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

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ABSTRACT

THE CONTROL OF MERGERS AND ACQUISITIONS
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This thesis aims at examining the main motives for mergers and acquisitions with special reference to the effect of globalization on these business strategies and making a comparative analysis of the Turkish merger control rules with that of the EU and the Central and Eastern European Countries so as to evaluate to what extent the Turkish legislation is in harmony with the Community acquis and whether the EU membership process had the same effect on the introduction of merger control rules in Turkey and in these ex-candidate countries.

Keywords: Competition Law, Merger Control, Concentrations, Globalization

ÖZ

AB VE TÜRK REKABET HUKUKUNDA BİRLEŞME VE DEVRALMALARIN KONTROLÜ

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Bu tezin amacı, birleşme ve devralmaların gerçekleştirilmesindeki temel etkenleri özellikle küreselleşmenin bu tür iş stratejileri üzerindeki etkisine değinmek suretiyle incelemek ve birleşmelerin kontrolüne ilişkin kuralların Türkiye'deki uygulamasını hem AB hem de Merkezi ve Doğu Avrupa Ülkelerinin kuralları ile karşılaştırmalı olarak analiz etmektir. Böylece, Türk mevzuatının Topluluk müktesebatı ile ne ölçüde uyumlu olduğunu ve AB üyelik sürecinin gerek Türkiye'de gerekse söz konusu eski aday ülkelerde birleşmelerin kontrolüne ilişkin kuralların getirilmesinde aynı etkiye sahip olup olmadığını değerlendirmektir.

Anahtar Kelimeler: Rekabet Hukuku, Birleşmelerin Kontrolü, Yoğunlaşmalar, Küreselleşme

To My Dear Parents Nurten YÜCEL and Yücel AŞKIN for their self-sacrifices and efforts in bringing me up as a hard-working, open-minded and honest individual

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LIST OF ABBREVIATIONS

CEECs	**:**	Central and Eastern European Countries
EC	**:**	European Community
EEC	**:**	European Economic Community
EU	**:**	European Union
EUMR	**:**	EU Merger Regulation
FDI	**:**	Foreign Direct Investments
GATT	**:**	General Agreement on Tariffs and Trade
HHI	**:**	Herfindahl-Hirschman Index
IMF	**:**	International Monetary Fund
M&As	**:**	Mergers and Acquisitions
MNEs	**:**	Multinational Enterprises
MTF	**:**	Merger Task Force
OECD	**:**	Organization for Economic Cooperation and Development
R&D	**:**	Research and Development
UNCTAD	**:**	United Nations Conference on Trade and Development
WTO	**:**	World Trade Organization

INTRODUCTION

Firms engage in M&As for different economic, financial and managerial motivations. Along with these motives, globalization is one of the important parameters in the increasing number of M&As activities. Indeed, globalization has not only enhanced the integration and interdependence of the national economies, but also intensified the competition both at the national and global level. Therefore, the tendency among the firms towards M&As increased in order to survive in such a competitive environment.

While increased competition affects firms, M&As activities of the firms may also have positive or negative effects on competition. It is considered that when companies combine via merger or acquisition, this generally has a positive impact on markets. The reason is that the likely synergetic and efficiency gains emerged after M&As will reduce the costs and increase the funds to be spent for R&D. As a result of these gains, the firms will become more efficient and competitive in the market. Therefore, competition between the firms will intensify, and the final consumer will benefit from higher-quality goods at lower prices.

Although a concentration in a market through a merger or an acquisition does not necessarily mean that it would reduce the competition, the excess market power in a sector may result in anti-competitive practices. Despite its competitors, for example, a firm being in a dominant position may misuse its market strength and increase its prices at the expense of consumers. Therefore, M&As (particularly horizontal ones) are regulated by the competition authorities for their potential negative effect on competition.

Within this framework, this thesis aims at examining the logic of M&As as a business strategy and making a comparative analysis of the Turkish merger control rules with that of the EU and the CEECs in order to evaluate the level of harmonization of Turkish legislation with the Community acquis and the effect of EU membership process on the introduction of merger control rules in Turkey and in these ex-candidate countries.

In Chapter I, the conceptual framework of M&As will be briefly drawn with special reference to the types as well as the motives of M&As. In this context, why firms engage in M&As; how economic globalization influences M&As activities and, accordingly, what are the driving-forces behind cross-border M&As will be examined.

In Chapter II, what are the main objectives and characteristics of the merger control policy within the general context of EU competition policy, and then why and how M&As are controlled in EU competition law will be analyzed. Within this framework, the rules and procedures set out in the new EUMR will be scrutinized. Moreover, relevant statistical data will be used in order to indicate the effects and outcomes of the application of the EUMR. Besides, whether any progress achieved in the accomplishment of the single market objective has a positive impact on M&As activities in the EU will be addressed. Finally, several selected merger cases will be examined so as to answer the question of how the judicial review of the decisions of the European Commission (hereinafter 'the Commission') by the ECJ and the CFI has provided guidance to the implementation of the EUMR.

In Chapter III, how the Customs Union process between the EU and Turkey affected the introduction of a competition legislation and, accordingly, merger control rules in Turkey will be briefly explained, and then how M&As are regulated under the Act on the Protection of Competition No. 4054 will be scrutinized. Similar to the previous chapter, the relevant statistical data will be used to evaluate the implementation of the Act. In addition to this, the Regular Progress Reports prepared by the Commission will be examined, and the assessments of the Commission on the application of merger control rules by the Competition Authority will be addressed.

In Chapter IV, the effect of the EU membership process on the introduction of merger control rules in the CEECs will be examined. In this respect, comparative analysis of the merger control rules of the CEECs with the Turkish legislation will be made and whether any similarities or differences exist between them will be evaluated.

CHAPTER I

1. THE CONCEPTUAL FRAMEWORK OF M&As

1.1. The Definition of M&As

An **acquisition** is the purchase of an entire company or controlling interest in a company. In other words, the acquisition of a company is the purchase of all its assets or all its shares from its sole or main owner. A purchase of a company's shares may also be termed as a *takeover*. (Horn 2001: 4)

A **merger** is the combination of two or more companies to achieve common objectives by pooling their sources into a single business. If the acquiring company assumes the assets and liabilities of the merged company and the merged company ceases to exist, it is called *statutory merger*. On the other hand, if the acquired company becomes a 100% subsidiary of the parent company, it is called *subsidiary merger*. (OECD 2001: 14)

A merger differs from a **consolidation**, which is a business combination whereby two or more companies join to form an *entirely new company*. In a consolidation, the original companies cease to exist and their stockholders become stockholders of the new company. A simple equation can be given to clarify the difference between a merger and a consolidation. In a merger, A + B = A, where company B is merged into company A. In a consolidation, A + B = C, where C is an entirely new company. Despite the differences between them, however, the terms *merger* and *consolidation* are generally used interchangeably in practice. (Gaughan 1999: 7)

After giving the definitions of M&As, it would be appropriate to explain the criteria used to distinguish an acquisition from a merger. In case of a merger, the stockholders or owners of both pre-merger companies have a share in the ownership of the merged business and the top management of both companies continues to hold

senior management positions after the merger. An acquisition, in contrast, is the takeover of the ownership or management control of one company by another. Therefore, ***control*** is the key test of the distinction between a merger and an acquisition. (Coyle 2000: 2)

1.2. The Types of M&As

M&As are generally classified as horizontal, vertical, or conglomerate (Weston et.al. 1998: 5-6; UNCTAD 2000: 101):

1. *Horizontal M&As:* Horizontal M&As occur between firms operating and competing in the same line of business activity. A merger or an acquisition between two music companies can be an example. Typical industries in which this type of M&As occurs are pharmaceuticals, automobiles, petroleum, and, increasingly, several services industries. Since they decrease the number of firms in an industry and potentially create monopoly power enabling them to make monopoly profits, they are regulated by competition authorities for their possible negative effect on competition.

2. *Vertical M&As:* Vertical M&As occur between firms in different stages of production operation. In other words, they occur between firms in client-supplier or buyer-seller relationships. A company producing final electronics, for example, may acquire a company providing the main components of its products in order to reduce the uncertainty over the availability or quality of its input supply. A drug producer company may acquire a company that is marketing drugs through retail drugstores in order to lower its distribution costs. Vertical M&As do not reduce the number of firms operating at the same level of an industry, but they may also be anti-competitive by reinforcing their market power and discouraging the entrance of new firms into the market.

3. *Conglomerate M&As:* Conglomerate M&As occur between firms engaged in unrelated types of business activity. For example, the acquisition of a bank by a manufacturer company can be regarded as a conglomerate. By this type of

M&As, companies seek to diversify risk and deepen economies of scope. Since the firms engaging in conglomerate M&As are not competitors producing the similar products (as in the case of horizontal M&As) and they do not have a buyer-seller relationship (as in the case of vertical M&As), it is considered that the degree of competition in the different markets of the merging firms is largely unaffected. However, if several different markets are dominated by two large conglomerates, the potential for collusion would be greater.

1.3. The Motives for M&As

One of the most fundamental motives for M&As is growth. The reason is that greater size can be a critical parameter in operations requiring economies of scale, large expenditures for R&D and expansion of distribution networks. In this context, companies having a strategy to expand have to make a choice between internal growth and external growth. (Gaughan 1999: 116) Internal growth of a company through creating new capacities (i.e. establishing new subsidiaries) or expanding the existing ones may be a slow process. Besides, internal restructuring may also prolong the internal growth as it necessitates the reorganization of activities, merging or closing of the existing production facilities and cutting of jobs. Therefore, external growth through M&As, joint ventures and other collaborative agreements can be a cheaper and faster way of both entering a new market or a new country and acquiring strategic assets, such as R&D, know-how, brand names, and patents.

M&As may be a part of a diversification program that allows the company to move into other lines of business. This outward expansion means growing outside a company's current industry category. (Gaughan 1999: 8 and 128) Companies often acquire others in order to diversify their operations either to increase returns or to lower risks.

M&As may also provide certain synergetic benefits to the firms in the pursuit of expansion. When synergy exists, the total returns from the combined organization exceed the sum of the individual returns of the two companies before the merger or acquisition. Synergy is simply described as 2 + 2 = 5 effect. In this context, four different types of synergy can be classified (Coyle 2000: 15-16):

- *Sales synergy:* This occurs where a merged organization can benefit from common distribution channels, sales administration, advertising, sales promotion and warehousing.
- *Operating synergy:* This can arise from a better utilization of facilities and personnel, and bulk-order purchasing to reduce material costs.
- *Investment synergy:* This can arise from the joint use of plant and equipment, joint R&D efforts, and having common raw material inventories.
- *Management synergy:* This can arise when the top management of one of the companies uses their relevant experience, after the merger or acquisition, to resolve the problems of the other company. In other words, a management team can bring its skills and experience to bear on the other company, and so help to improve its performance.

Managers may pursue their own aims and wish to expand their enterprises, since their salaries and perquisites as well as their power and prestige often increase as corporate size increases. Managers may also be interested in M&As for security concerns. For example, in an industry where merger activity is high, management may desire increased size for the security it brings, either in being in greater control of the immediate market or industrial environment. (Cooke 1986: 28)

Last but not least, when a merger occurred, it is generally followed by another merger. This is the case, especially when large firms engage in mergers, because rival firms or small firms are compelled to "defensive" mergers in order to survive not only against global competition but also against larger firms.

Consequently, it would be appropriate to conclude that there is not one single reason, but rather a number of reasons for M&As. The main motives for M&As can be summarized as following (Steiner 1975: 30):

1. A desire to limit competition or achieve monopoly profits.
2. A desire to utilize unutilized market power.
3. A response to shrinking opportunities for growth and/or profit in one's own industry due to shrinking demand or excessive competition.

4. A desire to diversify to reduce the risks of business.
5. A desire to achieve a large enough size to realize an economical scale of production and/or distribution.
6. A desire to overcome critical lacks in one's own company by acquiring the necessary complementary resources, patents, or factors of production.
7. A desire to achieve sufficient size to have efficient access to capital markets or inexpensive advertising.
8. A desire to utilize more fully particular resources or personnel controlled by the firm, with particular applicability to managerial skills.
9. A desire to displace an existing management.
10. A desire to utilize tax loopholes not available without merging.
11. A desire to reap the promotional or speculative gains attendant upon new security issues, or changed price earnings ratios.
12. A desire of managers to create an image of themselves as aggressive managers who recognize a good thing when they see it.
13. A desire of managers to manage an ever-growing set of subordinates.

Along with these economic, financial and managerial motives, globalization is another important factor in the increasing value and number of M&As activities. In this context, the effect of globalization on these business strategies is examined below.

1.4. Globalization and M&As

The term "globalization" is frequently used and widely debated both in the academic literature (articles, books, etc.) and in the media (newspapers, journals). In daily life, so many people use it for so many different purposes. When you search the "globalization" term in a search engine on the Internet, the outcomes fall into a wide spectrum. Some of them have positive and some of them have negative meanings depending on the party who analyzes the concept. Therefore, the proponents and the opponents of globalization define its causes and consequences in a different way.

Globalization simply denotes three things (Halliday 2001: 61): a marked *reduction in the barriers* between societies and states; an *increasing homogeneity* of societies and states; and an *increase in the volume of interactions* between societies and states (in terms of trade, capital, volumes of currency traded or movements of tourists and migrants). In this context, globalization is generally classified under three headings as economic, political, and cultural globalization.[1]

1.4.1. Economic Globalization and M&As

Economic globalization has three main components that transformed the world economy into a global marketplace: *liberalization of trade* (removal of tariffs, quotas, and non-tariff barriers); *liberalization of capital movements* (removal of barriers to the capital flows, and integration of financial markets), and *globalization of industry* (globalization of production by MNEs).

Within this framework, economic globalization has influenced and forced the governments to alter their countries' monetary and fiscal policies by focusing on low inflation and tight budgets; their industrial policies by liberalizing the financial markets, deregulating the rules governing business, and privatizing public sector firms; and their social policies by cutting social spending, rationalizing social services, and increasing flexibility in labour markets (Schmidt 2002: 15).[2]

As far as firms are concerned, such an economic globalization resulted in intensified competition and market pressures both at the national and global level. Therefore, these factors left the firms no choice but to restructure themselves, particularly in the form of (cross-border) M&As, in order to survive in such a competitive environment. Indeed, the value of cross-border M&As worldwide increased more than five-fold during the period of 1990-99, from $153 billion in 1990 to $792 billion in 1999 (Table 1.1.). The same trend was apparent, though a less spectacular degree, in the number of cross-border M&As, which increased three-fold

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[1] The objective of this thesis, however, is not to discuss the definition and the negative or positive effects of globalization. Our intention is to emphasize how economic globalization affected the business strategies of the firms in favor of M&As.

[2] In fact, under the guise of globalization, these processes have been carried out and promoted institutionally by the IMF and the World Bank (as a part of structural adjustment programs) and by the WTO (previously in the context of GATT) since the early years of the post-Second World War period.

during the period of 1990-99, from 2 572 to 7 242 in 1999 (Table 1.2.). Cross-border M&As also grew in size, with the average size increasing almost two-fold during the same period, from $59 million to $109 million. (OECD 2001: 15)

Table 1.1. Cross-border and domestic M&As

	Deal value (USD billion)		
	Total	Cross-border	Domestic
1990	406.8	152.7	254.1
1991	328.5	83.3	245.2
1992	285.8	81.1	204.7
1993	324.6	82.0	242.5
1994	464.7	131.7	333.0
1995	707.7	189.4	518.3
1996	1 015.5	232.2	783.3
1997	1 247.2	314.0	933.2
1998	2 060.8	583.2	1 477.6
1999	2 244.5	791.6	1 452.9
2000	2 764.8	974.3	1 790.5

Source: Thomson Financial, 2000.

Table 1.2. Cross-border and domestic M&As

	Number of deals		
	Total	Cross-border	Domestic
1990	8 587	2 572	6 015
1991	11 474	2 920	8 554
1992	11 290	2 811	8 479
1993	11 486	2 942	8 544
1994	13 137	3 596	9 541
1995	16 532	4 537	11 995
1996	17 655	4 838	12 817
1997	19 667	5 347	14 320
1998	22 205	6 127	16 078
1999	24 113	7 242	16 871
2000	20 280	6 520	13 760

Source: Thomson Financial, 2000.

1.4.2. The Driving Forces Behind the Cross-Border M&As

The driving forces behind the cross-border M&As can be grouped under five headings (Kang and Johansson 2000: 30-33):

1. *Macro-level factors:* Economic expansion in home countries increases earnings and equity prices and hence contributes to the accumulation of capital available for investment abroad. Similarly, an economic boom in host countries increases the short-term profitability of potential target firms for acquisition. Therefore, prolonged economic expansion in countries can stimulate both inward and outward cross-border M&As.

2. *Industry-level factors:* Intensified global competition and market pressures are compelling firms to concentrate on their core business activities. The largest cross-border M&As in 1998, for example, were among firms in the same sector. This may reflect the efforts of MNEs to strengthen their global competitiveness in their core businesses (Table 1.3.). Similarly, the recent cross-border M&As concentrated in a few major sectors, such as petroleum, automobiles, finance and telecommunications. Indeed, these are the sectors which are experiencing increased global competition and market pressures from falling commodity prices (petroleum), excess capacity in key markets (automobiles), and/or deregulation and rapid technological change (banks and telecommunications).

Table 1.3. Top six cross-border M&As in 1998

Acquiring company	**Acquired company**	**Deal value (USD billion)**
British Petroleum (U.K.) *Petroleum*	Amoco (U.S.) *Petroleum*	61.0
Daimler-Benz (Germany) *Automobile*	Chrysler (U.S.) *Automobile*	39.0
Zeneca Group Plc (U.K.) *Pharmaceuticals*	Astra (Sweden) *Pharmaceuticals*	34.0
Fortis (Netherlands) *Bank*	General de Banque (Belgium) *Bank*	14.0
Texas Utilities Co (U.S.) *Electricity*	Energy Group Plc (U.K.) *Electricity*	10.4
Seagram (Canada) *Music*	PolyGram (Netherlands) *Music*	10.4

Source: KPMG Corporate Finance, 1999.

3. *Firm-level factors:* The companies having competitive advantage arising from the existence of firm-specific intangible assets have stronger incentives to exploit them through geographical diversification in the form of FDI (i.e. through M&As). On the other hand, firms lacking of sufficient intangible assets to be competitive may seek to obtain them by acquiring an existing local firm having those assets. Firms may also acquire companies in other economies in order to spread and reduce their risks. This business strategy envisages that the covariance of industry returns across economies is likely to be smaller than within one economy. Finally, companies, which are unable to develop in-house technology due to time or resource constraints, can also engage in M&As for acquiring technology and human resources.

4. *Technology-related factors:* Technological changes and innovations, especially in information and communications technologies (i.e. the Internet), not only reduced the communication and transport costs but also created new businesses and markets. These developments stimulated international expansion of firms seeking to exploit and consolidate their competitive advantages. Technological change also tends to shorten product life cycles and promote new entrants with innovative technology. However, this causes rapid changes in both market structure and competition conditions. Therefore, M&As can be a quick and easy way to react competitors and acquire entry into new sectors and markets. Finally, the large R&D costs to develop new technologies may also force the firms to engage in M&As.

5. *Government-related factors:* Liberalization of capital movements and investments coupled with new investment incentives have promoted the rapid increase and spread of FDI, particularly the cross-border M&As. Besides, regulatory reforms and deregulation in the critical industries, such as telecommunications, electricity and finance, are playing important role in the increase of M&As in both developed and developing countries. Many countries are now opening up these industries to foreign investors and gradually allowing them to have full or majority ownership. Similarly, privatization is also contributing to cross-border M&As by increasing M&A targets and opening up economies to increased competition.

In terms of governmental factors, it would be appropriate to mention that *regionalism*, which is generally defined as the state-led response to globalization, has also stimulating effects on M&As activities. Integration of regional markets in Europe, for example, has created opportunities for European companies to expand their operations through M&As and benefit from economies of scale. Indeed, there are three important periods in which M&As activities significantly increased within the EU: the launch of the Single Market in 1993, the introduction of the euro in 1999, and the last enlargement in 2004.

