

67	22.09.2005 /05-59/876-235	Tasarruf Mevduatı Sigorta Fonu'nun (TMSF) kontrolünde bulunan Standart Alüminyum A.Ş. bünyesinde bulunan alüminyum fabrikası ile yardımcı tesislerin, mütemmim cüz ve teferruat niteliğindeki makina ve ekipmanların, Assan Galvaniz San. ve Tic. A.Ş. tarafınd	ÜNAL	P	Internal Procedure	The procedure is not applied according to the Communiqué 1998/4 Arts 3 and 4.	Y	139
67	22.09.2005 /05-59/876-235	Tasarruf Mevduatı Sigorta Fonu'nun (TMSF) kontrolünde bulunan Standart Alüminyum A.Ş. bünyesinde bulunan alüminyum fabrikası ile yardımcı tesislerin, mütemmim cüz ve teferruat niteliğindeki makina ve ekipmanların, Assan Galvaniz San. ve Tic. A.Ş. tarafınd	ASLAN	P	Internal Procedure	The transaction is not a privatization as defined in Communiqués 1998/4 and 1998/5. So The procedure does not require the pre-notification of TMSF	Y	140
67	22.09.2005 /05-59/876-235	Tasarruf Mevduatı Sigorta Fonu'nun (TMSF) kontrolünde bulunan Standart Alüminyum A.Ş. bünyesinde bulunan alüminyum fabrikası ile yardımcı tesislerin, mütemmim cüz ve teferruat niteliğindeki makina ve ekipmanların, Assan Galvaniz San. ve Tic. A.Ş. tarafınd	ERSİN	P	Internal Procedure	The transaction is not a privatization as defined in Communiqués 1998/4 and 1998/5. So The procedure does not require the pre-notification of TMSF	Y	141
68	13.10.2005 /05-67/949-256	Ekopark Turizm İnşaat Sanayi Ticaret A.Ş.'nin halen Hilton International Corporation (Hilton) tarafından işletilen 5 yıldızlı otel ve kongre merkezini kapsayan Konya İli Selçuklu İlçesinde bulunan alanla ilgili olarak Serko Tekstil Sanayi ve Turizm Ticare	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	142
68	13.10.2005 /05-67/949-256	Ekopark Turizm İnşaat Sanayi Ticaret A.Ş.'nin halen Hilton International Corporation (Hilton) tarafından işletilen 5 yıldızlı otel ve kongre merkezini kapsayan Konya İli Selçuklu İlçesinde bulunan alanla ilgili olarak Serko Tekstil Sanayi ve Turizm Ticare	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	143
69	13.10.2005 /05-67/950-257	TUI AG (TUI) tarafından CP Ships Ltd. (CP Ships)'nin %100 oranındaki hissesinin devralınması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	144
69	13.10.2005 /05-67/950-257	TUI AG (TUI) tarafından CP Ships Ltd. (CP Ships)'nin %100 oranındaki hissesinin devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	145
70	13.10.2005 /05-67/952-258	Türkiye İş Bankası A.Ş.'nin İzmir Demir Çelik A.Ş.'de sahip olduğu toplam payın Şahin-Koç Çelik Sanayi A.Ş. tarafından devralınması işlemine izin verilmesi talebi	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	146
70	13.10.2005 /05-67/952-258	Türkiye İş Bankası A.Ş.'nin İzmir Demir Çelik A.Ş.'de sahip olduğu toplam payın Şahin-Koç Çelik Sanayi A.Ş. tarafından devralınması işlemine izin verilmesi talebi	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	147
71	20.10.2005 /05-70/967-261	T.C. Devlet Demiryolları İşletmesi Genel Müdürlüğü (TCDD)'ne ait İskenderun Limanı'nın 36 seneliğine "işletme hakkının verilmesi" yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	KALDIRIMCI	S	Relevant Market	Market definition is wrong and efficiencies are not taken into consideration	Y	148
72	21.10.2005 /05-71/981-270	TÜPRAŞ'da %51 oranındaki Özelleştirme İdaresi Başkanlığı'na ait hissenin blok satış yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	AYTAÇ	S	Joint Ventures	The assessment of JV is wrong	Y	149