On the other hand, M&As may have positive impact on markets by increasing the competition between firms in favor of the consumers, or may have negative effects on competition by leading to a dominant position in a market at the expense of other competitors and consumers. Therefore, the control of M&As is one of the main pillars of EU competition policy which has two principal objectives: the maintenance of competitive markets and the smooth functioning of the common market.

CHAPTER II

2. MERGER CONTROL IN EU COMPETITION LAW

2.1. The main objectives and characteristics of the merger control policy within the general context of EU competition law

The Treaty of Rome (hereinafter 'the Treaty') gives the Community the objective of instituting "a system ensuring that competition in the internal market is not distorted".[3] The rules on competition are regulated in Articles 81 to 89 of the Treaty under two sections: Section 1 - the rules applying to undertakings (Articles 81-86); Section 2 - aids granted by states (Articles 87-89).

Within this framework, EU competition policy has two principal objectives. The *first* objective of the competition policy is the maintenance of competitive markets. In this respect, competition policy serves as an instrument to encourage industrial efficiency, the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment. The *second* is the achievement of the single market, which is an essential condition for the development of an efficient and competitive industry. (Commission SEC (2000) 720 final: 19) Therefore, in addition to the general goals pursued by any competition system, EU competition law fulfils the function of contributing to the accomplishment of the single market. Indeed, the removal of barriers to the free movement of factors of production by Member States would be pointless if private parties could divide the territories of the common market by means of anti-competitive practices or if concentrations of economic power could significantly restrict market access. (Albors-Llorens 2002: 6)

In this context, however, the Treaty did not establish a specific legal basis for merger control.[4] The ECJ in some of its early case law, considered the suitability of

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[3] Treaty of Rome, Article 3 (1) (g).

[4] Although the concentrations such as mergers, acquisitions and joint ventures are controlled under the same Regulation, the Regulation is called briefly as 'EU Merger Regulation' in the relevant literature. Therefore, the phrase 'merger control' is used interchangeably with the phrase 'the control of concentrations' in the thesis.

Article 81 (ex Article 85) or Article 82 (ex Article 86) of the Treaty as the means of merger control. However, the experiences gained in certain cases illustrated that Articles 81 and 82[5] were inadequate for dealing with anti-competitive concentrations. As far as Article 81 is concerned, it could be argued that acquisition of minority stakes in other firms does not, in itself, constitute proof of coordinated behaviour. As far as Article 82 is concerned, this article requires the *existence* of a dominant position, i.e. concentrations that *create* dominant positions cannot, in principle, controlled by applying Article 82. Furthermore, Article 82 cannot be invoked to require prior notifications of such concentrations. (Mourik 1996: 19)

Therefore, the recognition of the lack of clear rules for dealing with concentrations was resulted in the adoption of the first EUMR No. 4064/89 on 21 December 1989, which finally provided a separate substantive and procedural framework for the regulation of concentrations between undertakings.

On 30 June 1997, the European Council adopted its first amendments to the EUMR by enacting the Regulation No. 1310/97, which entered into force on 1 March 1998. The amendments reflected the experiences of the first years in applying the EUMR. While the main principles governing the EUMR remained unchanged, some changes have been found necessary, in particular to the thresholds for determining Community dimension and the applicability of the EUMR to joint ventures. (Commission 1998: 10)

Under a regular review clause, the Commission launched in December 2001 a consultation exercise that resulted in the adoption of a package of wide-ranging proposals for improving the EU merger control regime. As a result of this process, the revised EUMR No. 139/2004 entered into force on 1 May 2004.

When companies combine via a merger, an acquisition or the creation of a joint venture, this generally has a positive impact on markets. The linking-up of the firms' activities enables them to achieve synergy in numerous areas, i.e. R&D, cost reduction, and they become more efficient in the market. As a result of this,

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[5] While Article 81 regulates the agreements, decisions and concerted practices which prevent, restrict or distort competition in the common market, Article 82 governs the abuse of a dominant position within the common market or in a substantial part of it.

competition intensifies and the final consumer benefits from higher-quality goods at fairer prices. (Commission 2000: 19)

Globalization and increased competition within the European single market are among the factors which make it attractive for companies to join their forces. Such reorganizations are supported as long as they are capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the EU. (Commission 2004: 8) Therefore, EU merger control rules have facilitated restructuring of the European industry since their inception in 1989. As merger activity is part of industrial restructuring and necessary to respond to the challenges of the globalizing economy, the purpose of the merger control rules is not to stand in way of necessary and efficiency-enhancing restructuring. (Commission COM (2004) 293 final: 19)

However, mergers which significantly impede effective competition within the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are prohibited. A firm is in a dominant position when it is able to act on the market without having to take account of the reaction of its competitors, suppliers or customers. For example, such a firm can increase its prices above those of its competitors without fearing any loss of profit. All market players and especially consumers stand to lose from the emergence of this kind of dominant structure, which is likely to result in higher prices, a narrower choice of goods and scarcity of innovation. Therefore, the EU has set up an ex-ante control system for mergers with a Community dimension that enables it to prohibit a proposed concentration if it is incompatible with the common market. On the other hand, Member States have their own regimes to investigate mergers with national dimension. (Commission, *Competition policy in Europe and the citizen*: 20)

Such a division of competence between national and Community level is in accordance with the principle of subsidiarity. This system ensures the examination of the proposed merger by the most appropriate authority that is in a better position to evaluate its potential competitive effects. To this end, there are specific thresholds to be used to determine whether the proposed merger has a Community dimension or not. Within this framework, the proposed merger with a Community dimension is assessed in a single procedure by the Commission rather than to be evaluated by

different Member States having different procedures. Thus, such a procedure, which is called by the Commission as ‘one-stop shop’ system, reduces the administrative costs and bureaucracy as well as the legal uncertainty.

In fact, EU merger control regime regulates not only the mergers but also the acquisitions and joint ventures. That is why the title of the EUMR includes ‘the control of concentrations between undertakings’ instead of ‘the control of mergers’. In this context, the concept of concentration and how concentrations are examined under the Commission’s exclusive jurisdiction will be scrutinized in the next sections.

2.2. The Definition of Concentration

Within the scope of the EUMR, a concentration shall be deemed to arise where a change of control on a lasting basis result from:[6]

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

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

Along with the mergers and acquisitions, the EUMR also covers the joint ventures by stating that the creation of **a joint venture** performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of the explanation made for the acquisitions.[7] Consequently, it can be said that mergers, acquisitions and joint ventures are deemed to be concentrations within the scope of the EUMR.

[6] Council Regulation (EC) No 139/2004, Article 3(1).

[7] *ibid.*, Article 3(4).

In the light of its experience on the implementation of the EUMR, Commission published two notices[8] on the concept of concentration to interpret the definition of concentration more clearly in relation to mergers, acquisitions and joint ventures. In this way, a formal guidance is provided to enable the firms to understand whether and to what extent their operations are covered by the EUMR. Within this framework, the main principles laid down in these notices are addressed below under separate sub-sections and supported by the relevant references to the EUMR.

2.2.1. Mergers between previously independent undertakings

A merger within the meaning of the EUMR occurs when:

(i) two or more independent undertakings combine into a new undertaking and cease to exist as separate legal entities; or

(ii) an undertaking is absorbed by another and the latter retains its legal identity, while the former ceases to exist as a legal entity.

In addition to these two types of mergers conducted on a legal basis, a merger may also occur on a *de facto* basis. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, combine their activities by establishing contractually a common economic unit. While the existence of a permanent single economic management is a prerequisite for the determination of a common economic unit, other relevant factors such as joint liability externally, internal profit and loss compensation may reinforce the *de facto* amalgamation.

2.2.2. Acquisition of control

Control is constituted by rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking, in particular by:[9]

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

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

[8] Commission Notice on the concept of concentration, and Commission Notice on the concept of full-function joint ventures, both of which are published in the Official Journal C 66 of 02.03.1998.

[9] Council Regulation (EC) No 139/2004, Article 3(2).

Along with these legal elements, in exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers confer decisive influence.

Control is normally acquired by persons or undertakings which are holders of the rights or entitled to rights under the contracts concerned. However, while not being holders of such rights or entitled to rights under such contracts, a person or an undertaking may have the power to exercise those rights as if it is the formal holder of the rights.[10] This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights. The evidence needed to establish this type of indirect control may include factors such as the source of financing or family links.[11]

As stated in the EUMR, an acquisition of control may be obtained:

(i) by a person already controlling at least one undertaking; or

(ii) by two or more persons already controlling at least one undertaking; or

(iii) by one undertaking acting alone; or

(iv) by two or more undertakings acting jointly.

Within this framework, it can be said that an acquisition of control may be in the form of sole control or joint control. The sub-sections below regarding the sole control or joint control clarify the concept of decisive influence by explaining the different instruments for control. Consequently, whether it is acquired on a legal or *de facto* basis, or whether it is in the form of sole or joint control, the control is defined in the EUMR as having "the possibility of exercising decisive influence" rather than the actual exercise of such influence.

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[10] *ibid.*, Article 3(3).

[11] Commission Notice on the concept of concentration, paragraph 10.

2.2.2.1. Sole control

The crucial element for sole control is the acquisition of *the majority of the voting rights* of a company on a legal basis. The acquisition of a majority of share capital (i.e. 50% of the share capital plus one share) or even 100% of the share capital is not significant in this process. Therefore, an acquisition, which does not include a majority of the voting rights, does not normally confer control even if it involves the acquisition of the share capital.[12]

Sole control may also be acquired in the case of a “qualified minority”, which can be established on a legal and/or *de facto* basis:[13]

a) Sole control can occur on a legal basis where specific rights are attached to the minority shareholding. These may be preferential shares leading to a majority of the voting rights or other rights enabling the minority shareholder to determine the strategic commercial behavior of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.

b) A minority shareholder may also be deemed to have sole control on a *de facto* basis, for example, where a shareholder is highly likely to achieve a majority at the shareholders' meeting due to the fact that the remaining shares are widely dispersed among smaller shareholders. As it is unlikely that all the small shareholders will be present or represented at the shareholders' meeting, a minority shareholder having a stable majority of the votes at that meeting can attain the sole control.

2.2.2.2. Joint control

The acquisition of control can also be established on a legal or *de facto* basis. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence on another undertaking. 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 block the

[12] *ibid.*, paragraph 13.

[13] *ibid.*, paragraph 14.

proposed actions and decisions determining the strategic behavior of the undertaking. Therefore, this situation necessitates that these shareholders must reach a common understanding in determining the commercial policy of the undertaking.[14]

There are several elements in the determination of a joint control. On the other hand, these elements should not be evaluated in isolation and sometimes must be assessed as a whole. These elements can be enumerated as following:

a) *Equality in voting rights or appointment to decision-making bodies:* This type of joint control arises where there are only two parent companies which share equally the voting rights and have the right to appoint an equal number of members to the decision-making bodies of the undertaking and none of the members has a casting vote.[15]

b) *Veto rights:* Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights allowing them to veto decisions which are essential for the undertaking. However, the crucial element is that the veto rights must be related to strategic decisions on the business policy of the undertaking and must be sufficient to enable the parent companies to exercise decisive influence over these decisions. Therefore, veto rights regarding the appointment of the management, the determination of the budget, the business plan, or major investments typically confer joint control. However, the veto rights which normally accorded to minority shareholders in order to protect their financial interests as investors in the undertaking are related to decisions on the essence of the undertaking. A veto right, for example, which prevents the sale or the liquidation of the undertaking does not confer joint control on the minority shareholder concerned.[16]

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[14] *ibid.*, paragraph 19.

[15] *ibid.*, paragraph 20.

[16] *ibid.*, paragraphs 21-23.

c) *Joint exercise of voting rights:* Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. For example, the minority shareholders will have a majority of the voting rights when they act together in exercising these voting rights. The legal means to ensure the joint exercise of voting rights can be in the form of a holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement). Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the undertaking.[17]

Last but not least, a concentration may also occur where an operation leads to a change in the structure of control. This includes the change from joint control to sole control as well as an increase in the number of shareholders exercising joint control. A change from joint to sole control of an undertaking is deemed to be a concentration within the meaning of the EUMR because decisive influence exercised alone is substantially different from decisive influence exercised jointly. For the same reason, an operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the EUMR.[18]

2.2.3. Joint ventures

As mentioned above, within the meaning of the EUMR, a joint venture must perform on a lasting basis all the functions of an autonomous economic entity to be considered as a concentration. In other words, there are two essential elements for a joint venture to fall within the scope of the EUMR: it must be a full-function joint venture and it must operate on a lasting basis.

[17] *ibid.*, paragraphs 30-32.

[18] *ibid.*, paragraph 16.

2.2.3.1. Full-functionality

The full-functionality of a joint venture constitutes the essence of the concept of autonomous entity. It means that a joint venture must operate on a market by performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement.[19]

In sum, *legal autonomy* entails the transfer of a complete activity with all attached and required functions: customers, assets and supporting operations. However, transferring a complete activity in addition to allocating substantial resources is not sufficient if the parent companies maintain control over vital issues such as prices and customers. Therefore, *factual autonomy* necessitates holding the commercial risk and developing an independent business profile. (Bergqvist 2003: 499-500)

In this respect, a joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency.[20]

The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence leads to substantial sales or purchases between the parent companies and the joint venture: [21]

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[19] Commission Notice on the concept of full-function joint ventures, paragraph 12.

[20] *ibid.*, paragraph 13.

[21] *ibid.*, paragraph 14.

(i) Where *sales from the joint venture* to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market. In this respect, the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is whether sales to the parent companies are made on the basis of normal commercial conditions.

(ii) In relation to *purchases made by the joint venture* from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources.

2.2.3.2. Operating on a lasting basis

In addition to having an autonomous character, the joint venture must be intended to operate on a lasting basis. In fact, to what extent the parent companies commit themselves to equip the joint venture with the sufficient resources such as finance, staff and assets normally demonstrates whether their intention is in this direction. However, there are two subtle points to be taken into consideration when evaluating whether a joint venture operates on a lasting basis or not:[22]

(a) The incorporation of provisions into the joint venture agreement for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture, in case of the failure of the joint venture or a disagreement between the parent companies,

[22] *ibid.*, paragraph 15.

does not prevent the joint venture from being considered as operating on a lasting basis.

(b) The same is also true where the agreement specifies a period for the duration of the joint venture which is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for the possible continuation of the joint venture beyond this period. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

2.2.4. Exceptions to the concept of concentration

There are three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the EUMR:[23]

1. Acquisition of securities by **credit institutions** or **other financial institutions** or **insurance companies** whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if the following requirements are fulfilled:

   - the securities must be acquired with a view to reselling them and be hold on a temporary basis;
   - the acquiring institution or company must not exercise the voting rights with a view to determining the competitive behavior of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or securities; and
   - any such disposal takes place within one year of the date of the acquisition. In other words, the acquiring institution or company must

[23] Council Regulation (EC) No 139/2004, Article 3(5).

reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission on request where the acquiring institution or company can show that the disposal was not reasonably possible within the one-year period.

2. Acquisition of control **by an office-holder** according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings is not also deemed to establish a concentration as there is no change of control;

3. A concentration does not arise where **a financial holding company** within the meaning of the Fourth Council Directive 78/660/EEC[24] acquires control, provided that this company exercises its voting rights, especially in relation to the appointment of members of the management and supervisory bodies of the undertaking in which it has holding, only to maintain the full value of its investment and not to determine directly or indirectly the competitive conduct of the undertaking.

In the context of exceptions mentioned above, the question may arise whether a rescue operation constitutes a concentration under the EUMR. **A rescue operation** typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in the EUMR is normally not applicable to such an operation. The reason is that the restructuring program normally requires the controlling banks to determine the strategic commercial behavior of the rescued undertaking. Furthermore, transforming a rescued company into a commercially viable entity and reselling it within the permitted one-year period is not normally realistic. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an

[24] Article 5(3) of this Directive defines **financial holding companies** as “those companies the sole object of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders”.

extension of the disposal period.[25] Thus, where such an operation results in a joint control, it will be considered as a concentration within the meaning of the EUMR.

2.3. Community Dimension and the Thresholds

The Commission has the exclusive power to investigate concentrations with a Community dimension. There are two sets of thresholds which must be checked to establish whether a transaction has a Community dimension and falls within the scope of the EUMR. A concentration has a Community dimension where **(the first set of thresholds)**:[26]

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

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

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

Where the original thresholds are not met, **the second set of thresholds** must be examined. A concentration that does not meet the thresholds laid down above has a Community dimension where:[27]

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

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

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

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[25] Commission Notice on the concept of concentration, paragraph 45.

[26] Council Regulation (EC) No 139/2004, Article 1(2).

[27] *ibid.*, Article 1(3).

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

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

These thresholds, both worldwide and Community-wide, are designed to determine the jurisdiction in accordance with the principle of subsidiarity. They are not aiming at assessing the market position of the companies involved in concentration or the impact of the operation. They are to measure the overall economic strength of the undertakings concerned in terms of their turnover so that to determine their financial resources to be combined through the concentration, regardless of the sector where such turnover achieved or the possible effects of the concentration on those sectors. Therefore, these thresholds include turnover derived from all areas of activities of the undertakings concerned, not just those directly involved in concentration.[28]

Finally, these quantitative thresholds ensure simple and objective criteria for determining whether the transaction in question has a Community dimension and, accordingly, is notifiable. In this context, true calculation of turnover is important in order to reflect the economic strength of the undertakings concerned as accurately as possible.

2.4. Calculation of Turnover

The concept of turnover refers to "the amounts derived from the sale of products and the provision of services" within the scope of the undertaking's ordinary activities. As the amounts derived from the sale of products and the provision of services are generally shown in company accounts under the heading of "sales", the essential criterion for the calculation of turnover is **sales**. Therefore, the Commission takes into consideration the total amount of sales.

[28] Commission Notice on calculation of turnover, paragraphs 4 and 6.

The EUMR, on the other hand, refers to "net turnover" which means that the turnover after the deduction of sales rebates (all rebates or discounts) and of value added tax and other taxes directly related to turnover (i.e. indirect taxes such as excise duties).[29]

Another point is that the aggregate turnover comprises the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services. Thus, for each undertaking concerned, the turnover to be taken into account is the turnover of the closest financial year to the date of the transaction. As it is likely that the undertaking concerned will have no audited accounts of the current year to submit before the transaction, the closest representation of a whole year activity of the undertaking concerned would be the one reflected in the turnover figure of the last financial year.[30]

2.4.1. Acquisition of the parts of the companies

In cases where the acquirer does not purchase the target company as a whole, but only one or some parts of its businesses, only the turnover of the part(s) acquired will be included in the calculation of turnover with regards to the seller. Whether or not the acquired part is a legal entity, i.e. a subsidiary, does not change the essence of the transaction. [31]

2.4.2. Turnover of groups

When an undertaking concerned in a concentration within the meaning of the EUMR belongs to a group, the turnover of the group as a whole will be taken into consideration to determine whether the thresholds are met. The aim is to capture the total volume of the economic resources that are being combined through the operation. In such a situation, the aggregate turnover of an undertaking concerned will be calculated by adding together the respective turnovers of the following:[32]

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[29] Council Regulation (EC) No 139/2004, Article 5(1).

[30] Commission Notice on calculation of turnover, paragraphs 24-25.

[31] Council Regulation (EC) No 139/2004, Article 5(2).

[32] *ibid.*, Article 5(4).

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
- has the right to manage the undertaking's affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

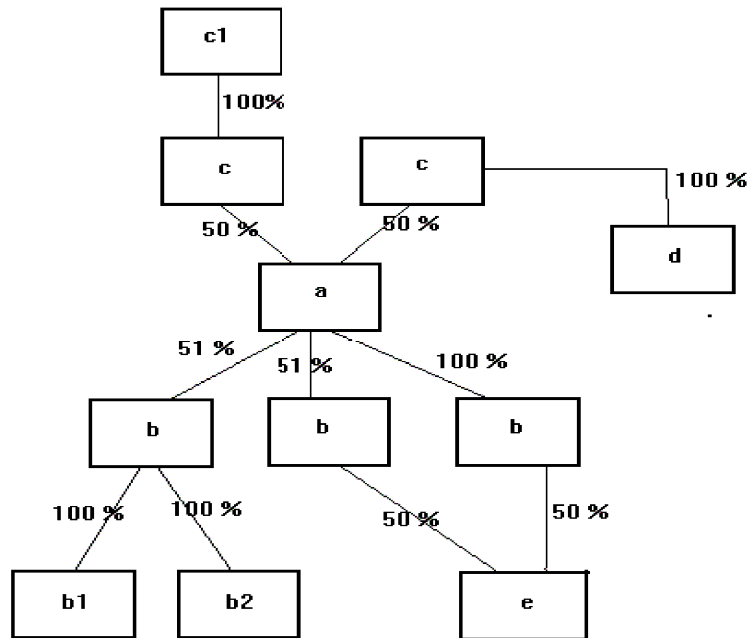
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

The EUMR, on the other hand, introduces a derogation from the general method of calculation of turnover by stating that the aggregate turnover of an undertaking concerned will not include the sale of products or the provision of services between any of the undertakings of a group.[33] This means that "internal" turnover of a group will be deducted from the aggregate turnover. The aim is to exclude proceeds of business dealings within a group in order to take into account of the real economic weight of each entity. Therefore, the amounts taken into consideration by the EUMR reflect only the transactions which take place between the third parties and the undertakings of the group.

[33] *ibid.*, Article 5(1).

Source: Commission Notice on calculation of turnover, OJ C 66 of 02.03.1998.

This figure shows the interpretation of the Article 5(4) with the use of letters correspond to the relevant points of the Article. Where (a) represents the undertaking concerned, the turnover of (a) should include its subsidiaries (b), its parent companies (c), the other subsidiaries of its parent companies (d), any other undertaking jointly controlled by two or more of the companies belonging to the group (e):



Several remarks can be made from this figure:

1. As long as the test of control of point (b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding of the controlling company. In the example, the whole turnover of the three subsidiaries (called b) of the undertaking concerned (a) will be included.

2. When any of the companies identified as belonging to the group also controls others, these should also be incorporated into the calculation. In the example, one of the subsidiaries of a (called b) has in turn its own subsidiaries b1 and b2.

3. When two or more companies jointly control the undertaking concerned (a) in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them should be included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). Although the EUMR does not explicitly mention this rule for those cases where the undertaking concerned is in fact a joint venture, it is inferred from the text of Article 5(4)(c), which uses the plural when referring to the parent companies. This interpretation has been consistently applied by the Commission.

4. Any intra-group sale should be subtracted from the turnover of the group.

Figure 2.1. Turnover of a Group

2.5. The Concept of Undertakings Concerned

Commission has also a notice on the concept of undertakings concerned[34] in order to clarify the interpretation of the term "undertakings concerned" used in the relevant provisions regarding the determination of Community thresholds and the calculation of turnover. The meaning of the term can be explained according to the type of concentration in question as following:

1. In the case of *a merger*, the undertakings concerned will be the undertakings that are merging.
2. With regard to *acquisition of control*, the undertakings concerned will be the acquiring company and the acquired company (the target company). On the other hand, the seller participating in this operation normally is not deemed to be one of the undertakings concerned. The reason is that its role ends when the transaction is completed and its links with the company disappears. However, where the seller retains joint control with the acquiring company (or companies), it will be considered to be one of the undertakings concerned.[35]
3. Where the acquisition is carried out by *a full-function joint venture* which is already operating on a market, the Commission will normally consider the joint venture itself and the target company to be the undertakings concerned (not the joint venture's parent companies). However, where the joint venture is set up especially for the purpose of acquiring the target company, where an existing joint venture has no legal personality or full-function character, the Commission will consider, together with the target company, each of the parent companies themselves to be the undertakings concerned. Because, in this situation, the joint venture is only a vehicle for an acquisition by the parent companies, which are in fact the real players behind the operation.[36]
4. Changes in the shareholding of a company may lead to a change in the quality of control. Such changes in the shareholding can occur in three forms:

[34] Commission Notice on the concept of undertakings concerned, Official Journal C 66 of 02.03.1998.

[35] *ibid.,* paragraphs 7-8.

[36] *ibid.,* paragraphs 27-28.

firstly, one or more existing shareholders can exit; *secondly*, one or more new additional shareholders can enter; *thirdly*, one or more existing shareholders can be replaced by one or more new shareholders. As they imply a change in the nature and quality of the control, the Commission considers that the undertakings concerned are the remaining shareholders (both existing and new) who exercise joint control and the joint venture itself. Similar to any seller, the exiting shareholder is not an undertaking concerned.[37]

5. In the case of a *de-merger*, the undertakings concerned will be the original parties to the merger, and the assets that each original party is acquiring. In the case of a *break-up of a joint venture*, the undertakings concerned will be the original parties to the joint venture, each as acquirer, and that part of the joint venture that each original part is acquiring.[38]

6. In those transactions where two or more companies *exchange assets*, regardless of whether these constitute legal entities or not, each acquisition of control constitutes an independent concentration. Therefore, the undertakings concerned will be, for each property transfer, the acquiring companies and the acquired companies or assets.[39]

7. As mentioned above, within the meaning of the EUMR, a concentration also arises where one or two persons already controlling at least one undertaking acquire control of the whole and parts of one or more other undertakings. This means 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).[40]

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[37] *ibid.,* paragraphs 34 and 44.

[38] *ibid.,* paragraph 48.

[39] *ibid.,* paragraphs 49 and 50.

[40] *ibid.,* paragraph 51.

8. In those situations where *a State-owned company* merges with or acquires control of another company controlled by the same State, the question arises as to whether these transactions really constitute concentrations within the meaning of the EUMR or rather internal restructuring operations of the "public sector group of companies". The EUMR underlines the principle of non-discrimination between public and private sectors.[41] A merger or acquisition of control arising between two companies owned by the same State may constitute a concentration and, if so, both of them will qualify as undertakings concerned, since the mere fact that two companies are both owned by the same State does not necessarily mean that they belong to the same "group". Indeed, the decisive issue will be whether or not these companies are both part of the same industrial holding and are subject to a coordinated strategy.[42]

2.6. Prior Notification of Concentration

Concentration with a Community dimension will 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. Where the Commission finds that "a notified concentration" falls within the scope the EUMR:[43]

- it will publish the fact of the notification, at the same time indicating;
  - the names of the undertakings concerned,
  - their country of origin,
  - the nature of the concentration, and
  - the economic sectors involved.

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[41] Council Regulation (EC) No 139/2004, recital (22) states that "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".

[42] Commission Notice on the concept of undertakings concerned, paragraph 56.

[43] Council Regulation (EC) No 139/2004, article 4(1) to (3). The article also states that the term "notified concentration" will also cover **intended concentrations** which are notified by the undertakings concerned to demonstrate to the Commission in a good faith that the intended agreement or public bid would result in a concentration with a Community dimension.

2.7. Case Referrals

As mentioned before, the turnover-related thresholds determine whether the concentration in question has a Community dimension and, accordingly, has to be examined under the Commission's exclusive jurisdiction. On the other hand, the previous experience in the application of the EUMR revealed that in some cases there is a need for re-attribution of cases between the Commission and Member States to ensure effective protection of competition. Thus, case referral rules governing the referral of concentrations from the Commission to Member States and from the Member States to the Commission are developed. These rules are consisted with the principles of subsidiarity, so that the most appropriate authority for dealing with a case having specific characteristics would be ensured.

In fact, case referral mechanism is a derogation from the general rules set out in the EUMR to determine the jurisdiction according to turnover-related thresholds. However, bearing in mind the increasing number of Member States after the last enlargement and the prospective enlargements in the future, it provides a necessary flexibility for the efficient application of the merger control regime.

In this context, this referral system is especially significant for the cases in which the concentration in question has not a Community dimension. In such a situation, the merging parties should make multiple notifications to the Member States concerned for the same transaction. Such a multiple filing will increase the legal uncertainty and the costs for the merging parties. Furthermore, it may lead to conflicting assessments between the competent authorities of the Member States concerned. Therefore, referral of such cases to the Commission gains importance.

Case referral requests can be made by the undertakings concerned or by the Member States. While the requests made by the former constitute the system of pre-notification referrals, the requests made by the latter establish the system of post-notification referrals. It should be noted that the system of pre-notification referrals is introduced with the revised EUMR in 2004 so as to further improve the efficiency of the merger control system. However, instead of the classification of referrals as pre-notification or post-notification, referral of cases will be addressed below according to the criteria of the most appropriate authority.

2.7.1. Referral of the cases by the Commission to Member States

2.7.1.1. Referral upon the request of the undertakings concerned

Prior to the notification of a concentration with a Community dimension, the undertakings participating in the concentration may apply for a referral from the Commission to a Member State by means of a reasoned submission that the concentration should be examined, in whole or in part, by that Member State. In order to make such a request, there are two legal requirements to be fulfilled:[44]

(i) *the concentration may significantly affect competition* in a market within a Member State; **and**

(ii) the market in question *presents all the characteristics of a distinct market*.

The Commission will transmit this submission to all Member States without delay. Within 15 working days of receiving the submission, the Member State referred in the reasoned submission will express its agreement or disagreement in relation to the referral of the case. Where that Member State takes no such decision within this period, it will be deemed to have agreed.

At the same time, within 25 working days starting from the receipt of the reasoned submission, the Commission will also decide whether or not to refer the case. If the Member State in question agrees with the referral and the Commission considers that two legal requirements are met, the Commission 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 competition law. On the other hand, if the Commission does not take a decision within this period, it will be deemed to have adopted a decision to refer the case. Consequently, where a concentration is referred, the competition law of the Member State in question will be applied.

The statistics about the case referrals from the Commission to a Member State upon the request of the undertakings concerned are shown in Table 2.1.

[44] Council Regulation (EC) No 139/2004, Article 4(4).

Table 2.1. Case Referrals from the Commission to a Member State

	2004	2005	2006	Total
Referral requests made by the undertakings concerned	2	14	13	29
Referral to MS	2	11	13	26
Refusal of referral	0	0	0	0

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

As the figures show in Table 2.1., while the number of case referrals remained limited in 2004, the undertakings concerned applied to the case referral mechanism intensively in 2005 and 2006. Therefore, it can be said that such a pre-notification referral option is adopted quickly by the undertaking concerned although it is newly introduced. Moreover, it can be concluded that the Commission supports pre-notification system as it did not refuse any referral request.

2.7.1.2. Referral upon the request of a Member State

The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned. Within 15 working days of the date of receipt of the copy of the notification, the Member State concerned, on its own initiative or upon the invitation of the Commission, may request the referral of a case to its competent authority under two legal conditions that:[45]

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

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

[45] *ibid.*, Article 9(2).

The Commission may decide whether or not to refer a case in parallel with the conditions mentioned above:[46]

1. If it considers that there is such a distinct market and that such a threat exists;
   a) it may itself deal with the case; **or**
   b) it may refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.
2. If it considers that such a distinct market, which does not form a substantial part of the common market, is affected by the concentration in question, it may refer the whole or part of the case relating to the distinct market concerned.

The statistics about the case referrals from the Commission to a Member State upon the request of that Member State are shown in Table 2.2.

Table 2.2. Case Referrals from the Commission to a Member State

	2000	2001	2002	2003	2004	2005	2006	Total
Referral requests made by Member States	4	9	8	10	4	7	6	48
Partial referral to MS	3	6	7	1	1	3	1	22
Full referral	2	1	4	8	2	3	1	21
Refusal of referral	0	0	0	1	0	0	0	1

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

As the figures indicate in Table 2.2., the number of the referral requests by Member States differs during 2000-2006 period. On the other hand, almost equal numbers of partial and full referrals show that the Commission has no specific preference between them. Moreover, the existence of only one refusal of referral means that the Commission supports this mechanism.

[46] *ibid.,* Article 9(3).

2.7.2. Referral of the cases from Member States to the Commission

2.7.2.1. Referral upon the request of the undertakings concerned

Prior to any notification of a concentration to the competent authorities, the undertakings participating in the concentration may apply for a referral from Member States to the Commission by means of a reasoned submission that the concentration should be examined by the Commission. In order to make such a request, there are two legal requirements to be fulfilled:[47]

(i) *the concentration has no Community dimension* within the meaning of the EUMR; **but**

(ii) *is capable of being reviewed under the national competition laws of at least three Member States.*

The Commission will transmit this submission to all Member States without delay. Within 15 working days of receiving the submission, any Member State competent to examine the concentration under its national competition law may express its disagreement in relation to the referral of the case. Where at least one such Member State has expressed its disagreement within this period, the case will not be referred to the Commission.

However, where no Member State has expressed its disagreement within this period, the concentration will be deemed to have a Community dimension and will be notified to the Commission. In such situations, no Member State will apply its national competition law to the concentration.

The statistics about case referrals from a Member State to the Commission upon the request of the undertakings concerned are shown in Table 2.3.

[47] *ibid.*, Article 4(5).

Table 2.3. Case Referrals from a Member State to the Commission

	2004	2005	2006	Total
Referral requests made by the undertakings concerned	20	28	38	86
Referral to the Commission	16	24	39	79
Refusal of referral	2	0	0	2

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

As the figures demonstrate, Table 2.3. is consistent with Table 2.1. in terms of the adoption of the system of pre-notification referrals by the undertakings concerned. On the other hand, when compared with Table 2.1., it seems that referral of cases to the Commission is more preferred by the undertakings concerned. This can be explained by the fact that the undertakings concerned would like to reduce the costs and legal uncertainties related to the multiple notifications and benefit from the advantages of being treated in a single transaction in accordance with the 'one-stop-shop' system.

2.7.2.2. Referral upon the request of one or more Member States

Within 15 working days of the date of on which the concentration is notified, one or more Member States may request the Commission to examine any concentration when three legal requirements are fulfilled:[48]

(i) *the concentration has no Community dimension* within the meaning of the EUMR; **but**

(ii) *affects trade between Member States*; **and**

(iii) *threatens to significantly affect competition within the territory of the Member State or Member States making the request.*

[48] *ibid.*, Article 22(1).

The Commission will inform the competent authorities of the Member States and the undertakings concerned of any request without delay. And other Member State will have the right to join the initial request within the period of 15 working days of being informed by the Commission of the initial request. All national time limits relating to the concentration will be suspended until it has been decided that where the concentration will be examined.

Within 25 working days after the receipt of the initial request, the Commission may decide to examine the concentration where it considers that the legal requirements are met. On the other hand, if the Commission does not take a decision within this period, it will be deemed to have adopted a decision to examine the concentration. The Member State or States having made the request will no longer apply their national legislation on competition to the concentration.

Alternatively, where the Commission itself considers a concentration fulfills the legal requirements, it may inform one or several Member States of its decision and may invite that Member State or those Member States to make a referral request.

The statistics about the case referrals from Member States to the Commission upon the request of one or more Member States are shown in Table 2.4.

Table 2.4. Case Referrals from Member States to the Commission

	2000	2001	2002	2003	2004	2005	2006	Total
Referral requests made by Member States	0	0	2	1	1	4	4	12
Partial referral	0	0	2	1	1	3	3	10
Refusal of referral	-	-	-	-	-	1	1	2

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

When compared to Table 2.2., the figures show that referral of cases to the Commission is less preferred by Member States. On the other hand, both Table 2.2. and Table 2.4. demonstrate that, similar to the case in pre-notification referrals, the Commission also supports post-notification referrals as it refused only three referrals.

Consequently, it can be said that case referral mechanism in general and pre-notification referrals in particular not only increase the legal certainty for the undertakings concerned, but also contribute to the effective application of the merger control regime in line with the principle of subsidiarity.

2.8. Examination of the notification and initiation of proceedings

The Commission will examine the notification and take a decision within 25 working days at most. That period will begin on the working day following that of the receipt of a notification and may be extended to 35 working days where the Commission receives a referral request from a Member State or the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market.[49] At the end of that period **(the so-called Phase 1)**:[50]

(a) Where the Commission concludes that the notified concentration does not fall within the scope of the EUMR, it shall record that finding by means of a decision.

(b) Where the Commission finds that the notified concentration, although falling within the scope of the EUMR, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) In the same situation, however, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

(d) Where the Commission finds that the notified concentration falls within the scope of the EUMR and raises serious doubts[51] as to its compatibility with the common market, it shall decide to initiate proceedings.

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[49] Council Regulation (EC) No 139/2004, Article 10(1).

[50] *ibid.,* Article 6(1).

[51] In fact, the EUMR does not give the explanation of such serious doubts as to the notified concentration's compatibility with the common market. Within the general framework of the appraisal of the concentrations, it can be interpreted as it is the serious doubt that the concentration in question may result in the creation or strengthening of a dominant position which would affect the trade between Member States and distort the effective competition in the common market.

If the Commission takes such a decision to initiate proceedings, it will open **the so-called Phase 2** for a more in-depth inquiry. As soon as it appears that the serious doubts have been removed, particularly as a result of modifications made by the undertakings concerned, the Commission will issue a decision declaring the concentration compatible with the common market.[52]

In other situations, the Commission will evaluate whether a notified concentration raising serious doubts is compatible or incompatible with the common market within 90 working days at most. That period will begin on the date on which the proceedings are initiated and may be increased to 105 working days where the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings. The notifying parties may make only **one such request**. Similarly, at any time following the initiation of proceedings, the periods mentioned above may be extended to a maximum of additional 20 working days by the Commission at the request of the notifying parties or with the agreement of the notifying parties.[53]

At the end of the Phase 2, the Commission may give clearance to the notified concentration unconditionally or with conditions and obligations, or it may declare the notified concentration incompatible with the common market and prohibit it. The general functioning of the two Phases (Figure 2.2.) and the time limits set by the EUMR (Table 2.5.) can be illustrated as following:

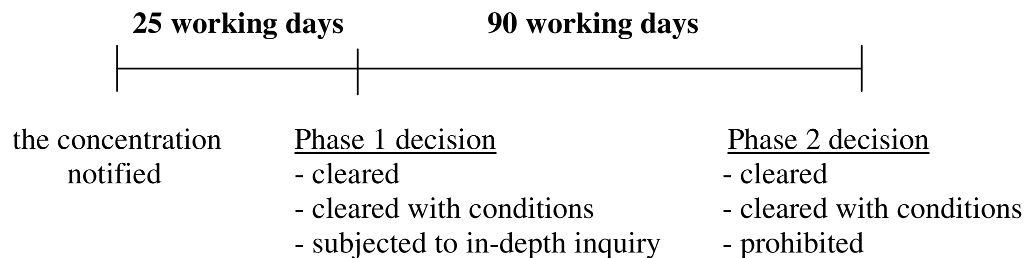

Figure 2.2. Phase 1 and Phase 2

[52] Council Regulation (EC) No 139/2004, Article 10(2).

[53] *ibid.,* Article 10(3).

Table 2.5. Time limits for initiating proceedings and for decisions

Phase 1	**25 working days** beginning on the working day following that of the receipt of a notification. **+ 10 working days** if the Commission receives a referral request from a Member State or the undertakings concerned offer commitments.
Phase 2	**90 working days** starting from the date on which the proceedings are initiated. **+ 20 working days** if requested by the notifying parties or by the Commission with the agreement of the notifying parties. **+ 15 working days** if the undertakings concerned offer commitments prior to the 55th working day after the initiation of proceedings.

Where the Commission has not taken a decision in relation to the situations stated above within the time limits set by the EUMR, the concentration shall be deemed to have been declared compatible with the common market.[54]

The fact that the Commission takes its decisions within strict time deadlines is a notable feature of the EUMR. Indeed, firms and the markets need to know as quickly as possible if a merger can be carried out or not. The uncertainty related to long regulatory processes is always very costly but it is especially so for mergers, where firms need to deeply restructure and reorganize their production, distribution, research and marketing activities. The preventive authorization system also responds to an efficiency criterion. It simply be wasteful to let firms carry out the merger first and then rule that they should return to the original situation. Forced spin-offs would be extremely inefficient. Thus, that is the reason why the European legislators decided to introduce the EUMR. (Motta 2004: 37)

Last but not least, if the ECJ gives a judgement which annuls the whole or part of a Commission decision which is subject to a time limit set by the EUMR, the concentration will be re-examined by the Commission in the light of current market conditions. The notifying parties will submit a new notification or supplement

[54] *ibid.*, Article 10(6).

original notification without delay, because the original notification may become incomplete due to the changes in market conditions or in the information provided. Where there are no such changes, the parties will certify this fact without delay. The relevant periods will start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification.[55]

The statistics about the Phase 1 and Phase 2 Decisions are shown below in Table 2.6. and Table 2.7. respectively.