72	21.10.2005 /05-71/981-270	TÜPRAŞ'da %51 oranındaki Özelleştirme İdaresi Başkanlığı'na ait hissenin blok satış yöntemiyle özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	S	Joint Ventures	The assessment of JV is wrong	Y	150
73	25.10.2005 /05-73/984-272	Star TV Ticari ve İktisadi Bütünlüğü'nün Tasarruf Mevduatı Sigorta Fonu tarafından satışı.	AYTAÇ	J	Competence	The responsibility of the Authority is removed with a legislative change in Banking Law	Y	151
74	27.10.2005 /05-74/996-278	General Electric Capital Corporation (GECC) tarafından Türkiye Garanti Bankası A.Ş. (Garanti Bankası)'nin %25,52 oranındaki hissesinin Doğuş Grubu'ndan devralınarak, söz konusu Banka üzerinde ortak kontrol tesis edilmesi işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	152
74	27.10.2005 /05-74/996-278	General Electric Capital Corporation (GECC) tarafından Türkiye Garanti Bankası A.Ş. (Garanti Bankası)'nin %25,52 oranındaki hissesinin Doğuş Grubu'ndan devralınarak, söz konusu Banka üzerinde ortak kontrol tesis edilmesi işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	153
75	27.10.2005 /05-74/990-276	Fresenius Diyaliz Hizmetleri A.Ş. (FDH)'nin Diyalisans Diyaliz ve Sağlık Hizmetleri A.Ş. (Diyalisans)'nin %99,997 oranında hissesini devralması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	154
75	27.10.2005 /05-74/990-276	Fresenius Diyaliz Hizmetleri A.Ş. (FDH)'nin Diyalisans Diyaliz ve Sağlık Hizmetleri A.Ş. (Diyalisans)'nin %99,997 oranında hissesini devralması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	155
76	27.10.2005 /05-74/1009-283	Edison Mission Energy'nin MEC Esenyurt B.V.'deki hisselerinin Kansai Power International Corporation ve Doğa Enerji Yatırım İşletme ve Ticaret Limited Şirketi tarafından devralınması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	156
76	27.10.2005 /05-74/1009-283	Edison Mission Energy'nin MEC Esenyurt B.V.'deki hisselerinin Kansai Power International Corporation ve Doğa Enerji Yatırım İşletme ve Ticaret Limited Şirketi tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	157
77	27.10.2005 /05-74/1008-282	Union Carbide Corporation'ın iştiraki olan Catalysts, Absorbents and Process Systems Inc.'in UOP LLC'de bulunan %50 hissesinin, Honeywell International Inc.'in iştiraki olan Honeywell Specialty Materials LLC tarafından devralınması işlemine izin verilmesi	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	158
77	27.10.2005 /05-74/1008-282	Union Carbide Corporation'ın iştiraki olan Catalysts, Absorbents and Process Systems Inc.'in UOP LLC'de bulunan %50 hissesinin, Honeywell International Inc.'in iştiraki olan Honeywell Specialty Materials LLC tarafından devralınması işlemine izin verilmesi	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	159
78	27.10.2005 /05-74/991-277	Exel Overseas Limited (Exel Overseas)'in Yurtiçi Tibbett&Britten S.C.M. ve Lojistik Hizmetleri A.Ş. (YTB)'de sahip olduğu hisselerin Arıkanlı Holding A.Ş. (Arıkanlı) tarafından devralınması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	160
78	27.10.2005 /05-74/991-277	Exel Overseas Limited (Exel Overseas)'in Yurtiçi Tibbett&Britten S.C.M. ve Lojistik Hizmetleri A.Ş. (YTB)'de sahip olduğu hisselerin Arıkanlı Holding A.Ş. (Arıkanlı) tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	161

79	31.10.2005 /05-76/1030-287	Tansaş Perakende Mağazacılık Tic. A.Ş. (Tansaş)'nin %70,77'sine tekabül eden hissesinin Migros Türk T.A.Ş. (Migros) ve Koç Holding A.Ş. tarafından devralınması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	162