With regard to Phase 1 decisions (Table 2.6.), the decreasing number of cases falling out of the scope of the EUMR and finally the absence of any such cases in last years show that the reforms and the revisions of the EUMR in the light of the problems faced during its early application have ensured that its content is now sufficiently clear and comprehensible for the undertakings concerned.

As regards Phase 2 decisions (Table 2.7.), it can be said that the Commission generally permits the concentrations with a Community dimension to the extent that the notifying parties propose the accurate and adequate commitments to remove the Commission's competition concerns. The number of the prohibited concentrations is very low when compared to the total number of concentrations declared compatible with the common market, including the ones with commitments. In addition, it seems that the dissolution of a concentration is not preferred by the Commission. In fact, the Commission's stance is consistent with the general objective of the EU merger control rules to facilitate restructuring of the European industry in terms of increasing efficiencies and competitiveness as a response to the challenges posed by the globalization.

[55] *ibid.*, Article 10(5).

Table 2.6. **Phase 1 Decisions**

	90	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**03**	**04**	**05**	**06**	**Total**
Out of scope of the EUMR	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	**52**
Within the scope of the EUMR and compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	**2797**
Within the scope of the EUMR and compatible after the modifications with commitments	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	**140**

Table 2.7. **Phase 2 Decisions**

	90	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**03**	**04**	**05**	**06**	**Total**
Within the scope of the EUMR but raises serious doubts (proceedings initiated)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	**161**
Compatible	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	**32**
Compatible after the modifications with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	**79**
Prohibitions	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	**19**
Restoring effective competition through the dissolution of the concentration	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	**4**

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

2.9. Suspension of concentrations

A concentration with a Community dimension shall not be implemented either before its notification or until it has been declared compatible with the common market. However, the Commission may grant a derogation from these obligations upon request which must be reasoned. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. The suspension of a concentration, on the other hand, shall not prevent the implementation of a public bid or of a series of transactions in securities including those traded on a stock market, by which control is acquired from various sellers, provided that:[56]

(a) the concentration is notified to the Commission without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain full value of its investments based on a derogation granted by the Commission.

2.10. The Commission's exclusive power

The Commission has the exclusive power to investigate concentrations with a Community dimension. As mentioned above in the examination of notifications, the Commission mainly takes three types of decisions in relation to a notified concentration: clearance, clearance with conditions, or prohibition. Along with these decisions, the other types of decisions taken by the Commission are addressed in detail in this section.

2.10.1. The Commission's decision giving clearance to the notified concentration

The Commission may decide that a notified concentration is compatible with the common market:[57]

[56] Council Regulation (EC) No 139/2004, Article 7(1) to (3).

[57] *ibid.,* Article 8(1) and (2) as well as Article 81(3) of the Treaty of Rome.

(a) where the notified concentration would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position;

(b) where two or more parent companies, while retaining their independence, create a joint venture constituting a concentration within the meaning of the EUMR with a view to *coordinate their competitive behaviors*, and if such coordination;

- contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; **and**
- does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(c) where the undertakings concerned make the necessary modifications to the notified concentration and ensure that the conditions laid down in (a) and (b) are met.

There are two special situations in which the notified concentration can be declared compatible with the common market: efficiencies and failing firm defence.

2.10.1.1. Efficiencies

A concentration may be in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, thereby improving the conditions of growth and raising the standard of living in the Community.[58] Therefore, it is possible that efficiencies brought about by the concentration counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have.[59] In order to assess whether a merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, the Commission performs an

[58] Council Regulation (EC) No 139/2004, Recital 4.

[59] *ibid.*, Recital 29.

overall competitive appraisal of the merger. In making this appraisal, it takes into account several factors, including the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.[60]

The Commission considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers (i.e. lower prices, new or improved products or services), thereby counteracting the adverse effects on competition which the merger might otherwise have.[61]

2.10.1.2. Failing Firm Defence

The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.[62]

The Commission considers the following three criteria to be especially relevant for the application of a 'failing firm defence': [63]

1. The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.

[60] Council Regulation (EC) No 139/2004, Article 2(1).

[61] Guidelines on the assessment of horizontal mergers, paragraph 77.

[62] *ibid.*, paragraph 89.

[63] *ibid.*, paragraph 90.

2. There is no less anti-competitive alternative purchase than the notified merger.
3. In the absence of a merger, the assets of the failing firm would inevitably exit the market.

The notifying parties are responsible for providing in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.

2.10.2. The Commission's decision attaching conditions and obligations to the notified concentration

In some cases, the Commission may give clearance **but** attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the requirements they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.[64]

2.10.3. The Commission's decision prohibiting the notified concentration

The Commission may decide that a notified concentration is incompatible with the common market:[65]

(a) where the notified concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position;

(b) where two or more parent companies, while retaining their independence, create a joint venture constituting a concentration within the meaning of the EUMR with a view to *coordinate their competitive behaviors*, and if such coordination:

- does not contribute to improving the production or distribution of goods or to promoting technical or economic progress, while preventing consumers a fair share of the resulting benefit; **and**

[64] Council Regulation (EC) No 139/2004, the second subparagraph of the Article 8(2).

[65] *ibid.,* Article 8(3); and Article 81(3) of the Treaty of Rome.

– affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

2.10.4. The Commission's decision requiring the dissolution of a concentration

The Commission may require the undertakings concerned to dissolve the concentration where it finds that a concentration:[66]

(a) has already been implemented and that concentration has been declared incompatible with the common market, **or**

(b) has been implemented in contravention of a condition attached to a decision intended to ensure that the undertakings concerned comply with the requirements they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

Within this framework, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the dissolution of all shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration.

On the other hand, in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, it may take any other measures to achieve such restoration as far as possible.

2.10.5. The Commission's interim measures

The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:[67]

(i) has been implemented either before its notification or until it has been declared compatible with the common market;

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[66] Council Regulation (EC) No 139/2004, Article 8(4).

[67] *ibid.,* Article 8(5).

(ii) has been implemented in contravention of a condition attached to a decision;

(iii) has already been implemented and is declared incompatible with the common market.

2.10.6 The Commission's decision revoking its previous decision

The Commission may revoke its decision declaring the notified concentration compatible with the common market where:[68]

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; **or**

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

The statistics about the Commission's decisions other than the Phase 1 and Phase 2 decisions are shown in Table 2.8.

As the figures indicate, during 1990-2006 period, the Commission revoked only one concentration due to incorrect information. While it did not introduce any interim measures, it imposed fines only in eight cases. On the other hand, the Commission granted derogation from the suspension of a concentration in 91 cases. However, the statistics do not give details whether these derogations are made subject to conditions and obligations in order to ensure conditions of effective competition. Consequently, it can be said that the fines to prevent the submission of incorrect or misleading information and to reduce the non-compliance with the measures, conditions or obligations imposed by the Commission are sufficiently deterrent to ensure that the undertakings concerned comply with the rules set out in the EUMR.

[68] *ibid.*, Article 8(6).

Table 2.8. The Commission's Decisions other than the Phase 1 and Phase 2 decisions

	90	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**	**00**	**01**	**02**	**03**	**04**	**05**	**06**	**Total**
Decision revoked due to incorrect information	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	**1**
Decisions introducing interim measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**
Decisions granting a derogation from the suspension of a concentration	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	1	**91**
Decisions imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	**8**

Source: European Commission, *Statistics*, 21.09.1990 to 31.12.2006.

2.11. The Commission's powers of inspection

The Commission may conduct all necessary inspections of undertakings and associations of undertakings in order to carry out its duties assigned by the EUMR. The officials and other accompanying persons authorized by the Commission to conduct an inspection will have the power:[69]

(i) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(ii) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(iii) to take or obtain in any form copies of or extracts from such books or records;

(iv) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(v) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Officials authorized by the Commission will exercise their powers upon production of a written authorization specifying their duties and powers to be used in the inspection. In good time before the inspection, the Commission will give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be concluded.

Undertakings and association of undertakings are required to submit to inspections ordered by the decision of the Commission. The decision will specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate penalties provided for non-compliance, and the right to have the decision reviewed by the ECJ. The Commission will take such decisions after consulting the competent authority of the Member State in question.

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[69] Council Regulation (EC) No 139/2004, Article 13(2).

The officials of the competent authority of that Member State will, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorized by the Commission. To this end, they will exercise the same powers authorized to the latter by the Commission.

Alternatively, at the request of the Commission, the competent authorities of the Member States may undertake the inspections. On the other hand, the officials of the competent authorities of the Member States who are responsible for conducting these inspections will exercise their powers in accordance with their national law. If so requested by the Commission or by the competent authority of the Member State in question, officials and other accompanying persons authorized by the Commission may assist the officials of that authority.[70]

2.12. Fines and Periodic Penalty Payments

The Commission may impose two types of sanctions in order to ensure compliance with the application of the EUMR in an effective way.

2.12.1. Fines

The Commission may impose two different rates on the aggregate turnover of the undertakings concerned according to the essence of the non-compliance. In fixing the amount of the fine, the nature, gravity and duration of the infringement will be taken into account.

The Commission may impose fines not exceeding **1 % of the aggregate turnover** of the persons or the undertakings concerned, where *intentionally or negligently*:[71]

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement in relation to prior notifications and requests on case referrals;

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[70] *ibid.*, Article 12.

[71] *ibid.*, Article 14(1).

(b) they supply incorrect or misleading information in response to the Commission's simple request for information;

(c) they provide incorrect, incomplete or misleading information in response to the Commission's decision requiring the supply of information or do not provide information within the required time limit;

(d) they produce the required books or other records related to business in incomplete form during inspections conducted by the Commission;

(e) in response to a question asked on facts or documents relating to the subject matter and purpose of an inspection;

- they give an incorrect or misleading answer,
- they fail to rectify within in a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer.

(f) seals affixed in the context of an inspection by officials or other accompanying persons authorized by the Commission have been broken.

The Commission may impose fines not exceeding **10 % of the aggregate turnover** of the persons or the undertakings concerned where either *intentionally or negligently*:[72]

(a) they fail to notify a concentration in relation to prior notification or case referrals before its implementation, unless the Commission grant them a derogation from the obligations imposed;

(b) they implement a concentration either before its notification or until it has been declared compatible with the common market;

(c) they implement a concentration declared incompatible with the common market;

[72] *ibid.*, Article 14(2).

(d) they do not comply with any measure ordered by the Commission regarding the dissolution of a concentration so as to restore the situation prevailing before the implementation of the concentration;

(e) they do not comply with any interim measure taken by the Commission to restore or maintain the conditions of effective competition;

(f) they fail to comply with a condition or an obligation imposed by the Commission to ensure that the concentration compatible with the common market;

(g) they fail to comply with a condition or an obligation attached to a derogation granted by the Commission to ensure the conditions of effective competition.

2.12.2. Periodic penalty payments

The Commission may impose periodic penalty payments not exceeding **5 % of the average daily aggregate turnover** of the persons or the undertakings concerned, for each working day of delay to be calculated from the date set in the decision, in order to compel them:[73]

(a) to provide complete and correct information in response to the Commission's decision requiring the supply of information;

(b) to submit to an inspection conducted by the Commission;

(c) to comply with a condition or an obligation imposed by the Commission to ensure that the concentration compatible with the common market;

(d) to comply with a condition or an obligation attached to a derogation granted by the Commission to ensure the conditions of effective competition;

(e) to comply with any measure ordered by the Commission regarding the dissolution of a concentration so as to restore the situation prevailing before the implementation of the concentration;

[73] *ibid.*, Article 15.

(f) to comply with any interim measure taken by the Commission to restore or maintain the conditions of effective competition.

Where the persons or the undertakings concerned have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

2.13. Review by the ECJ

The ECJ has unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payments. It may cancel, reduce or increase the fine or the periodic penalty payment imposed.[74] In addition, the decisions taken by the Commission within the scope of the EUMR are also subject to the review by the ECJ.[75] As mentioned above, where the ECJ gives a judgement which annuls the whole or part of a Commission decision which is subject to a time limit set by the EUMR, the concentration will be re-examined by the Commission in the light of current market conditions.

2.14. The Concept of Dominant Position

The concept of dominant position is defined neither in the EUMR nor in the Treaty. It is defined in the various judgements of the ECJ. A dominant position refers to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[76]

A dominant position derives from a combination of several factors. In general, very large market shares are highly significant evidence of the existence of a dominant position. Other relevant factors can be the relationship between the market

[74] *ibid.*, Article 16.

[75] *ibid.*, Article 21(2).

[76] Case 27/76 United Brands V EC Commission (1978) ECR, p. 207.

shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of the undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition.[77]

On the other hand, the Treaty explicitly prohibits the abuse of dominant position and specifies some types of such abuse. In this respect, any abuse of single dominance by one undertaking or of collective dominance by two or more undertakings within the common market or in a substantial part of it shall be prohibited in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:[78]

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

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

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

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

Consequently, it should be noted that not the dominant position itself, but rather **the abuse of dominant position** is prohibited in EU competition law. In order to determine whether an undertaking concerned has a dominant position within the common market or in a substantial part of it and whether it abuses such a position, it is necessary to define the relevant market in which the undertaking concerned would have a dominant position.

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[77] Case 85/76 Hoffmann La Roche V EC Commission (1979) ECR, p. 461.

[78] Article 82 of the Treaty of Rome.

2.14.1. Relevant Market

The relevant market in which a dominant position would be evaluated is established by the combination of the product and geographic markets.

2.14.1.1. Relevant Product Market

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.[79] When defining markets, the concept of substitutability has to be examined in terms of both demand and supply substitution.

2.14.1.1.1. Demand substitution

The assessment of demand substitution entails the determination of the range of products which are considered as substitutes of a given product by the consumer. This also necessitates the evaluation of likely reactions of the consumers to a small but permanent change in relative prices. Therefore, the question to be answered is whether the customers of the undertakings concerned are in a position to switch easily to available substitute products or to suppliers located elsewhere in response to such a price increase. If the consumers are in a position to do so, the additional products and areas will be included in the relevant market. The reason is that the competition derived from these other products and areas may affect or restrain sufficiently the pricing decisions of the undertakings concerned so that they cannot have a significant impact on the prevailing market prices.[80]

For example, in case of a merger of soft-drink bottlers, if a sufficient number of consumers of flavour A would switch to flavour B when they confronted with a permanent price increase of 5 % to 10 % for flavour A and make such a price

[79] Commission Regulation No 802/2004, *Annex I*, Section 6(I) of the Form CO.

[80] Commission Notice on the definition of relevant market, paragraphs 16-17.

increase unprofitable due to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended to other available flavours until a set of products is identified for which a price increase would not induce a sufficient demand substitution.[81]

2.14.1.1.2. Supply substitution

Supply substitutability may also be taken into account when defining markets in those situations where its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch their production to the relevant products and market them in the short term (such a period that does not entail a significant adjustment of existing tangible and intangible assets) without incurring significant additional costs or risks in response to small but permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will affect or restrain sufficiently the competitive behaviour of the undertakings concerned.[82]

An example for supply substitution can be given when defining product markets in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers. From the demand side, different qualities of paper cannot be used for any given use. For instance, an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are contemplated to manufacture the different qualities and production can be adjusted with negligible costs in a short time. Therefore, in particular where orders are placed with sufficient lead time to allow for modification of production plans, paper manufacturers are able to compete for orders of various qualities. Under such circumstance, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper will be included in the relevant market, and their sales will be aggregated to estimate the total value or volume of the market.[83]

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[81] *ibid.,* paragraph 18.

[82] *ibid.,* paragraph 20.

[83] *ibid.,* paragraph 22.

2.14.1.2. Relevant Geographic Market

The relevant geographical market comprises the area in which the undertakings are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. Factors related to the assessment of the relevant geographical market include the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas or substantial price differences.[84]

In determining the relevant geographic market, the Commission makes a preliminary analysis of the scope of the geographic market by examining the distribution of market shares between the undertakings concerned and their competitors, as well as the price differences at national and Community level.

2.14.1.2.1. Demand-side factors

The initial analysis, in terms of demand characteristics, will include an exploration of the factors such as the importance of national or local preferences, current patterns of purchases of customers, and product differentiation or brands in order to establish whether companies in different areas constitute a real alternative source of supply for consumers. Similar to the relevant market evaluation, demand substitution arising from changes in relative prices will be checked so as to determine again whether the customers of the undertakings concerned would switch easily their orders to companies located elsewhere.[85]

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[84] Council Regulation No 139/2004, Article 9(7).

[85] Commission Notice on the definition of relevant market, paragraph 29.

2.14.1.2.2. Supply-side factors

If necessary, supply factors will also be checked to observe whether those companies located in different areas conduct their sales without any obstacle throughout the whole geographic market. In other words, it is aimed at identifying the possible barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level. Thus, this analysis will include an examination of requirements for a local presence in order to sell in that area, the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement rules, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc.[86]

2.15. The Market Share and Concentration Levels

The Commission takes into account market shares and concentration levels in order to analyze the market structure and the competitive importance of both the merging parties and their competitors.

2.15.1. Market Share Levels

The Commission considers the current market shares in its competitive analysis. However, the current market shares may be adjusted to reflect reasonably certain future changes, in the light of exit, entry or expansion. Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares.[87]

According to the well-established case law, very large market shares (50% or more) may be evidence of the existence of a dominant market position. On the other hand, a merger involving a firm whose market share will remain below 50% after the

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[86] *ibid.,* paragraph 30.

[87] Guidelines on the assesstment of horizontal mergers, (2004/C 31/03), paragraph 15.

merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. Therefore, the Commission has in several cases considered mergers resulting in firms holding market shares between 40% and 50%, and in some cases below 40%, to lead to the creation or the strengthening of a dominant position.[88]

Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be assumed to be compatible with the common market. An indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.[89]

2.15.2. Concentration Levels

The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index ('HHI'). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in concentration directly brought about by the merger.[90]

The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. Such markets normally do not require extensive analysis. It is also unlikely to identify horizontal competition concerns in a

[88] *ibid.*, paragraph 17.

[89] Council Regulation 139/2004, Recital 32.

[90] Guidelines on the assesstment of horizontal mergers, (2004/C 31/03), paragraph 16.

merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances such as one or more of the following factors are present:[91]

(a) a merger involves a potential entrant or a recent entrant with a small market share;

(b) one or more merging parties are important innovators in ways not reflected in market shares;

(c) there are significant cross-shareholdings among the market participants;

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;

(e) indications of past or ongoing coordination, or facilitating practices, are present;

(f) one of the merging parties has a pre-merger market share of 50 % of more.

Each of these 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.

2.16. Selected Cases

The judicial review of the Commission's decisions by the CFI and the ECJ has always provided guidance to the implementation of the EUMR. Indeed, their judgements not only shed light on the conceptual uncertainties in the interpretation of the EUMR, but also impel the Commission to revise and improve the EUMR so as to ensure that it is implemented more effectively to increase compliance and it is more responsive to the needs of the companies intending to engage in concentrations. Within this framework, five well-known cases on which a lot of discussions made in recent times are summarized below in order to emphasize the contribution of the CFI and the ECJ to the development and effective application of EU merger control rules.

[91] *ibid.*, paragraphs 19-20.

Airtours/First Choice judgement highlighted that the interpretation of the concept of dominance also applies to the collective dominance within the scope of the EUMR. In this respect, it brought clarity in relation to what are the necessary standards of proof in cases of creation of collective dominance.

GE/Honeywell judgement acknowledged that conglomerate mergers can be anticompetitive in particular circumstances and provided useful guidance for future cases. In addition, as the parties to the concentration are US-based companies, the case itself is an important example of demonstrating that the EUMR applies to all concentrations with a Community dimension, regardless of whether they are located within or outside the Community.

Schneider/Legrand judgement showed that the statement of objection in which the Commission is enumerating its competition concerns in relation to the notified concentration should be sufficiently clear that the undertakings concerned could accurately understand those concerns and offer appropriate commitments to remove them. Moreover, the Commission must be consistent in its decision with the content of the statement of objection as to competition concerns.

Tetra Laval/Sidel judgement acknowledged that the merged entity may have the ability to engage in leveraging practices (when an undertaking having a dominant position in one market abuse its dominant position in another market where it is not dominant) but there should be sufficient evidence to establish convincingly the anticompetitive effects of such practices.