79	31.10.2005 /05-76/1030-287	Tansaş Perakende Mağazacılık Tic. A.Ş. (Tansaş)'nin %70,77'sine tekabül eden hissesinin Migros Türk T.A.Ş. (Migros) ve Koç Holding A.Ş. tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	163
79	31.10.2005 /05-76/1030-287	Tansaş Perakende Mağazacılık Tic. A.Ş. (Tansaş)'nin %70,77'sine tekabül eden hissesinin Migros Türk T.A.Ş. (Migros) ve Koç Holding A.Ş. tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	S	Dominant Position	Phase II Required	Y	164
79	31.10.2005 /05-76/1030-287	Tansaş Perakende Mağazacılık Tic. A.Ş. (Tansaş)'nin %70,77'sine tekabül eden hissesinin Migros Türk T.A.Ş. (Migros) ve Koç Holding A.Ş. tarafından devralınması işlemine izin verilmesi talebi.	ASLAN	S	Dominant Position	Phase II Required	Y	165
79	31.10.2005 /05-76/1030-287	Tansaş Perakende Mağazacılık Tic. A.Ş. (Tansaş)'nin %70,77'sine tekabül eden hissesinin Migros Türk T.A.Ş. (Migros) ve Koç Holding A.Ş. tarafından devralınması işlemine izin verilmesi talebi.	ÜNAL	S	Relevant Market	Definition of market should be revised	Y	166
80	24.11.2005 /05-79/1083-271	Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi ile Kalkınma Bankası kontrolünde bulunan %3,81 oranında hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	167
80	24.11.2005 /05-79/1083-271	Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi ile Kalkınma Bankası kontrolünde bulunan %3,81 oranında hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	168
80	24.11.2005 /05-79/1083-271	Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi ile Kalkınma Bankası kontrolünde bulunan %3,81 oranında hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	ÜNAL	S	Dominant Position	Insufficient assessment and risk of market foreclosure and dominance	Y	169
80	24.11.2005 /05-79/1083-271	Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi ile Kalkınma Bankası kontrolünde bulunan %3,81 oranında hissesinin özelleştirme yoluyla devredilmesi işlemine izin verilmesi talebi.	KALDIRIMCI	S	Insufficient Examination	Decision on EOGG is not grounded	Y	170
81	24.11.2005 /05-79/1088-314	Isı değiştiricileri faaliyet alanındaki "Tranter İşi"nin Dover Diversified, Inc. ve/veya bağlı şirketleri tarafından Alfa Laval U.S. Holding Inc.'le ve bağlı şirketlerine devredilmesi işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	171
81	24.11.2005 /05-79/1088-314	Isı değiştiricileri faaliyet alanındaki "Tranter İşi"nin Dover Diversified, Inc. ve/veya bağlı şirketleri tarafından Alfa Laval U.S. Holding Inc.'le ve bağlı şirketlerine devredilmesi işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	172
82	24.11.2005 /05-79/1087-313	Digital Platform İletişim Hizmetleri A.Ş.'nin %90.64'üne tekabül eden Çukurova Investment NV. hisselerinin, %9.36'sına tekabül eden Çukurova Holding A.Ş. hisselerinin ve bazı azınlık hisselerin P5 DP INV S.a.r.l. (Providence) ve Çukurova Investments N.V.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	173
82	24.11.2005 /05-79/1087-313	Digital Platform İletişim Hizmetleri A.Ş.'nin %90.64'üne tekabül eden Çukurova Investment NV. hisselerinin, %9.36'sına tekabül eden Çukurova Holding A.Ş. hisselerinin ve bazı azınlık hisselerin P5 DP INV S.a.r.l. (Providence) ve Çukurova Investments N.V.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	174
83	24.11.2005 /05-79/1084-310	InterGen Adapazarı Generating Company B.V., InterGen Gebze Generating Company B.V. ve InterGen İzmir Generating Company B.V.'nin Adapazarı Elektrik Üretim Limited Şirketi, Gebze Elektrik Üretim Limited Şirketi ve İzmir Elektrik Üretim Limited Şirketi'ndek	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	175
83	24.11.2005 /05-79/1084-310	InterGen Adapazarı Generating Company B.V., InterGen Gebze Generating Company B.V. ve InterGen İzmir Generating Company B.V.'nin Adapazarı Elektrik Üretim Limited Şirketi, Gebze Elektrik Üretim Limited Şirketi ve İzmir Elektrik Üretim Limited Şirketi'ndek	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	176
84	01.12.2005 /05-80/1108-319	Deutsche Post AG (DPAG)'nin, Exel Plc. (Exel) üzerinde tek başına kontrole sahip olmasını sağlayacak şekilde, söz konusu şirketin hisselerini devralması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	177
84	01.12.2005 /05-80/1108-319	Deutsche Post AG (DPAG)'nin, Exel Plc. (Exel) üzerinde tek başına kontrole sahip olmasını sağlayacak şekilde, söz konusu şirketin hisselerini devralması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	178
85	01.12.2005 /05-80/1107-318	İş Girişim Sermayesi Yatırım Ortaklığı A.Ş. (İş Girişim) ve Nederlandese Financierings Maatschappij Voor Ontwinkkelingsladen N.V. (NFMVO)'nin Tüyap Holding A.Ş. (Tüyap Holding)'nin sermaye artırımına iştirak etmek suretiyle söz konusu şirketin paylarının	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	179
85	01.12.2005 /05-80/1107-318	İş Girişim Sermayesi Yatırım Ortaklığı A.Ş. (İş Girişim) ve Nederlandese Financierings Maatschappij Voor Ontwinkkelingsladen N.V. (NFMVO)'nin Tüyap Holding A.Ş. (Tüyap Holding)'nin sermaye artırımına iştirak etmek suretiyle söz konusu şirketin paylarının	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	180
86	20.12.2005 /05-86/1188-340	Rumeli Çimento Grubu şirketlerinden Ladik Çimento Ticari ve İktisadi Bütünlüğü'nün, TMSF tarafından satışı ihalesinde en yüksek iki teklif veren Akçansa Çimento Sanayi ve Ticaret A.Ş. ile Türkerler İnşaat Turizm Madencilik Ticaret ve Sanayi A.Ş.'den herha	KALDIRIMCI	S	Dominant Position	Rejecting to the prohibition decision based on dominant position and SLC risks associated to Akçansa. Market actors should be strong.	Y	181
87	20.12.2005 /05-86/1190-342	Rumeli Çimento Grubu şirketlerinden Gaziantep Çimento Ticari ve İktisadi Bütünlüğü'nün, TMSF tarafından satışı ihalesinde en yüksek iki teklifi veren Sanko Pazarlama İthalat İhracat A.Ş. ile Çimko Çimento ve Beton Sanayi Ticaret A.Ş. tarafından devralınma	KALDIRIMCI	S	Dominant Position	Rejecting to the prohibition decision based on dominant position and SLC risks associated to Akçansa. Market actors should be strong.	Y	182
88	20.12.2005 /05-86/1192-344	Rumeli Çimento Grubu şirketlerinden Van Çimento Ticari ve İktisadi Bütünlüğü'nün Tasarruf Mevduatı Fonu tarafından gerçekleştirilen ihalede en yüksek iki teklifi veren Limak Kurtalan Çimento San. ve Tic. A.Ş. veya OCI Çimento A.Ş.'den biri tarafından devr	KALDIRIMCI	S	Dominant Position	Rejecting to the prohibition decision based on dominant position and SLC risks associated to Akçansa. Market actors should be strong.	Y	183

89	29.12.2005 /05-88/1226-356	Deutsche Lufthansa AG (Lufthansa) ile AK Industriebeteiligung GmbH (AKI) arasında 14.4.2005 tarihinde akdedilmiş bulunan Oy Hakkı Sözleşmesi ile Eurowings Luftverkehrs AG (Eurowings)'nin kontrolünün Deutsche Lufthansa AG tarafından devralınması işlemine izin verilmesi talebi	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	184
89	29.12.2005 /05-88/1226-356	Deutsche Lufthansa AG (Lufthansa) ile AK Industriebeteiligung GmbH (AKI) arasında 14.4.2005 tarihinde akdedilmiş bulunan Oy Hakkı Sözleşmesi ile Eurowings Luftverkehrs AG (Eurowings)'nin kontrolünün Deutsche Lufthansa AG tarafından devralınması işlemine izin verilmesi talebi	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	185