ENI/EDP/GDP judgement revealed the Commission's error in the substantive assessment of the merger in relation to a relevant market as it did not take into account a derogation provided for that relevant market. In addition, the derogation in question itself is a good example of the Member States' protectionist attitudes in the liberalization of key national markets.

2.16.1. Airtours V Commission[92]

On 29 April 1999, the Commission received the notification of a proposed concentration by which Airtours plc. (‘Airtours’) would acquire control of the whole of First Choice plc (‘First Choice’) by way of a public bid. On 3 June 1999, the Commission initiated second phase proceedings because it had serious doubts in relation to the concentration’s compatibility with the common market.

Airtours is a UK company active in tour operating, travel agencies, charter airlines, hotels and cruise ships with operations in 17 countries across Europe (notably in the UK and Ireland) and North America. ***First Choice*** is a UK company active in tour operating, travel agencies, charter airlines, seat broking and car rental broking, mainly in the UK and Ireland, with some activities in Canada. Airtours proposed to acquire First Choice by way of a public bid.

The UK package holiday sector was found to exhibit a number of characteristics such as market transparency, mature market, low rate of innovation, similarity of cost structures, commercial links between the oligopolists which made it more likely, in the Commission’s view, that the merger would lead to collective dominance with substantial adverse effects on competition.[93]

The structure was highly concentrated even before the merger. The four largest firms, Thomson Travel Group plc (30,7%), Thomas Cook Group Limited (20.4), Airtours (19.4%) and First Choice (15%) had 85,5% of the market shares in short-haul package holidays in the UK. After the merger there would have been three major tour operators left in the market and all other players would have had less than 3%. The Commission’s view was that the three remaining large operators would be able to coordinate behaviour by restricting the capacity put on sale, thereby raising prices for British consumers.

All four large companies (in contrast to the numerous but much smaller competitors who made up the remaining of the market) were fully vertically

[92] Case No IV/M.1524 *Airtours/First Choice*, 22.09.1999.

[93] 29th Report on Competition Policy 1999, p. 63.

integrated, both upstream into charter airline operation and downstream into distribution via the chains of travel agents which they owned. This tended to align their cost structures. It was also found that important commercial links existed between the four large companies — for example, significant supplies of seats on each other's airlines and arrangements to distribute each other's holidays through their travel agency chains. This increased the transparency of the market and reduced the likelihood of strong competition between them.[94]

Another key feature of the market was the relative inflexibility of supply. This inflexibility created an incentive for the larger, integrated tour operators to keep the market 'tight' and not to expand capacity in order to compete aggressively with each other for market share. Oversupply by one supplier would increase the number of unsold holidays, threatening the profitability of all, whereas constraining capacity would, other things being equal, improve profitability for all.[95]

In addition, Airtours considered that it would be impossible for the major suppliers to retaliate in the event that one of them tried to win market share from the others by increasing capacity and offering lower prices. However, the Commission did not agree that there was no scope for retaliation in this market. Rather there was considerable scope for retaliation, which would only increase the incentives to behave in an anti-competitive parallel way.[96]

The Commission concluded 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 and potential entrants to compete will make it rational for the three major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity.[97] Consequently, by its Decision of 22 September 1999, the Commission prohibited the notified merger as it was incompatible with the common market.

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[94] *ibid.*, p. 63.

[95] *ibid.*, p. 64.

[96] Case No IV/M.1524, paragraph 55.

[97] *ibid.*, paragraph 56.

On 6 June 2002, however, the CFI annulled the Commission's decision to prohibit the merger between Airtours and First Choice. The applicant had argued that the Commission used a new and incorrect definition of collective dominance.

The Commission had stated in its decision that it is not a necessary condition of collective dominance for the oligopolists always to behave *as if* there were one or more explicit agreements (i.e. to fix prices or capacity, or share the market) between them. Thus, it is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act individually in ways which will substantially reduce competition between them, and as a result of which they may act to an appreciable extent independently of competitors, customers and consumers.[98]

With respect to the general analysis of tacit coordination, the CFI specified three necessary conditions for a collective dominance as defined in this case to exist: transparency, deterrent mechanisms, and the unlikelihood of a response from competitors and consumers.[99] In this context:

- **Transparency:** For tacit coordination to be credible, each member of the oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common collusive policy. The Commission had concluded in its assessment that the market was sufficiently transparent, partly due to the frequent interaction of the oligopolists, partly due to the publication of brochures that allowed each operator to closely monitor the capacity of the others. The CFI disagreed with this assessment.[100]

- **Deterrents:** For tacit coordination to be sustainable there must exist punishment or retaliation mechanisms that deter the oligopolists from departing from the common policy. The Commission had found that several punishment mechanisms existed. An increase in capacity of one operator

[98] *ibid.*, paragraph 54.

[99] 32nd Report on Competition Policy 2002, paragraph 230.

[100] *ibid.*, paragraph 231.

could severely hurt the others and since each operator sold the products of the other operators in its retail chain, it could de-rack a deviator's products. The CFI rejected these deterrent mechanisms since they were either not credible, or costly to implement.[101]

- **Reaction from competitors and customers:** Tacit coordination is only stable if current and future competitors as well as consumers are not able to jeopardise the results expected from the common policy. The Commission did not believe that the fringe could constrain the oligopolists because the vertical integration of the big operators had brought the fringe into a situation of dependence vis-à-vis the members of the oligopoly. The CFI concluded that the Commission's assessment was incorrect and that it underestimated their ability to react as a countervailing force capable of counteracting the creation of a collective dominant position.[102]

Consequently, the CFI found that the Commission made errors of assessment in its analysis of competition obtaining in the relevant market prior to the notification. *First*, it did not provide adequate evidence in support of its finding that there was already a tendency in the industry to collective dominance and, hence, to restriction of competition, particularly as regards capacity setting. *Second*, it did not take into account the fact that the main tour operators' market shares have been volatile in the past and that such volatility is evidence that the market was competitive.[103]

2.16.2. GE/Honeywell V Commission[104]

On 5 February 2001, the Commission received the notification of a proposed concentration by which the General Electric Company ('GE') of the US has agreed to acquire the entire share capital of Honeywell International Inc. ('Honeywell') of

[101] *ibid.*, paragraph 232.

[102] *ibid.*, paragraph 233.

[103] Judgement, paragraph 120.

[104] Case No COMP/M.2220 *General Electric/Honeywell*, 03.07.2001.

the US. On 1 March 2001, the Commission initiated second phase proceedings because it had serious doubts in relation to the concentration's compatibility with the common market.

GE is a diversified industrial corporation active in fields including aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting (through the NBC media channel), financial services and transportation systems.

Honeywell is an advanced technology and manufacturing company serving customers worldwide with aerospace products and services, automotive products, electronic materials, speciality chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls.

GE is not only a leading industrial conglomerate active in many areas including aerospace and power systems, but also a major financial organisation through GE Capital. GE's financial arm contributes around half of the GE Corporation consolidated revenues and manages over USD 370 billion, more than 80% of GE's total assets. If GE Capital were an independent company, it would, on its own, rank in the Top 20 of the Fortune 500 largest corporations.[105]

In addition to having enormous financial means available in-house, GE's unmatchable balance sheet size offers other major advantages to GE businesses. Indeed, unlike any other company, and in particular other engine manufacturers, GE is able to take more risk in product development programmes than any of its competitors. This ability to absorb product failures without jeopardising its future ability to compete and develop new products in an industry characterized by long-term investments is critical.[106]

GE has taken advantage of the importance of financial strength in this industry by relying heavily on discounts on the catalogue price of the engines. GE's strategy of granting discounts on the catalogue price of the engine must not be

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[105] Case No COMP/M.2220, paragraph 107.

[106] *ibid.*, paragraph 108.

confused with an actual price reduction to the customer and therefore cannot be used as an indication of lack of dominance. Indeed, lower prices on the initial engine sales result not in net lower prices to the customer but in the weakening of engine competitors and ultimately in foreclosing them from current and future platforms and airlines competitions.[107]

Another factor contributing to its dominance is GE's vertical integration into aircraft purchasing, financing and leasing activities through GE Capital Aviation Services ('GECAS'), the largest purchaser of new aircraft and the owner of the largest fleet of aircraft in service and the largest share of aircraft on order and options. Unlike any other parties, GECAS's policy is to select only GE engines when purchasing new aircraft. Therefore, GECAS's influence actually derives from its ability to create an unmatchable economic incentive for airframe manufacturers to favour GE products. Consequently, the Commission found that airframe manufacturers have been influenced by GE's powerful combination of GECAS aircraft order prospects and financial contribution from GE Capital to select GE engines for their new airframes. The competitors of GE Aircraft Engines are not in a position to replicate such packages.[108]

In the light of these findings, the Commission's investigation demonstrated that GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Its strong market position combined with its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell is the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters, a key input in the manufacture of engines.[109]

The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics

[107] *ibid.*, paragraphs 111-112.

[108] *ibid.*, paragraphs 121-122, 126-127.

[109] 31st Report on Competition Policy 2001, p. 237.

and corporate jet engines, as well as to the strengthening of GE’s existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE’s financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would have enabled the merged entity to leverage the respective market power of the two companies into one another’s products. This would have had the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately adversely affecting product quality, service and consumer prices.[110]

On 14 June 2001, GE proposed a number of commitments to address these concerns but they were considered insufficient to resolve the competition problems identified by the Commission. On 28 June 2001, after the deadline for the submission of commitments, GE proposed a new set of remedies. However, it was not also accepted because it was insufficient to remove those concerns at such a very late stage in the procedure.

Finally, the Commission concluded that the proposed merger would lead to the creation or strengthening of a dominant position on the markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbine, as a result of which effective competition in the common market would be significantly impeded. Accordingly, by its Decision of 03 July 2001, the Commission declared the proposed merger incompatible with the common market.

The notifying parties appealed to the CFI for the annulment of the Commission’s decision. However, on 14 December 2005, the CFI upheld the Commission’s decision. The CFI found errors in the Commission’s assessment of the conglomerate and vertical effects of the merger, but considered that the horizontal effects of the merger alone were sufficient to justify the prohibition of the transaction.

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[110] *ibid.*, p. 237.

Honeywell's application was dismissed on procedural grounds, as it focused on only one aspect of the decision (i.e. the conglomerate effects) and could not thus lead to an annulment of the decision. In relation to *GE's application*, the CFI upheld the decision on the basis of the horizontal effects of the transaction on the markets for jet engines for large regional jets, corporate jet aircraft and small marine gas turbines, finding that the proposed commitments submitted by the parties were rightly rejected by the Commission. It also confirmed the Commission's conclusion that GE's market share for large commercial jet aircraft engines is indicative of pre-merger dominance and reinforced through GE's vertical integration and the characteristics of the industry.[111]

For the conglomerate effects based on various bundling practices, the CFI required the Commission to prove both ability and interest of the merged entity to engage in mixed bundling. In that respect, the documented past bundling practices of Honeywell were considered by the CFI as insufficiently probative. Therefore, the CFI concluded that the Commission had not established that the merged entity would have bundled sales of GE's engines with Honeywell's avionics and non-avionics products. The CFI then concluded that, in the absence of such proof, the mere fact of having a wider range of products does not suffice to conclude that dominant positions would have been created. Finally, the CFI considered that the Commission had failed to take into account the possible impact of the deterrent effect of Article 82 of the Treaty on practices such as pure bundling and mixed bundling.[112]

2.16.3. Schneider V Commission[113]

On 16 February 2001, the Commission received the notification of a takeover plan whereby Schneider Electric SA ('Schneider') was to acquire sole control of Legrand SA ('Legrand') through an exchange of shares.

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[111] Report on Competition Policy 2005, paragraphs 399-400.

[112] *ibid.*, paragraph 403.

[113] Case No COMP/M.2283 *Schneider/Legrand*, 10.10.2001.

Schneider, a French limited company, is the parent company of a group whose business is in the production and sale of products and systems in the electricity distribution, industrial control and automation sectors. It is active worldwide. ***Legrand***, a French limited company, is the parent company of a group whose business is in the production and sale of low-voltage switchgear and accessories. It is also active worldwide.

On 30 March 2001, the Commission initiated second phase proceedings because it had serious doubts in relation to the concentration's compatibility with the common market. In the meantime, Schneider proposed some commitments, including the divestment of some of its entities, in order to remove those concerns. However, these commitments were not considered sufficient to restore effective competition. Schneider submitted a revised package of commitments after the expiry of the deadline. The Commission also rejected these commitments by stating that it cannot accept such late filed commitments without a further market test.

The Commission's investigation showed that there were substantial overlaps between the activities of Schneider and Legrand in the markets for electrical switchboards (distribution boards and final panelboards, together with their components, where the combined market share would have been between 40% and 70% depending on the country), wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40% to 90%) and certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (for example emergency lighting).[114]

In the light of these findings, the Commission found that the merger would have caused serious competition problems in several national sectoral markets for low-voltage electrical equipment, particularly in France where Schneider and Legrand were by far the largest markets players and the rivalry between the two companies was the mainstay of competition. Therefore, it decided that the notified merger would lead to the creation or strengthening of dominant positions with the

[114] 31st Report on Competition Policy 2001, p. 87.

effect of significantly restricting effective competition and the proposed commitments did not allow to find that they would make the merger compatible with the common market. Accordingly, by its Decision of 10 October 2001, the Commission prohibited the notified merger as it was incompatible with the common market. On 30 January 2002, it also issued a Decision ordering Schneider to divest its shares in Legrand.

Schneider appealed to the CFI against the Commission's decision. On October 2002, the CFI annulled the Commission's decision prohibiting the Schneider/Legrand merger. The annulment of the Commission's decision was based on two sets of considerations: errors of analysis and assessment; and infringement of the rights of the defence.

First, the CFI noted that the Commission had relied on evidence such as the range of products and the combination of brands which it would have been able to offer throughout the European Economic Area in assessing the economic power which the new entity resulting from the merger would enjoy in each of the different national markets affected by the operation. Without ruling out in principle the possibility of taking into account, on a supplementary basis, transnational factors in the analysis of the effects of a merger on national markets, the CFI held that, in the present case, the Commission had not shown that such effects existed in each of the national markets affected.[115]

Secondly, the CFI held that the Commission had been wrong not to take into account the internal sales of certain vertically integrated competitors, leading it to overestimate the strength of the entity resulting from the merger. The CFI considered that the prices of non-integrated manufacturers such as Schneider and Legrand were subject to direct competitive pressure from integrated manufacturers when it came to carrying out large construction projects following an invitation to tender.[116]

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[115] 32nd Report on Competition Policy 2002, paragraph 238.

[116] *ibid.*, paragraph 239.

Finally, the CFI concluded that the Commission had infringed Schneider's rights of defence as it had included in its decision an objection that did not feature in the statement of objections. The objection in question concerned the position of strength of the entity resulting from the merger enjoyed vis-à-vis wholesalers. The CFI took the view that this infringement of Schneider's rights of defence had affected the outcome of the proceedings in two respects. *First*, Schneider had not been given a proper opportunity to comment on the objection, either in its reply to the statement of objections or at the hearing. *Secondly*, Schneider had not been given an opportunity to submit in good time proposals for divestiture capable of resolving the competition problems identified by the Commission on the French markets.[117]

In a separate judgement delivered on the same day, the CFI also annulled the Commission's decision of 30 January 2002 ordering Schneider to demerge from Legrand. The CFI held that, since the decision finding that the merger operation was incompatible with the common market had been annulled, the demerger decision had no basis in law.

2.16.4. Tetra Laval V Commission[118]

On 18 May 2001, the Commission received the notification of a proposed concentration whereby Tetra Laval SA ('Tetra') intends to acquire Sidel SA ('Sidel') by way of a public bid announced on 27 March 2001.

Tetra is a privately held group of companies, which is active in the design and manufacture of equipment, consumables and ancillary services for the processing, packaging and distribution of liquid food. Tetra's business includes traditional carton packaging, where it is the worldwide market leader, and more limited activities in the plastic packaging sector. Tetra also engages in the supply of equipment, systems, accessories and consumables to dairy farm production and animal husbandry.

[117] *ibid.*, paragraph 241.

[118] Case No COMP/M.2416 *Tetra Laval/Sidel*, 30.10.2001.

Sidel is a company involved in the design and production of packaging equipment and systems, in particular, blow moulding machinery, barrier technology and filling machines for polyethylene terephthalate ('PET') plastic bottles. Sidel is the worldwide leader for the production and supply of stretch blow-moulding machines ('SBM'). The company also has activities in engineering, conveying, overwrapping and palletising, health and beauty.

Given the strong positions of the parties in their respective fields, the Commission's investigation focused on the interplay between carton packaging and PET packaging. Carton packaging, in particular aseptic carton, has been traditionally used to package products which are sensitive to light or oxygen such as liquid dairy products, fruit juices, fruit-flavoured drinks, and ready-to-serve tea and coffee drinks ('sensitive products'). Aseptic packaging is used for long-life products, which do not require chilled distribution. PET bottles are transparent plastic bottles made from resin. PET bottles have traditionally been used for the packaging of mineral water and carbonated soft drinks. In 2000, not more than 1% of milk and juices were packaged in PET in the European Economic Area.[119]

In the light of the traditionally different focus of the two packaging materials, the parties claimed that the two markets, carton packaging and PET packaging, should be viewed as distinct and unrelated markets for competition law purposes. The Commission's detailed investigation and market definition analysis showed that the two markets constitute distinct relevant product markets.[120]

However, the Commission found that, even though carton and PET packaging equipment are distinct relevant product markets, the two are closely related neighbouring markets and belong in the same industry sector: liquid food packaging. PET and carton are technical substitutes as PET can be an alternative packaging material for all products that are currently packaged in carton. Already PET and

[119] 31st Report on Competition Policy 2001, paragraph 266.

[120] *ibid.*, paragraph 267.

carton are used as packaging materials for common product segments (liquid dairy products, juices, fruit flavoured drinks and tea/coffee drinks). [121]

Consequently, the Commission concluded that the operation could ***strengthen*** Tetra's dominant position in the market for aseptic carton packaging machines and aseptic cartons by eliminating Sidel as a competitor in a closely neighbouring market, and ***create*** a dominant position in the market for PET packaging equipment and, in particular SBM (low and high capacity) in the sensitive product end-use segments, liquis dairy products, juices, fruit-flavoured drinks and tea/coffee drinks by enabling it to leverage its dominant position in carton packaging to gain a dominant position in PET packaging equipment.[122] Accordingly, by its Decision of 30 October 2001, the Commission prohibited the notified merger as it was incompatible with the common market.

However, on 25 October 2002, **the CFI** annulled the Commission's decision. Although the CFI acknowledged that the Commission had shown, on the basis of well-established and objective evidence, that the two markets in question were closely related and that the merged entity would have the ability to engage in leveraging practices, it held that, under the circumstances of the case, the merged entity would be unlikely to engage in leveraging practices with significant anticompetitive foreclosure effects.[123]

The CFI also acknowledged that the Commission was entitled to examine potential anticompetitive conglomerate effects, namely the significance for the carton markets of a reduction of potential competition from the neighbouring PET equipment markets. However, it held that Tetra's behaviour as regards pricing and innovation in the carton market would not change after the merger as there was a sufficient level of competition to ensure that Tetra would have to continue to fight and innovate. Therefore, the CFI concluded that it had not been demonstrated that the

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[121] *ibid.*, p. 239.

[122] Case No COMP/M.2416, paragraphs 213 and 452.

[123] 32nd Report on Competition Policy 2002, paragraphs 215 and 252.

merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.[124]

In response, the Commission appealed to the ECJ against the judgement of the CFI on the Tetra Laval case. However, on 15 February 2005, **the ECJ** dismissed the Commission's appeal. The ECJ's judgement is again important for clarifying the particular importance of the standard of proof and judicial review in merger control.