90	29.12.2005 /05-88/1229-358	Süd-Chemie AG'nin reolojik katkı ve karbonsuz kil işletmelerinin kontrolünün Rockwood Specialties Group, Inc tarafından devralınması işlemine izin verilmesi talebi.	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	186
90	29.12.2005 /05-88/1229-358	Süd-Chemie AG'nin reolojik katkı ve karbonsuz kil işletmelerinin kontrolünün Rockwood Specialties Group, Inc tarafından devralınması işlemine izin verilmesi talebi.	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	187
90	29.12.2005 /05-88/1229-358	Süd-Chemie AG'nin reolojik katkı ve karbonsuz kil işletmelerinin kontrolünün Rockwood Specialties Group, Inc tarafından devralınması işlemine izin verilmesi talebi.	KALDIRIMCI	S	Dominant Position	Decision desides that there is dominant position but not SLC. Rejection to the watchdog of the Authority over prices and market shares for 2 years each 6 months	Y	188
90	29.12.2005 /05-88/1229-358	Süd-Chemie AG'nin reolojik katkı ve karbonsuz kil işletmelerinin kontrolünün Rockwood Specialties Group, Inc tarafından devralınması işlemine izin verilmesi talebi.	ERSİN	S	Dominant Position	Decision desides that there is dominant position but not SLC. Rejection to the watchdog of the Authority over prices and market shares for 2 years each 6 months	Y	189
91	29.12.2005 /05-88/1227-357	Renault S.A.S. (Renault) kontrolünde olan Dacia Otomobilleri Satış, Satış Sonrası ve Dağıtım Hizmetleri Ticaret Ltd. Şti. (DOSSD)'nin nev'i anonim şirket olduktan sonra, Motorlu Araçlar İmal ve Satış A.Ş. (MAİS)'nin sermaye artırımı yapılırken şirkete ort	SONGÖR	P	Quorum	The Board should meet with a maximum of 7 members	Y	190
91	29.12.2005 /05-88/1227-357	Renault S.A.S. (Renault) kontrolünde olan Dacia Otomobilleri Satış, Satış Sonrası ve Dağıtım Hizmetleri Ticaret Ltd. Şti. (DOSSD)'nin nev'i anonim şirket olduktan sonra, Motorlu Araçlar İmal ve Satış A.Ş. (MAİS)'nin sermaye artırımı yapılırken şirkete ort	ÇAKIN	P	Quorum	The Board should meet with a maximum of 7 members	Y	191
92	02.02.2006 /06-08/98-26	Motorlu ve Motorsuz Kara Nakil Vasıtalarının Zorunlu Fenni Muayenesi Hizmetinin İmtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÜNAL	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	192
92	02.02.2006 /06-08/98-26	Motorlu ve Motorsuz Kara Nakil Vasıtalarının Zorunlu Fenni Muayenesi Hizmetinin İmtiyaz verme yoluyla özelleştirilmesi işlemine izin verilmesi talebi.	ÇAKIN	J	Powers of the Authority	Court judgements on the transaction should be taken into consideration	Y	193
93	09.02.2006 /06-11/130-32	Kariyer.Net Elektronik Yayıncılık A.Ş. ile birlikte Kariyer.Net tarafından kontrol edilen Kariyerakademi.Net Elektronik Yayıncılık ve İnternet Hizmetleri A.Ş.'nin İLAB Holding A.Ş. veya İLAB Holding'in göstereceği üçüncü kişiler tarafından devralınması iş	ERSİN	S	Ancillary Restraints	Confidentiality clause should not be decreased to 3 years	Y	194
93	09.02.2006 /06-11/130-32	Kariyer.Net Elektronik Yayıncılık A.Ş. ile birlikte Kariyer.Net tarafından kontrol edilen Kariyerakademi.Net Elektronik Yayıncılık ve İnternet Hizmetleri A.Ş.'nin İLAB Holding A.Ş. veya İLAB Holding'in göstereceği üçüncü kişiler tarafından devralınması iş	KALDIRIMCI	S	Ancillary Restraints	Confidentiality clause should not be decreased to 3 years	Y	195