With regard to the standard of proof required, the ECJ's judgement underlined that the prospective analysis in merger control involves a prediction of events which are more or less likely to occur in future and such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely. The ECJ's judgement thus upheld the Commission's view that the requisite standard of proof in all merger cases is that of a balance of probabilities. In the present case, on the other hand, the ECJ considered that the CFI did not alter the conditions relative to the standard of proof but merely drew attention to the requirement that the evidence should establish convincingly the merits of an argument or decision. In relation to the prospective analysis of conglomerate mergers, the ECJ found that the question whether a conglomerate merger will permit the merged entity to leverage its strength in order to gain a dominant position over time involves "chains of cause and effect which are dimly discernible, uncertain and difficult to establish". Consequently, the quality of the evidence justifying prohibition of such mergers is particularly important in order to support the view that this economic development would be "plausible".[125]

As regards judicial review of such findings, the ECJ held that the Commission has a margin of discretion in relation to economic matters but the courts must establish whether the evidence relied upon is factually accurate, reliable and consistent, whether it contains all the information that must be taken into account and

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[124] *ibid.*, paragraph 254.

[125] Report on Competition Policy 2005, paragraph 382.

whether it is capable of substantiating the conclusions drawn from it. Therefore, the ECJ considered that the CFI had respected the requirements of judicial review.[126]

2.16.5. ENI/EDP/GDP V Commission[127]

On 9 July 2004, the Commission received the notification of a proposed concentration whereby Energias de Portugal SA ('EDP') and Eni Spa, through its wholly-owned subsidiary Eni Portugal Investment S.p.A., ('ENI') acquire joint control over Gás de Portugal SGPS S.A ('GDP') by way of purchase of shares.

On 12 August 2004, the Commission initiated the second phase proceedings as the notified concentration raised serious doubts as to its compatibility with the common market.

EDP is the incumbent electricity company in Portugal. Its main activities consist of generation, distribution and supply of electricity in Portugal. EDP also controls the Spanish company Hidrocantábrico5, which is active in Spain in the sectors of electricity and gas.

ENI is an Italian energy company active at all levels of the energy supply and distribution chain.

GDP is the incumbent gas company in Portugal. GDP and its subsidiaries cover all levels of the gas chain in Portugal. It imports natural gas into Portugal and it is responsible for the transportation, storage, transport and supply through the high-pressure gas pipeline network. GDP is also active in the natural gas supply to large industrial customers and in the development and future operation of the first underground natural gas storage caverns in Portugal. It also currently controls five of the six local distribution companies active in Portugal.

The Commission identified the following relevant product markets affected by the operation. In electricity: wholesale supply of electricity, balancing power and ancillary services, retail supply of electricity to large industrial customers and retail

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[126] *ibid.*, paragraph 383.

[127] Case No COMP/M.3440 *EDP/ENI/GDP*, 09.12.2004.

supply of electricity to small customers. In gas: supply of gas to power producers, supply of gas to local distribution companies, supply of gas to large industrial customers and supply of gas to small customers.[128]

Since mid-2004, all electricity markets have been fully open to competition. As for the gas markets, owing to its status of emerging market, Portugal will continue to benefit from a derogation from the liberalisation calendar established by the second gas Directive (2003/55/EC). Therefore, the opening-up Portuguese gas markets to competition will start at the latest by 2007 and be completed by 2010.[129]

The Commission concluded that all relevant markets were at most national in scope. In fact, the parties had argued that the electricity wholesale market would soon be Iberian in scope in particular owing to the impending launch of an Iberian electricity trading system ('MIBEL'). However, the Commission found that MIBEL has been postponed several times over the past years, and there are different competitive conditions between both Iberian countries and likely to remain in the foreseeable future. Therefore, the Commission considered that the electricity wholesale market was national in scope.[130]

The Commission held that, despite the commitments proposed by the parties, the proposed operation will strengthen *EDP's dominant position* on the markets for the wholesale supply of electricity, ancillary services and retail supply of electricity in Portugal as well as *GDP's dominant position* in the supply of gas to gas-fired power plants, large distribution companies, large industrial customers and small customers, as a result of which effective competition will be significantly impeded in a substantial part of the common market. Accordingly, by its Decision of 9 December 2004, the Commission prohibited the proposed concentration as it was incompatible with the common market.

EDP appealed to the CFI for the annulment of the Commission's decision. However, on 21 September, the CFI dismissed EDP's action. The CFI rejected

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[128] Report on Competition Report 2004, paragraph 214.

[129] *ibid.*, paragraph 215.

[130] *ibid.*, paragraphs 216-217.

various pleas submitted by the applicant regarding the assessment of the commitments proposed by the merging parties. With regard to commitments presented after the deadline imposed by the various regulations, the CFI also underlined that the Commission was right to reject them on the sole ground of their "extreme lateness".

As regards the substantive assessment of the merger, the CFI considered that the Commission erred in law when it concluded that the concentration would strengthen GDP's dominant positions and give rise to a significant impediment to competition on the gas markets. The CFI recalled that, as a result of the derogation provided for in the Second Gas Directive, the gas markets in Portugal were not open to competition on the date of adoption of the decision. According to the CFI, in the total absence of competition, there was no competition that could be significantly impeded by the concentration on the date of the adoption of the contested decision. The CFI then went on to rule that, by assessing only the future effects of the concentration on the gas markets when these markets were to be open to competition, the Commission had wrongly refrained from taking into account the immediate effects of the concentration on those markets. In this respect, the CFI referred to the fact that the situation on the gas markets would be distinctly improved by the concentration as modified by the proposed commitments.[131]

However, despite that error, the CFI recalled that there is no reason to annul a decision prohibiting a concentration if certain grounds of that decision which are not vitiated by illegalities, in particular those concerning one of the relevant markets, are sufficient to justify its operative part. In the present case, the CFI found that the Commission did not make a manifest error of assessment when it considered that the concentration would cause an important potential competitor (GDP) to disappear from all the electricity markets. That fact would entail the strengthening of EDP's dominant positions on each of the electricity markets, with the consequence that effective competition would be significantly impeded. That conclusion was in itself

[131] Report on Competition Policy 2005, paragraph 395.

sufficient to justify the Commission's decision.[132] The CFI therefore dismissed EDP's application and upheld the decision of the Commission.

As mentioned before, these five selected cases have specific results for the implementation of the EUMR. However, more importantly than the specific results derived from each individual case, there are two significant common points found in the judgements of the CFI and the ECJ:

(i) The Commission made errors of assessment in its analysis of competition, in particular in the determination of anti-competitive effects of the concentration in question. Although the courts make a judicial review and acknowledge the discretion of the Commission in economic matters, their judgements revealed the Commission's insufficient economic analysis capability.

(ii) The Commission failed to provide sufficient and qualified evidence to justify its decisions. Therefore, the courts required the Commission to provide a high standard of proof.

Indeed, the high capability of economic analysis supported by econometric models and merger simulations is a key factor in ensuring accurate and reliable evidence to be relied upon by the Commission to take consistent decisions in the implementation of the EUMR.

Under the previous merger control regime, the Merger Task Force ('MTF'), the Director B within DG Competition, was dealing with all concentrations of Community dimension. However, the severe criticism on the inadequate analysis capacity of the MTF and the CFI's rulings supporting this fact compelled the Commission to revise the structure of DG Competition.

This reorganization primarily consisted of dismantling the MTF and creating a unit responsible for mergers in each of the five sectoral Directorates that are focused on antitrust investigations in specific sectors: Directorate B deals with energy, water, food and pharmaceuticals; Directorate C with information; Directorate D with services; Directorate E with industry; and Directorate F with consumer goods.

[132] *ibid.*, paragraph 396.

Furthermore, a merger unit has been established within Directorate A, which is in charge of ensuring the coordination and flow of information between the merger units. The rationality of such a Merger Network is that the former MTF officials would push colleagues of the sectoral Directorates to expedite their investigations, while the colleagues would complement the MTF officials' knowledge with their market-specific expertise. (Maudhuit and Soames 2005: 144)

On the other hand, the CFI supported the Commission's rigid attitude towards the compliance with strict deadlines in the submission of commitments by the undertakings concerned. The reason is that merger analysis depends on the probabilities and future predictions. If the commitments are not submitted in due time, the re-examination of the notified concentration in the light of new or revised commitments will take a long process which is detrimental to the implementation of the concentration. As market conditions may change, the expected benefits from the proposed concentration would be lost. Therefore, one of the major objectives of the EUMR is to reduce such time-consuming procedures and related costs in favor of the companies participating in the concentrations.

However, concentration cases in general demonstrated that sometimes these strict deadlines for offering commitments may lead to prohibition of concentrations because of procedural reasons rather than substance. Indeed, submitting appropriate commitments is often the key factor in getting clearance for the merger. In complex cases, the undertakings concerned may unintentionally be late in offering remedies to remove the Commission's competition concerns.

Following the criticisms about this issue, the Commission, in its Green Paper on the Review of the Merger Control Regulation, proposed the introduction of a "stop-the-clock" provision in order to allow more time for the collection of information and for the negotiations of modifications to the concentration in the light of the commitments to be offered by the undertakings concerned.[133] Subsequently, the Commission introduced a flexible timeframe in the revised

[133] Green Paper on the Review of the EUMR, COM (2001)745/6, paragraphs 213-215.

EUMR. As mentioned above, the EUMR now allows an automatic extension of the examination period when the notifying parties offer commitments.

Consequently, merger control regime in the EU is a very dynamic process which is driven by the European courts' rulings and the Commission's innovative approach to improve the processes and procedures in the light of its experience in handling the merger cases. This progress can be seen in the Figure 2.3. below.

Source: European Commission, *Statistics*, 21.09.1990 to 30.06.2006.

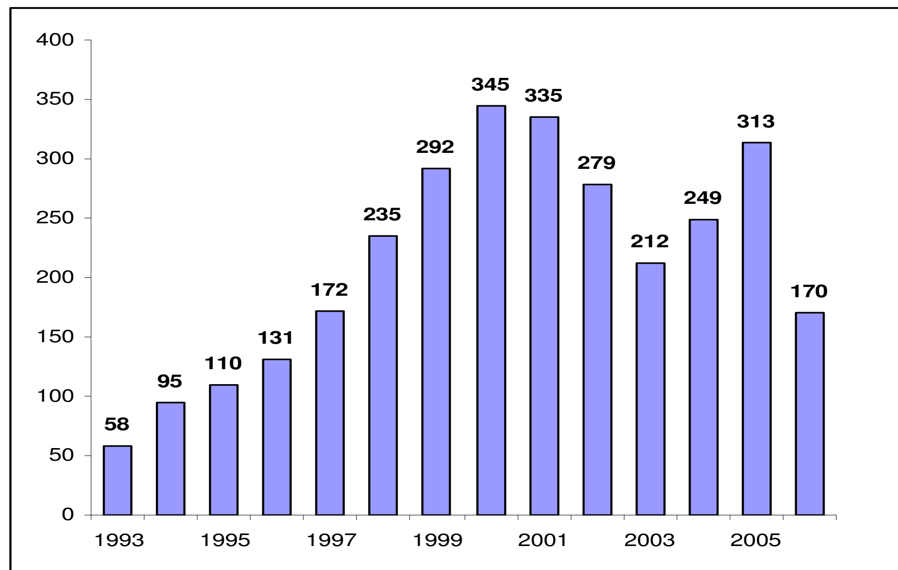

Figure 2.3. Notifications Received

There are three important periods in which merger activities significantly boosted within the EU: the launch of the Single Market in 1993, the introduction of the euro in 1999, and the last enlargement in 2004. As the figures show above, there is a close relationship between the increase in the number of M&As and the progress in the level of economic integration of the EU. Indeed, integration of regional markets in Europe has created opportunities for European companies to expand their operations through M&As and benefit from economies of scale. The removal of the legal, regulatory and technical barriers to the four freedoms of movement (people, goods, services, and capital) has given the European companies the opportunity to

enhance their competitiveness by significantly reducing their costs and increase their efficiencies.

According to Dale, the boom in corporate M&As in Europe reflects the dramatic transformation of the Continent's economic and financial landscape. For example, the hostile takeovers were long seen in Continental Europe, unlike in Britain, as a distasteful aspect of American capitalism. In the Continent's less aggressive corporate world, the interlocking directorships and government policy carried more weight than shareholder interest. However, all that has changed in the wave of corporate restructuring, following the introduction of the single market and single currency in the EU together with the wider reflections of economic globalization. (Dale, *International Herald Tribune*, 13.06.2000)

In this context, the liberalization of the regulated sectors has also been started in Europe through privatization and deregulation processes. Thus, the opening-up of economic sectors to competition constitutes one of the important pillars of the EU competition policy. However, with a protectionist intention, Member States may still act politically contrary to the spirit of the ongoing liberalization process in Europe by encouraging 'national' mergers or impeding 'market-based' deals in vital national sectors such as telecommunications, banking, aviation, gas and electricity.

In 2004, the framework for the creation of the Single European Sky was laid down in order to reduce the fragmentation between states, between civil and military, and between systems. According to Phillips, however, while cross-border consolidation would make economic sense in Europe's crowded and fragmented skies, governments refuse to let flag carriers disappear. In such a massively oversupplied market, the traditional airlines throughout Europe have reduced costs and cut staff to make profit. Despite that, with the firm EU rules banning unlimited subsidies, long-unprofitable airlines are struggling to stay afloat. Many countries have sought to at least partly privatize their flag carriers. Sometimes these national airlines are downsized, but in most cases permanently shutting down of a national airline does not seem to be an option. In this sense, he underlines that there has been no truly major cross-border takeover. For instance, Air France controls KLM, and Lufthansa is assuming control of Swiss, but in both cases the target companies are

maintaining their national identities and operations because the countries made that a condition of any deal. (Phillips, *International Herald Tribune*, 11.06.2005)

In 2005, Italy has raised concerns about economic protectionism in the banking sector. The Commission started a legal action against the Italian central bank, the Bank of Italy, over its handling of a merger case. The bank's governor, Antonio Fazio, was accused of abusing his power to favor Italian bank **Banca Popolare Italiana (BPI)** in a takeover battle with Dutch rival bank **ABN Amro** for another Italian bank **Antonveneta**. In August 2005, the story was unveiled when secret recordings allegedly showing Mr. Fazio advising the former head of BPI on how to best proceed with an approach for Antonveneta were leaked to Italian newspapers. Mr. Fazio denied these charges. After BPI's approach was blocked by Italian authorities investigating the scandal, ABN Amro acquired a majority 69% stake in Antonveneta on 26 September 2005. (BBC News, 24 November 2005, <http://news.bbc.co.uk/1/hi/business/4465668.stm>, last accessed on 16.07.2006) Following the investigation and the criticisms, Mr. Fazio eventually had to resign from his position in December 2005.

With regard to the energy market, the EU single market for gas and electricity will be completed next year with the household market opening up to competition in July 2007. Along with this process, increasing energy prices in the world boosted the profits of the utilities and make them attractive targets for M&As. It is likely that this trend will continue due to the prospective defensive deals among the rivals.

In February 2006, for example, German utility German **E.On** AG's €29.1 billion takeover offer for Spanish energy company **Endesa** SA threatened to derail a government-approved €22 billion bid by **Gas Natural SDG** SA of Spain. Therefore, as a response to such an attack, the Spanish government passed legislation to expand the merger-oversight powers of the country's energy regulator. The Commission urged Spain to avoid trying to use national-security concerns about energy supplies to block E.On's bid. Accordingly, it warned that a law giving the country's regulator far-ranging powers to block company takeovers in the energy sector violates broader EU rules. (Echikson & Cohen, *The Wall Street Journal,* 07.03.2006)

In the meantime, the French government unveiled a merger of French utility **Suez** SA and France's state-owned gas provider **Gaz de France** SA, just days after Italian power producer **Enel** SpA publicly signaled interest in making a bid for Suez. French officials have described the deal as an attempt to create a French energy "champion" but denied actively blocking the Italians. Moreover, French Finance Minister Thierry Breton said that the Suez-GDF merger had been in the works for months and it was neither aimed against anyone nor accelerated by Enel's expression of interest in Suez. (Galloni, *The Wall Street Journal,* 02.03.2006) In fact, such a preemptive tactic used by France was indicated before when France introduced a new law restricting foreign takeovers in 11 sectors deemed to be of national strategic value, a move set in motion in 2005 after rumors that PepsiCo Inc. interested in a bid for French food company Danone SA. (Jacoby, *The Wall Street Journal,* 05.04.2006)

The review of **Endesa** and **Suez** cases by *The Wall Street Journal* on 28.02.2006 reveals the politics behind the blocked moves and how such interventions are justified in the name of national interests by the two countries. According to this, Spanish Prime Minister Jose Luis Zapatero needed the support of Catalonia, where Gas Natural is based, to stay in power so he came up with preventive legislation changing the national merger review rules. On the other hand, with a presidential election a year away and his popularity dropping as a result of tentative labor reforms initiated by his government, French Prime Minister Dominique de Villepin was motivated by fears of union backlash and a blow to a national pride so he moved preemptively against the Italians.

In fact, the resurge of economic nationalism is not promoted only by the big European countries. For instance, Luxembourg also opposed to a takeover deal. When its steelmaker company **Arcelor** SA has become the subject of a hostile takeover bid by Indian **Mittal Steel** Co, Luxembourg put the proposed amendments to the takeover law on the agenda. As the government owned only 5.2% of Arcelor and European regulations prevented it from wielding any "golden share" to fend off the unwanted Mittal offer, its limited tools compelled them to propose such amendments. The main reason for such an opposition was the fear that Mittal would close many of the remaining Luxembourg steel mills and move the headquarters of Arcelor. (Echikson, *The Wall Street Journal,* 17.03.2006)

Even the newcomer Poland refused to allow Italian lender **UniCredit** SpA to merge its two Polish subsidiaries. European Central Bank President and the chairman of the monthly ECOFIN meeting both have criticized Polish plans to create a national body overseeing all financial sectors and stripping the Polish central bank of many of its power in order to stop UniCredit. Because such an action called into question one of the building blocks of the euro currency: independent central banks. (Echikson, *The Wall Street Journal,* 15.03.2006)

Taylor draws attention to the critics of the current system saying that while governments can act swiftly to thwart unwanted mergers or promote mergers to create "national champions", the slow-motion legal powers of the Brussels to police the internal market are far from achieving this job. He states that the EU has the power to prohibit mergers on competition grounds and order companies to make concessions like divestments to win clearance for takeovers, but it has no such immediate authority to stop governments from interfering with the internal market. Instead, it has to use cumbersome and multistage infringement proceedings that eventually lead to taking a Member State to the ECJ, which typically takes two to three years to issue a ruling that can involve heavy fines. (Taylor, *International Herald Tribune*, 28.06.2006)

On the other hand, the Commission launched a broad legal attack and named 21 of 25 Member States in violation of at least one single-market rules in sectors ranging from energy to telecommunications. In most cases, the Commission sent letters to countries warning them it would file lawsuits in the ECJ if they do not quickly comply. However, it is argued that the Commission has long had to battle Member States on economic protectionism, but it had been reluctant to do so recently after the French and Dutch voters in 2005 rejected the EU constitution, casting doubt on Europeans' willingness to accept direction from EU institutions in Brussels. (Jacoby, *The Wall Street Journal*, 05.04.2006)

Consequently, it is obvious that there is a serious inconsistency between what has been declared by the Member States in EU Summits and what they do in practice. While Brussels intends to apply a coherent and integrated competition policy to foster the competitiveness of Europe's industries, Member States take

decisions contravening the fundamental principles of the internal market such as the free movement of capital and freedom of establishment. On the one hand, the Lisbon Strategy of the EU sets targets to make the EU the most competitive and dynamic knowledge-based economy in the world by 2010. On the other hand, the EU lags behind the US as regards to economic growth and most of the Member States suffer from the high unemployment rates. Together with the constitutional crisis last year, all these call into question the rationality behind the EU.

Nevertheless, global competition is intensifying as new global players such as China and India further penetrate national markets. Therefore, it is likely that the European companies will continue to engage in M&As and hostile takeovers in order to reinforce their position in terms of assets and geographical reach against their global rivals. Accordingly, it is also likely that new conflicts between Member States may occur with a view of economic protectionism.

At this point, Cox and et al. (Cox, Currie & Nixon, *The Wall Street Journal*, 04.04.2006) draw attention to a very interesting deal and conclude that Greece and Turkey, the two countries which came close to war only 10 years ago, could teach some of their more-established European allies a thing or two. That deal is the acquisition of Finansbank of Turkey by National Bank of Greece for $5.5 billion. They emphasize that Turkey's openness to foreign investment, even from a country so recently an enemy, stands in contrast to the protectionism on display elsewhere, not least in Poland, France and Spain, which are trying to block cross-border deals. Finally, they conclude that a long debate has raged whether Turkey is sufficiently European to join the EU, but when it comes to openness to trade, it seems Turkey is more European than most Europeans.

The question of whether this conclusion is a reasonable and consistent one or to what extent Turkish merger control rules are in line with that of the EU can only be answered after scrutinizing them with a comparative approach. To this end, the control of M&As in Turkish competition law will be addressed in the next chapter.

CHAPTER III

3. MERGER CONTROL IN TURKISH COMPETITION LAW

3.1. Main objectives and characteristics of merger control policy within the general context of Turkish competition law

Since 1980s, the period during which drastic reforms were initiated with an aim of transforming Turkish economy into a free market economy and gradually integrating it into the world economy, remarkable steps have been taken in the economic liberalization process to open the country to international trade, capital flows and competition. Before this period, the economy was protected by high customs tariffs, Turkish Lira was not convertible, the exchange rates and interest rates were determined by the state. As it was the case in many other developing countries, state monopolies supplied raw materials at non-market prices, a state controlled banking system provided credit to favored firms or sectors, and various subsidies distorted market responses (OECD 2005: 11). Moreover, the state's active involvement in the economy as a producer and the existence of big holding companies which were protected against international competition by import substitution policies caused excessive concentrations and monopolies in the economy (Katırcıoğlu 2003: 79 & 85). Therefore, the essence of the reforms triggered in 1980s was also reflected in the Turkish Constitution. According to this, Article 167[134] of the Turkish Constitution charged the state with the task of taking necessary measures to ensure smooth functioning of markets within the country. Within this framework, the Act on the Protection of Competition No. 4054 was enacted in December 1994 and the Turkish Competition Authority became functional in November 1997. However, the legislative studies regarding competition have a long past than it is supposed (Competition Authority, Annual Report 2003: 3):

[134] Article 167 requires that "the state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods or services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets."

- The first action directed towards the protection of competition was the symposium on the protection of consumer which was arranged under the auspices of Ministry of Trade ('the Ministry') in 1971. After this symposium, the Ministry prepared "The Draft Act on the Regulation of the Activities regarding Commercial Goods and Services for the Protection of Consumer", which included provisions in relation to the protection of consumer and the regulation of domestic markets.
- In 1975, the Ministry prepared "The Draft Act on the Regulation of Trade and the Protection of Consumer", which included provisions regarding competition law for the first time in Turkey.
- In 1980, the Ministry prepared "The Draft Act on the Protection of Fairness in Trade", which had the aim of protecting free market system and removing anti-competitive elements.
- In 1981, the Ministry prepared "The Draft Act on the Regulation of Commercial Activities and the Protection of Consumer", which included provisions in parallel to the previous draft.
- "The Draft Acts on the Protection of Consumer", which were prepared in October 1983 and March 1984 respectively, included provisions regarding cartels and monopolies under separate chapters for the first time.
- Along with the conditions formed by the new economic model adopted in 1980s and the responsibility assigned to the State by 1982 Constitution to prevent the formation of monopolies and cartels, Ministry of Industry and Trade prepared "The Draft Act on the Agreements and Practices Restricting Competition", which separated the issues regarding the restriction of competition from the protection of consumer and the regulation of trade, in November 1984. This draft was different from the previous ones, as it was the first draft, which has a separate text regarding restricting of competition and which was forwarded to the Turkish Grand National Assembly to be enacted. As it was not discussed within the 17th Legislation Term, however, it was not enacted.

In fact, the main catalyst for the introduction of the Act on the Protection of Competition No. 4054 (hereinafter 'the Act') was the relationship between the EU and Turkey. Along with other obligations, the compliance with the competition rules of the EU was stipulated in the implementation of the Customs Union between the EU and Turkey. [135] Therefore, the EU's anti-trust provisions were taken as a model and incorporated into the Act. As the Competition Authority has gained more experience and competence in the application of the Act, it further aligned the competition legislation with the Community *acquis* by issuing detailed secondary legislation in parallel to the developments in EU competition law.

Within the framework of the Customs Union relations with the EU, Turkey committed to comply with the principles laid down in the provisions on competition, taxation, and the approximation of laws in the Treaty.[136] This commitment was also reiterated in the Additional Protocol and, as regards the competition rules, Turkey committed to adopt the conditions and rules for the application of the principles laid down in the relevant articles of the Treaty regarding the agreements, decisions and concerted practices which have the effect of prevention, restriction or distortion of competition; the abuse of dominant position; and the state-aids.[137] Moreover, the wording of these relevant articles was directly quoted in the Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, and Turkey committed to adopt the necessary rules for the application of these articles within two years following the entry into force of the Customs Union.[138]

With regard to approximation of legislation, the Decision 1/95 stipulated that Turkey shall adopt a competition law and establish a competition authority before the entry into force of the Customs Union, and shall apply the principles contained in

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[135] The obligations set out in Association Agreement between Turkey and EEC (Ankara Agreement) dated 12.09.1963, and in the Additional Protocol, 23.11.1970. When Ankara Agreement was signed, the official name of the European Union was "European Economic Community (EEC)". The term "EU" is used interchangeably with the term "EEC" in order to ensure consistency in the thesis.

[136] Ankara Agreement, Article 16.

[137] Additional Protocol, Article 43.

[138] Decision No 1/95 of 22 December 1995, Articles 32-34.

block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities within one year after the entry into force of the Customs Union. In addition, Turkey also committed to adapt its legislation to the future amendments of any procedure related to adoption, abolition or modification of block exemption Regulations within one year from being informed about the amendments.[139]

Consequently, Turkey undertook many obligations regarding the enactment of a competition law, the establishment of a competition authority, and the adoption of the principles laid down in the Treaty. It should be noted that such a compliance with the Community rules covers not only the existing rules in the primary and secondary legislation, but also the future amendments in the Community rules and the case-law of the Community.

In this context, the scope of the Act was determined with a view to prevent anti-competitive practices stated below: [140]

- ✓ Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services;
- ✓ Abuse of dominance by the undertakings dominant in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices;
- ✓ Any kind of legal transactions and behaviour having the nature of mergers and acquisitions which significantly decrease competition as a result of the creation or strengthening of a dominant position.

Within this framework, *merger* of two or more undertakings aimed at creating a dominant position or strengthening their dominant position, as a result of which competition would be significantly decreased in any market for goods or services

[139] *ibid.*, Article 39.

[140] *ibid.*, Article 2.

within the whole or a part of the country, or *acquisition* of an undertaking by any undertaking or person through acquisition of its assets, or all or a part of its partnership shares, or other means which confer them the power to have a right in the management are deemed illegal and prohibited.[141]

In this way, it is envisaged that the growth of undertakings outside of their own internal dynamics has been placed under control. The reason is that obtaining a dominant position through mergers or acquisitions causes a larger distortion in the competitive regime than getting a dominant position through growth with its own internal dynamics.[142]

3.2. Comparative analysis of Turkish merger control rules with the EUMR

In parallel with the EUMR, Turkish merger control rules also comprise mergers, acquisitions and joint ventures. However, while the EUMR regulates these three types of business strategies within a single framework based on the concept of 'concentration', the Act does not specify joint ventures together with mergers and acquisitions. Joint ventures are mentioned in the Communiqué 1997/1[143] clarifying which mergers and acquisitions should be notified and get authorization from the Competition Board (hereinafter 'the Board') to gain legal validity. Thus, the definition of a concept, which is not referred in the main Act, in a secondary legislation constitutes an inconsistency. Therefore, it would be appropriate to revise the existing article in the Act and use a single framework based on the concept of 'concentration' to cover these three business strategies as it is used in the EUMR.

On the other hand, similar to the EUMR, joint ventures are evaluated on full-functionality basis under the Turkish merger control rules. According to this,

[141] The Act No. 4054, Article 7.

[142] The reasoning of the Article 7 of the Act No. 4054.

[143] Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 1997/1. The legal basis for the Communiqués to be issued by the Board is laid down in the second paragraph of the Article 7 of the Act: "The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which authorization has to be obtained in order to become legally valid."

joint ventures, which emerge as an autonomous economic entity possessing the staff and assets to achieve their goals and which do not have the aim or effect of restricting competition between the parties or between the parties and the joint venture, are deemed as mergers and acquisitions.[144]

As mentioned above, acquisitions by any undertaking or person which significantly decrease competition as a result of the creation or strengthening of a dominant position are prohibited by the Act. In this context, however, the prohibition of an acquisition of an undertaking by a person is inappropriate. The reason is that an acquisition by a person who does not already have an economic activity cannot raise any competition concern. From the competition law perspective, a transaction has importance if it causes an important change in the market structure or creates entry barriers to the market. (Aslan 2006: 167) Therefore, as it is used in the EUMR, it would be more convenient to prohibit 'acquisition of an undertaking by one or more persons already controlling at least one undertaking'.

In line with the EUMR, Turkish merger control rules introduce some exceptions to the definitions of mergers and acquisitions. In this context, temporarily holding of securities with a view to resell them (provided that the voting rights arising from such securities are not exercised), and acquisition by a public institution with the aim of liquidation, insolvency, cessation of payments, and similar reasons are not deemed as an acquisition. Moreover, different from the EUMR, acquisitions via inheritance are also excluded.[145]

The last version of the EUMR, which entered into force in May 2004, is now based on "competition test" in the assessment of concentrations. Within this framework, it prohibits any concentration "which would significantly impede effective competition within the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Article 2(3) of the EUMR). This change was introduced by the EU to deal with the concentrations that presented a risk of anticompetitive effects although not leading to

[144] Communiqué 1997/1, Article 2(c).

[145] *ibid.*, Article 3.

dominance. By taking into account the oligopolistic market structures, the EUMR envisages that not only the likelihood of coordination between the members of the oligopoly, but also the non-coordinated behaviour of the remaining competitors may result in a significant impediment to effective competition (Recital 25 of the EUMR). Therefore, the objective was to make dominance only an example of a significant anticompetitive effect arising from a concentration, rather than requiring the creation or strengthening of dominance as a prerequisite for illegality (OECD 2005: 24-25).

However, similar to the old version of the EUMR, the Act still envisages "dominance test" in the evaluation of concentrations. Within this framework, there are two conditions to prohibit a merger, an acquisition or a joint venture under the Turkish merger control rules. First, the concentration in question should be aimed at creating or strengthening of a dominant position. Second, the competition in the relevant market must be significantly decreased as a result of this concentration. In this respect, a dominant position itself is not prohibited. It means that an undertaking which is dominant in a market can also engage in a concentration transaction. In such a case, the analysis of the transaction should be based on the determination of whether the dominant position of the undertaking concerned would be strengthened and, accordingly, significantly reduce the competition in the relevant market.

As mentioned before, the EUMR sets specific turnover thresholds to determine whether a concentration has a Community dimension to be notified to the Commission. On the other hand, Turkish merger control rules envisage two types of quantitative thresholds (market share or turnover) for the compulsory notification of a concentration to get authorization from the Board. In this respect, a merger or an acquisition must be notified to the Board and get authorization where as a result of the merger or the acquisition:[146] [147]

[146] *ibid.*, first paragraph of the Article 4.

[147] As mentioned above, according to the EUMR, "a concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal field of activity in the Community, provided they have substantial operations there" (Recital 10 of the EUMR). Similar to the EUMR, in the context of the application of the Act, concentrations between foreign firms, regardless of the location of their headquarters,

(i) the total market share of the undertakings carrying out the merger or the acquisition exceeds 25% of the market in the relevant product market within the whole or a part of the country, **or**

(ii) the total turnover[148] of the undertakings carrying out the merger or the acquisition exceeds 25 trillion TL, even though their total market share does not exceed 25%.

On the other hand, there is an important derogation from the market share threshold in the banking sector. When a bank operating in Turkey merge with one or several other banks or financial institutions, or transfer all its assets and liabilities and other rights and obligations to another bank operating in Turkey, or takeover all the assets and liabilities and other rights and obligations of another bank, or disintegrate, or change shares, the permission of the Banking Regulatory and Supervision Authority is required. However, in mergers, disintegrations and transfers of banks to be carried out pursuant to the provisions of Banking Law, on the condition that the market share of the total assets of the banks subject to merger or integration does not exceed 20%, the related provisions of the Act No. 4054 shall not be applied.[149]

As it is known, this derogation was introduced in the aftermath of 2001 crisis within the scope of the economic program to restructure the Turkish economy. In this process, the bureaucrats managing the economy would like to reduce the red tape in order to take and implement the necessary measures without delay. Thus, the legal framework for bank mergers has been amended with a view to accelerating consolidation in the banking sector. In this way, excluding the authorization of the Competition Authority eliminated a further step. This reasoning for such derogation might be reasonable at that time under those crisis conditions. However, in 2002

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operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey must be notified to the Board. (Erol 2000:168)

[148] In parallel with the EU merger control rules, the concept of turnover refers to the net sales achieved in the preceding financial year. The turnovers resulting from the sales between the undertakings themselves will not be taken into account in the calculation of the turnover. In addition, in mergers and acquisitions realized with partial acquisition of undertakings, only the turnover of the transferred part will be taken as the basis. (Communiqué No: 1997/1, third paragraph of the Article 4)

[149] Banking Law No. 5411, Article 19.

Report of Regulatory Reform in Turkey, OECD had recommended that the exclusion for bank mergers should be repealed once the emergency situation in the financial sector is under control, and emphasized that competition problems in the banking sector may spill over into other sectors, as constraints on access to funds can discourage entry into other sectors or encourage discrimination (OECD 2002: 32). In 2005 Report, OECD reiterated the same recommendation and concern, and stated that "In the EU, on whose system Turkey is supposed to be modelled, the antitrust authorities generally retain authority to conduct competition reviews of bank mergers, while the member states may still undertake prudential supervision and analysis" (OECD 2005: 66).

Another discussion regarding the thresholds is on the elimination of market share threshold for compulsory notification. In 2002 and 2005 Reports, OECD also recommended the elimination of market share test for notification, on the ground that market share test requires judgements about market definition and market share, thus imposes unnecessary costs and risks on the filing parties, especially for small firms. OECD suggested the determination of the number of transactions that are filed only on the market share. In this context, it recommended that, if most notifications are based on the aggregate turnover threshold, the market share test should be eliminated unless it can be established that high-market-share mergers among relatively small firms pose a particularly significant competition problems in Turkey. (OECD 2002: 32, OECD 2005: 69)

On the other hand, it should be noted that market share and turnover thresholds are introduced as alternative to each other. It is obvious that the calculation of turnover thresholds is easier and turnover gives a definite value. Therefore, the difficulties in the definition of the relevant market and the calculation of market share are not confronted. However, as market share is related to the market structure and the market power of the undertaking, it is a more effective measure for the competition authorities' assessments. (Öz 2005: 71)

Consequently, the existence of market share test is not an obstacle for notification because most of the transactions are made on the basis of turnover threshold. Moreover, analysis of concentrations by using dominance test necessitates

the determination of relevant market and the market share of the undertaking concerned in that market so as to evaluate whether there is a creation or strengthening of a dominant position in the relevant market. Therefore, the current application of alternative thresholds for notification is convenient with the essence of merger control rules.

At the first glance it seems that only market share and turnover thresholds are checked for compulsory notification and authorization of mergers and acquisitions. However, there is also a critical and implicit measure for the notification of mergers and acquisitions: "change of control". For example, even though an acquisition transaction exceeds the market share and turnover thresholds, this transaction will be considered out of the scope of the Act if there is no change in the control of the undertaking whose assets, shares or other means are acquired as a result of the transaction. When the excessive number of cases which are found out of the scope by the Board is observed, it is seen that majority of these cases involves transactions which do not result in change of control and remain out of scope. Therefore, it can be said that "change of control" measure is not known enough and unnecessarily increases the workload of the Board. (Kayar 2003: 146-147,179-180)

In fact, this problem stems from the implicit expression about the change of control in the Communiqué 1997/1. In the EUMR, it is explicitly stated that a concentration arises where a change of control results from a merger or an acquisition, and control is constituted by rights, contracts and other means which, either separately or jointly, confer the possibility of exercising decisive influence on an undertaking. Moreover, the Commission provides guidance in its Notice on the concept of concentration and explains the different instruments for control to clarify the concept of decisive influence. Similar to the EUMR, the concept of control and how the control is acquired are defined in the Communiqué. [150] However, although the Board's several decisions constitute a case-law for explaining the change of control, lack of an explicit criterion on the change of control in the Communiqué may cause some hesitations. Therefore, the introduction of a guideline similar to the Commission's notice would be beneficial not only to reduce the unnecessary

[150] Communiqué No. 1997/1, the second paragraph of the Article 2.

workload of the Board, but also to get under control the possible non-notified transactions, which should be considered as a concentration but not notified unintentionally. (Güngördü 2003: 52)

As mentioned above, any concentration, which meets the market share or turnover threshold, must be notified to the Board and get authorization. When the Board is informed about a non-notified concentration transaction which has to be notified to the Board, it examines the transaction. As a result of the examination:[151]

(a) If the Board decides that the merger or acquisition in question does not fall within the scope of the Act, it allows the transaction but imposes fines on the parties due to their failure to notify.

(b) If the Board considers that the merger or acquisition in question falls within the scope of the Act, together with fines and other measures deemed necessary, it decides that the transaction be terminated and all de facto conditions committed contrary to the law be eliminated.

As of the date the Board is notified of merger or acquisition agreements, the Board will make a preliminary examination within 15 days and according to the result of this examination:[152]

(i) it will permit the merger or acquisition transaction, or

(ii) if it decides to deal with the transaction under final examination, it will notify the parties that the merger or acquisition transaction is suspended and cannot be implemented until the final decision.

This means that, in parallel with the EUMR, examination of notifications consists of two phases: Phase 1 (preliminary examination) and Phase 2 (final examination). Although Phase 1 procedures are specifically described in the Act, Phase 2 procedures are not defined in the Act. Therefore, scrutiny of merger and acquisition transactions under final examination is subject to standard procedures

[151] *ibid.*, Article 11.

[152] The Act No. 4054, Article 10.

applicable to any investigation under the Act. According to standard procedures, investigations are concluded within 6 months at the latest. In cases where it is deemed necessary, the Board may grant an additional period of 6 months for once.[153] Such time limits for final examination is too long for the examination of concentration cases, as a result of which expected benefits from the transaction can be lost and the parties to the transaction may decide to abandon a merger or an acquisition.

Similar to the decision-making powers of the Commission, the Board takes mainly three types of decisions in relation to a notified merger or acquisition: permission, conditional permission, or prohibition.[154] Besides, it may also grant negative clearance to the concentrations falling out of the scope of the Act[155]. In other words, negative clearance is given in order to ensure legal certainty and safety for mergers or acquisitions, which are not subject to the authorization of the Board (Aslan 2006: 182). Finally, the Board may re-examine and revoke its previous decision giving permission to a merger or an acquisition, if that decision has been taken on the basis of incorrect or misleading information provided by one of the parties or the obligations attached to the decision have not been fulfilled.[156]

On the other hand, while the legal basis for conditional permission is explicitly stated in the EUMR, such a legal basis is not found in the Act. The Communiqué 1997/1 gives the authority to the Board for conditional permissions. The Board's decision giving permission to mergers or acquisitions is an administrative procedure. Thus, it is discussed that administrative procedures cannot be bound to conditions in cases where there is no explicit provision in the Act.[157]

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[153] *ibid.*, first paragraph of the Article 43.

[154] Communiqué No: 1997/1, Article 6.

[155] The Act No. 4054, Article 8.

[156] Communiqué No: 1997/1, Article 9.

[157] In fact, Ankara 6th Administrative Court's decision on the stay of execution of the privatization of 51% shares of Petrol Ofisi Inc.Co. ('POAŞ') intensified this discussion. On 15.07.1998, the Privatization High Council decided the sale of 51% shares of POAŞ with a sale price of 1.160.000.000$ to the Joint Venture Group consists of İş Bank Inc.Co., Bayındır Construction Tourism Commerce and Industry Inc.Co., Park Holding Inc.Co. and PÜAŞ-Petroleum Products Tourism and Transportation Inc.Co. This decision was sent to the Competition Board by Presidency

According to İnan, conditional permissions to mergers and acquisitions are necessary within the logical framework of competition law. However, she mentions that in some conditional permission cases the Board did not have an interview with the parties concerned and persuade them for those conditions. Therefore, such an approach may cause two problems (İnan 2000: Rekabet Bülteni, Vol.2):

1. It would be inappropriate and unfair to give a conditional permission, which has legal uncertainty, without informing and taking the consent of the parties concerned.