94	16.02.2006 /06-13/154-38	Kars Karper Peynir ve Gıda Sanayi ve Ticaret A.Ş.'nin %51 oranındaki hissesi ile bu teşebbüsün kontrol ettiği Karper Gıda Sanayi Pazarlama ve Dış Ticaret A.Ş. ile Karper Basım Ambalaj Hizmet ve Gıda Sanayi A.Ş. unvanlı şirketlerin Société Industrielle Com	ÜNAL	J	Relevant Market	Definition of market is too broad. If narrowed the transaction should be cought	N	196
95	02.03.2006 /06-16/188-48	DaimlerChrysler AG'nin karayolu dışı uygulamalar için dizel motorları faaliyetlerini yürüten şirketlerinin Camulos Vermögenswaltung GmbH ve Teutates Vermögensverwaltung GmbH aracılığıyla EQT IV Fund tarafından devralınması işlemine izin verilmesi talebi.	KALDIRIMCI	S	Ancillary Restraints	Non-compete obligation should not be restricted and should be cleared as notified. Authority should take into account factors specific to the transaction and not automatically consider the ancillary restraints	Y	197
95	02.03.2006 /06-16/188-48	DaimlerChrysler AG'nin karayolu dışı uygulamalar için dizel motorları faaliyetlerini yürüten şirketlerinin Camulos Vermögenswaltung GmbH ve Teutates Vermögensverwaltung GmbH aracılığıyla EQT IV Fund tarafından devralınması işlemine izin verilmesi talebi.	ERSİN	S	Ancillary Restraints	Non-compete obligation should not be restricted and should be cleared as notified. Authority should take into account factors specific to the transaction and not automatically consider the ancillary restraints	Y	198
96	23.03.2006 /06-20/257-64	OFIC SA'nın ve tüm iştirak ve bağlı şirketlerinin kontrolünün, AAC France 2005 A, AAC France 2005 B ve Astorg III unvanlı özel risk sermayesi fonları tarafından devralınması işlemine izin verilmesi talebi.	KALDIRIMCI	S	Ancillary Restraints	Non-compete obligation should not be restricted and should be cleared as notified. Authority should take into account factors specific to the transaction and not automatically consider the ancillary restraints	Y	199
96	23.03.2006 /06-20/257-64	OFIC SA'nın ve tüm iştirak ve bağlı şirketlerinin kontrolünün, AAC France 2005 A, AAC France 2005 B ve Astorg III unvanlı özel risk sermayesi fonları tarafından devralınması işlemine izin verilmesi talebi.	ERSİN	S	Ancillary Restraints	Non-compete obligation should not be restricted and should be cleared as notified. Authority should take into account factors specific to the transaction and not automatically consider the ancillary restraints	Y	200
97	26.05.2006 /06-36/459-121	Van Et Entegre Et San. ve Tic. A.Ş. (Van Et)'nin kontrolünün Galip ÖZTÜRK tarafından devralınması işlemine izin verilmesi talebi.	KALDIRIMCI	P	Notification timing	In joint-stock companies notification is triggered after the change of control since the share transfer is sudden	Y	201
97	26.05.2006 /06-36/459-121	Van Et Entegre Et San. ve Tic. A.Ş. (Van Et)'nin kontrolünün Galip ÖZTÜRK tarafından devralınması işlemine izin verilmesi talebi.	KALDIRIMCI	P	Fines	Should not apply fines because the timing is right	Y	202
98	15.06.2006 /06-44/549-147	Akzo Nobel Coatings International B.V.'nin Sefra Farben Handel GmbH'den Balakom as'nin %99,5 oranındaki hissesini devralması işlemine izin verilmesi talebi.	PARLAK	P	Legal representation	Ex-competition expert's representation power does not exist however the notification is co-signed.	Y	203
98	15.06.2006 /06-44/549-147	Akzo Nobel Coatings International B.V.'nin Sefra Farben Handel GmbH'den Balakom as'nin %99,5 oranındaki hissesini devralması işlemine izin verilmesi talebi.	ERSİN	P	Legal representation	Ex-competition expert's representation power does not exist however the notification is co-signed.	Y	204

98	15.06.2006 /06-44/549-147	Akzo Nobel Coatings International B.V.'nin Sefra Farben Handel GmbH'den Balakom as'nin %99,5 oranındaki hissesini devralması işlemine izin verilmesi talebi.	ÜNAL	P	Legal representation	Should proceed against ex-competition experts representing undertakings and working in law and consultancy firms	Y	205
98	15.06.2006 /06-44/549-147	Akzo Nobel Coatings International B.V.'nin Sefra Farben Handel GmbH'den Balakom as'nin %99,5 oranındaki hissesini devralması işlemine izin verilmesi talebi.	KALDIRIMCI	P	Legal representation	Ex-competition expert's representation power does not exist however the notification is co-signed.	Y	206
99	24.08.2006 /06-59/780-229	Bank Pozitif Kredi ve Kalkınma Bankası A.Ş. (Bank Pozitif)'nin sermayesinin % 65'ine tekabül eden hisselerin, Pratic İletişim ve Teknoloji Hizmetleri Ticaret A.Ş. (Pratic İletişim) hisselerinin ve Bank Pozitif'in doğrudan kontrolüne sahip olduğu C Menkul	KALDIRIMCI	S	Ancillary Restraints	Non-compete obligation should not be restricted and should be cleared as notified.	Y	207
100	24.08.2006 /06-59/774-227	Nestle Waters S.A.'nın Nestle Waters Gıda ve Meşrubat San. Tic. A.Ş. aracılığıyla Erikli Su Meşrubat San. ve Tic. A.Ş.'yi devralması işlemine izin verilmesi talebi.	KALDIRIMCI	S	Ancillary Restraints	Non-compete obligation should not be reduced to 2 years instead of 3 years as notified.	Y	208
100	24.08.2006 /06-59/774-227	Nestle Waters S.A.'nın Nestle Waters Gıda ve Meşrubat San. Tic. A.Ş. aracılığıyla Erikli Su Meşrubat San. ve Tic. A.Ş.'yi devralması işlemine izin verilmesi talebi.	ERSİN	S	Ancillary Restraints	Non-compete obligation should not be reduced to 2 years instead of 3 years as notified.	Y	209
101	15.09.2006 /06-64/882-254	Rekabet Kurulu'nun, 24.11.2005 tarih ve 05-79/1083-271 sayılı kararına karşı, Danıştay 13. Dairesi'nin verdiği "Yürütmeyi Durdurma Kararı" üzerine Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi	SONGÖR	P	Internal Procedure	The Council of State decided on the stay of execution based on quorum procedure of the Competition Board and did not decided on essence yet. So the Board should not issue a new decision on the transaction but inform the High Authority of Privatisation.	Y	210
101	15.09.2006 /06-64/882-254	Rekabet Kurulu'nun, 24.11.2005 tarih ve 05-79/1083-271 sayılı kararına karşı, Danıştay 13. Dairesi'nin verdiği "Yürütmeyi Durdurma Kararı" üzerine Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi	ÜNAL	S	Dominant Position	Insufficient assessment and risk of market foreclosure and dominance	Y	211
101	15.09.2006 /06-64/882-254	Rekabet Kurulu'nun, 24.11.2005 tarih ve 05-79/1083-271 sayılı kararına karşı, Danıştay 13. Dairesi'nin verdiği "Yürütmeyi Durdurma Kararı" üzerine Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'nin Özelleştirme İdaresi Başkanlığı'na ait %46,12 oranında hissesi	KALDIRIMCI	S	Insufficient Examination	Decision on EOGG is not grounded	Y	212
102	02.11.2006 /06-79/1018-294	Swiss Reinsurance Company'nin İsviçre Sigorta A.Ş. (İsviçre Sigorta)'de bulunan %9,90 oranındaki hissesinin Ergo International AG (Ergo) tarafından devralınması işlemine izin verilmesi talebi.	ASLAN	J	Control	Rejecting to the Board decision ruling that the control does not change	N	213
0a	26.03.1998 /59/438-59	TC Başbakanlık ÖİB/Turgay CİNER	?	?	?	?	Y	214
0b	14.05.1998 /65/498-80	Refreshment/Atlantic/Anadolu Endüstri Holding/Ege Biracılık/Erciyas Biracılık/Özgörkey Ailesi/Etap İçecek/E. Özgörkey İçecek	?	?	?	?	Y	215
0c	28.05.1998 /67/517-84	Trakmak Traktör/New Holland N.V./Koç Grubu	?	?	?	?	Y	216