2. It should be discussed whether a conditional permission can be given for a merger or an acquisition, which does not create or strengthen a dominant position. According to İnan, even in cases where no dominant position emerges, the Board should attach conditions with the sole aim of protection of competition.

Ulu also mentions that there is no explanation regarding the procedure to be followed by the Board and the undertakings concerned about conditional permission in the Act, in the Communiqué and in the Board's decisions. For example, who will determine the conditions is not clear. In the light of the Board's decisions, it is understood that the Board itself determined the conditions, and there is no record in the decisions that the undertakings concerned accepted those conditions. Therefore, Ulu emphasizes that introduction of the relevant regulations by the Board about the procedure to be followed in the course of conditional permission process and the rights and obligations of the undertakings concerned in this process would be appropriate. (Ulu 2004: 66)

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of Privatization Administration on 17.07.1998 and the Board gave a conditional permission to the privatization transaction on 30.07.1998. However, Petrol-İş Trade Union and one person working at POAŞ sued the decision of the Privatization High Council to an administrative court for the annulment of the decision. On 14.10.1998, Ankara 6th Administrative Court decided for the stay of execution of the sale transaction. In its reasoning, Ankara 6th Administrative Court explained that when the market share of POAŞ was taken into account, the sale of 51% shares of the company would lead to a dominant position. Moreover, the Court stated that the Board's conditional permission decision cannot be regarded as a permission given within the meaning of Article 27/d of the Act. According to the Court, a regulation, which exceeds the limits set up in the Act, cannot be introduced by Communiqué provisions. (Tan 1999: 37-42) However, it should be noted that, pursuant to Article 55 of the Act, Council of State is the only judicial organ to which an appeal against the decisions of the Board can be made.

According to Aslan, there are several provisions in the Act which may indicate that the Board can give conditional permission. In this respect, the provision stating that negative clearance decisions may be revoked “in case of failure to fulfill the conditions or obligations attached to the decision” (Article 13/1(b)), and the provision stating that “the duties imposed on and the rights granted to the parties by the decision made have to be written explicitly in such a way that they do not pave the way for doubts and hesitations” (Article 52) can be interpreted as the Board can give conditional permissions to mergers and acquisitions. The fact that negative clearance is given to the mergers and acquisitions which fall below the thresholds and, accordingly, they are regarded as compatible with the market, it is hard to say that conditions or obligations cannot be attached to the mergers and acquisitions which raise serious anti-competitive effects. Moreover, it is possible to interpret the “duties” imposed on the parties by the decision as the conditions and obligations. (Aslan 2006: 183)

Öz also states that evaluation of Article 2, which defines the scope of the Act, together with Articles 20/1 and 27, which regulate the general duties and powers of the Competition Authority and the Competition Board, constitutes the legal basis for the Board to impose some conditions and obligations in the context of measures taken to ensure competition in the relevant market while it is giving a permission to a merger or an acquisition. (Öz 1999: 53)

In parallel with the EUMR, the Board may impose two types of sanctions (fines or periodic penalties) [158] on natural and legal persons having the nature of undertakings, associations of undertakings and the members of such associations in order to ensure compliance with the rules governing the mergers and acquisitions in an effective way. These sanctions are imposed where incorrect or misleading information is provided in applications for negative clearance and permission as to mergers or acquisitions, and where merger or acquisition transactions subject to authorization are implemented without the authorization of the Board.

[158] The Act No. 4054, Articles 16 and 17; the amounts of fines and periodic penalty payments are re-determined each year and announced by the Communiqués of the Board.

However, unlike the sanctions stated in the EUMR, if a fine is imposed to an undertaking or association of undertakings which have legal personality, an additional fine up to 10% of this fine is imposed to each of the natural persons who undertake responsibility in the management boards.

Last but not least, similar to the judicial review of the decisions of the Commission by the ECJ, the parties can appeal to the Council of State for the judicial review of the Board's final decisions, precautionary decisions, decisions imposing fines and periodic penalty payments. However, if the parties do not apply in due time, the decision becomes final.[159] Two examples are given below regarding the judicial review made by the Council of State:

(a) The annulment of the Board's decision imposing a fine for non-notification

On 12.08.2002, Sentim Information Technologies Industry and Commerce Inc.Co. ('Sentim') and Indeks Computer Systems Engineering Industry and Commerce Inc.Co. ('Indeks') notified the establishment of a joint venture with the trade name of Decodo Computer Distribution and Commerce Inc.Co. to the Board. The preliminary inquiry revealed that the joint venture agreement was signed on 11.07.2002 and all the procedures related to the agreement were concluded in the same day. However, according to the Act, merger and acquisition transactions must be notified to the Board and get authorization before the implementation of the transactions. While the deadline for prior notification is not stated in the Act, the Communiqué 1997/6[160] requires that all kinds of mergers and acquisitions subject to authorization of the Board must be notified to the Board and get permission in a proper time (preferably 30 days) before the implementation of the transaction.

In the light of the facts and evaluations, on 27.09.2002, the Competition Board gave permission to the joint venture transaction between Sentim and Indeks, as the transaction did not create or strengthen a dominant position in the relevant market and, accordingly, did not significantly decrease the competition. On the other

[159] The Act on the Protection of Competition No. 4054, Article 55.

[160] The Communiqué 1997/6 was repealed by the Communiqué 2006/2 on 09.03.2006.

hand, since the transaction was not notified in time before its implementation, the Board imposed fines not only on the parties to the joint venture, but also on each of the members of the Board of Directors of both parties.[161]

However, the parties to the joint venture appealed to the Council of State for the annulment of the Board's decision. The plaintiff parties claimed that the deadline for prior notification of mergers and acquisitions is not stated in the Act and fines can only be imposed if the Board, on its own initiative, is informed about a non-notified merger or acquisition. In its assessment, the 13th Division of the Council of State concluded that although the Communiqué 1997/6 requires prior notification of any mergers and acquisitions in a proper time before their implementation, the Act does not state a specific deadline for prior notifications and it regulates only the procedures conducted after the notification of merger and acquisition agreements to the Board. Therefore, on 03.05.2005, the 13th Division of the Council of State decided the annulment of the Board's decision imposing fines, on the ground that the deadline for prior notification of mergers and acquisitions is not stated in the Act and the Board can impose fines if it, on its own initiative, is informed about a non-notified merger or acquisition. (Danıştay Dergisi Vol.110: 380-384)

(b) The annulment of the Board's decision prohibiting a privatization

On 13.10.2005, Savings Deposit and Insurance Fund made a tender for the sale of Ladik Cement Commercial and Economic Unity ('Ladik Cement'). In the tender, Akçansa Cement Industry and Commerce Inc.Co. ('Akçansa') gave the highest bid and Türkerler Construction Tourism Mining Commerce and Industry Inc.Co. ('Türkerler') gave the second highest bid for Ladik Cement. However, after its examination, the Competition Board prohibited the acquisition of Ladik Cement by Akçansa on the ground that the transaction would result in "joint dominance" in the gray cement market (the relevant product market); and gave permission to the acquisition of Ladik Cement by Türkerler as the transaction would not create or

[161] Sentim Decision No. 02-57/719-288, 27.09.2002.

strengthen a dominant position and, accordingly, would not significantly decrease competition in the relevant product market.[162]

In the examination of the transaction, the area covering Samsun, Tokat, Amasya, Çorum and Sinop provinces was determined as the relevant geographic market for gray cement product. The examination revealed that, in case of the acquisition of Ladik Cement by Akçansa, 96 % of the relevant geographic market would be controlled by three undertakings (Akçansa, YLOAÇ, and Oyak). It also showed that there are structural links between Akçansa and Oyak. Sabancı Group, which controls Akçansa, and Oyak Group jointly control a joint venture named OYSA Cement Industry and Commerce Inc.Co. This structural links give Sabancı and Oyak the opportunity to act as if they were one undertaking. Therefore, the relevant market could be transformed into duopoly where Oyak-Sabancı-YLOAÇ would have very close market shares with each other. Therefore, by taking into account the coordination effects, the Board prohibited the acquisition of Ladik Cement by Akçansa as a result of which a joint dominance would be created in the relevant market.

On the other hand, the second highest bidder Türkerler had no activity in the cement market. Therefore, if Türkerler acquired Ladik Cement, the relevant market structure would not be changed after the transaction. Moreover, when the possibility that Ladik Cement's competition enhancing "independent-separated attitude" could be continued by Türkerler was taken into account, it was concluded that the creation or strengthening of a dominant position as a result of the acquisition of Ladik Cement by Türkerler would not occur. Based on these facts, the Board gave permission to the acquisition of Ladik Cement by Türkerler.

However, Akçansa appealed to the Council of State for the annulment and stay of execution of the Board's decision. The 13th Division of the Council of State decided with unanimity for the stay of execution of the Board's decision, on the ground that there is no creation of a dominant position through an acquisition in the relevant market and the competition violations previously experienced in the cement

[162] Ladik Cement Decision No. 05-86/1188-340, 20.12.2005.

sector cannot constitute a presumption that the same would occur in case Akçansa acquires Ladik Çimento. (http://www.ntvmsnbc.com/news/364118.asp) The Board objected to the decision of the 13th Division of the Council of State and the file was conveyed to the Council of State's Plenary Session of the Administrative Law Divisions. However, the Council of State's Plenary Session of the Administrative Law Divisions rejected the objection of the Board. After this stage, the 13th Division of the Council of State will make a decision on the request for the annulment of the Board's decision. (http://www.haber7.com/haber.php?haber_id=154991)

3.3. Selected Cases

Six cases are summarized below in order to give one example to each type of the decisions given by the Board and demonstrate how the merger control rules are interpreted by the Board in the application of the Act.

Toros Fertilizer-Akdeniz Fertilizer case showed the importance of 'change of control' measure in the application of the Act. The Board, in its assessment, concluded that the parties to the transaction were not deemed to be independent undertakings within the meaning of the Act, as the parties were involved in the same economic unity and there was no change of control. Therefore, it decided that the acquisition was out of the scope of the Act.

Yurtiçi Kargo-Geopost GmbH case confirmed that the Board can attach conditions even to negative clearances. As mentioned before, there are discussions about the legal basis for conditional permissions. In this context, in line with Aslan's argument, this decision can be an answer to those discussions by showing that while even negative clearances can be attached to conditions, it is hard to claim that conditions or obligations cannot be attached to permissions with an aim of removing the possible anti-competition effects of a concentration transaction.

Doğan Daily News case indicated that the Board can always examine a non-notified transaction whenever it is informed about it and apply necessary sanctions for non-compliance with the merger control rules. The Board's decision giving permission to this transaction also showed that non-notification is not a prerequisite

for prohibition. In such cases, the Board makes its assessment as if it is examining a notified transaction.

İŞ-TİM - AYCELL case demonstrated that the Board gives importance to the assurance of competition in regulated markets, such as telecommunications, where a few firms operate. In this respect, by giving permission to the merger of İş-Tim and Aycell, the Board aimed at ensuring effective competition in GSM services market where Turkcell and Telsim have high market shares.

TNT Logistics case is an example of conditional permissions given by the Board. In its decision, the Board attached a condition requiring the abolishment of the non-competition clause found in an agreement signed between the parties to the acquisition.

Joint Venture aimed at supplying LPG case is one of the three transactions prohibited by the Board since 1997. This case is important to indicate that while the Board was making a separation between cooperative and concentrative joint ventures in the past, it now evaluates the joint ventures on full-functionality basis in line with the EUMR instead of such differentiation.

3.3.1. Toros Fertilizer-Akdeniz Fertilizer[163]

On 30.12.2004, the acquisition of Akdeniz Fertilizer Industry Inc.Co. (‘Akdeniz Fertilizer’) by Toros Fertilizer and Chemistry Industry Inc.Co. (‘Toros Fertilizer’) was notified to the Competition Authority.

The examination of the notification revealed that Toros Fertilizer was controlled by Tekfen Industrial Investments Inc.Co. and Akdeniz Fertilizer was controlled by Toros Fertilizer. In the light of the findings regarding the partnership structures of Toros Fertilizer and Akdeniz Fertilizer, it was concluded that both companies were controlled by Tekfen Industrial Investments Inc.Co. Although Toros Fertilizer and Akdeniz Fertilizer had two different legal personalities, two companies were involved in the same economic unity. Therefore, within the meaning of the Act, these companies were regarded as one undertaking.

[163] Toros Fertilizer-Akdeniz Fertilizer Decision No. 05-05/27-15, 13.01.2005.

According to the Act, the concept of undertaking covers 'natural and legal persons who produce, market and sell goods or services in the market, and the units which can decide independently and constitute an economic whole'. In this respect, Toros Fertilizer and Akdeniz Fertilizer were not considered as 'undertaking' within the meaning of the Act. Thus, on 13.01.2005, the Board decided that the acquisition of Akdeniz Fertilizer by Toros Fertilizer was out of the scope of the Act, as the parties to the transaction were involved in the same economic unity.

3.3.2. Yurtiçi Kargo-Geopost GmbH[164]

On 03.05.2004, the Competition Authority was notified of a joint venture transaction between Yurtiçi Cargo Services Inc.Co. ('Yurtiçi Kargo') and Geopost GmbH ('Geopost').

Within the framework of the examination, the relevant product market was determined as international speedy courier and express package transportation market. Since the business activity of the proposed joint venture was envisaged as the transportation of international cargo whose point of arrival or departure would be Turkey, the relevant geographic market was determined as the boundaries of the Republic of Turkey.

Based on the existing information in the application, it was understood that the turnover of Yurtiçi Kargo in 2003 was below the turnover threshold, and Geopost had no activity in the relevant product market. On the other hand, there are 4 big undertakings in the relevant market: DHL, TNT, UPS and Fedex. The sum of the market shares of these four undertakings was equal to 86%, and the remaining market share of 14% dispersed among other undertakings, including Yurtiçi Kargo.

In the light of the facts and evaluations, on 26.05.2004, the Board concluded that although the joint venture in question was a full-functional one within the meaning of the Communiqué 1997/1, it was not subject to the authorization of the Board as the market share and turnover thresholds were not exceeded. In this context, with majority of the votes, the Board gave negative clearance to the transaction,

[164] Yurtiçi Kargo-Geopost GmbH Decision No. 04-38/427-107, 26.05.2004.

provided that the non-competition clause found in the Joint Venture Agreement was limited to only the business activity of the joint venture.[165]

3.3.3. Doğan Daily News[166]

Upon the news appeared in the media about the establishment of a joint venture with the trade name of Doğan Daily News Journalism and Printing Inc.Co. and the transfer of the privilege and publication right of the Turkish Daily News periodical, the Competition Board, on its own initiative, conducted a preliminary inquiry in December 2000. The inquiry revealed that the joint venture in question was set up between Doğan Publication Holding Inc.Co. and Hakkı İlnur Çevik, Abdullah İlhan Çevik and Mine Çevik who possess 83,96 % of the shares of the Turkish Daily News Printing and Publishing Inc.Co., and the privilege and publication right of the Turkish Daily News Printing and Publishing Inc.Co. was transferred to this joint venture on 26.01.2000. However, the parties to the joint venture did not notify the transaction to the Board.

Within the framework of the preliminary inquiry, the relevant product market was determined as the market where daily newspapers in English, which mainly address economic, political and social events occurred in Turkey, are published and sold. Accordingly, the relevant geographic market was determined as the boundaries of the Republic of Turkey. Doğan Publication Holding Inc.Co. did not have any share in the relevant market. On the other hand, the Turkish Daily News was the only newspaper in the relevant market and the market share of the Turkish Daily News Printing and Publishing Inc.Co. in the relevant market exceeded the statutory market share threshold. Therefore, the joint venture transaction should have been notified to the Board to get authorization.

In the light of the facts and evaluations, on 12.12.2000, the Board gave permission to the establishment of the joint venture and the transfer of the privilege and publication right, as the transaction did not create or strengthen a dominant

[165] On the other hand, one of the members of the Board cast an opposite vote, on the ground that the relevant provision regarding negative clearance in the Act does not provide a legal basis for a "conditional negative clearance".

[166] Doğan Daily News Decision No. 00-49/519-284, 12.12.2000.

position in the relevant market and, accordingly, did not significantly decrease the competition. On the other hand, since the transaction was not notified, the Board imposed fines not only on the parties to the joint venture, but also on each of the members of the Board of Directors of both parties.

3.3.4. İŞ-TİM - AYCELL[167]

On 17 November 2003, the merger of İŞ-TİM Telecommunications Services Inc.Co. ('İŞ-TİM') and AYCELL Communication and Marketing Services Inc.Co. ('AYCELL') under TTI Communication Services Inc.Co. ('TTI'), which is established by the shareholders of these two undertakings, was notified to the Competition Authority.

As a result of the assessment of the shareholder structure and the provisions regarding the decision-making and executive bodies, it was concluded that the shareholders of İŞ-TİM and AYCELL [Türk Telekomünikasyon A.Ş. ('TTAŞ'), TIM International N.V. and İş Bank] operating in the field of GSM 1800 services have joint control over TTI.

TTAŞ, whose all shares are owned by the Undersecretariat of Treasury, is a public enterprise having operations in the management and provision of various telecommunications network and services, particularly in the provision of some services (fixed telephone network and sound transmission through this network) which are assigned to it as legal monopoly. Within this framework, TTAŞ owns all shares of AYCELL operating in GSM 1800 mobile telecommunications services.

TIM International N.V. is a subsidiary of TIM (Telecom Italia Mobile) whose 55,85% of shares are owned by Telecom Italia. TIM International N.V. and İş Bank (directly and through their participations or group companies) control İŞ-TİM.

On the other hand, 20% of TTI's shares are owned by the group companies of ***İş Bank***. Having 51% of İŞ-TİM's shares, İş Bank Group operates in GSM services market together with TIM International N.V.

[167] İŞ-TİM – AYCELL Decision No. 03-81/970-399, 18.12.2003.

GSM services, the so-called mobile phones, are telecommunications services that are provided through wireless networks based on frequency band (GSM 900 and GSM 1800 bands). As a result of the evaluation of telecommunications services provided through GSM 900 and GSM 1800 bands, it was concluded that there is no difference between these services for consumers. The only difference between them is that the mobile phones to be used in GSM 1800 have "dual band" technology, which can receive signals from both networks. Therefore, provided that a mobile phone compatible with these bands is used, the services rendered through GSM 900 and GSM 1800 are fully substitutes as both bands meet the same type of needs.

Consequently, the relevant product market was defined as "GSM services" market, because the merger comprised whole GSM infrastructure, all services provided through this infrastructure, and all user groups.

In addition, the relevant geographic market was determined as the boundaries of Turkey. The reason was that the allocation of frequency band to be used in the provision of GSM services is made within the boundaries of Turkey; it is compulsory to include whole country in the coverage area at the end of the period determined in the privilege contracts signed by GSM operators; and there are not any different regions in which competition conditions are dissimilar in terms of relevant market within the boundaries of Turkey.

The calculation of thresholds showed that the market share of TTI in terms of subscriber number was approximately 13% and the market share of TTI in terms of turnover was 4%. Therefore, the transaction fell out of the scope of the Act as it remained below the 25% market share threshold.

However, the total turnover of the parties in the relevant product market was 157.908.086.000.000TL as of the end-of-2002. This amount exceeded the turnover threshold of 25 trillion TL. Therefore, the transaction was subject to authorization of the Board.

The assessments demonstrated that the merged entity TTI's market share calculated in terms of turnover and subscriber number would be far behind its

competitors. This situation stemmed from the fact that Turkcell and Telsim had "the advantages of first-comers" and reached country-wide coverage areas in Turkey as they had entered into the market nearly about nine years ago. In addition, within the framework of the interviews made by the suppliers and rivals of the parties to the merger, the representative of Siemens Industry and Commerce Inc.Co., which is a infrastructure provider, stated that the merger in question is important for the parties in order to continue to their operations in this field and, if the merger is not implemented, it will be hard for the parties to stay in the market.

However, TTAŞ had legal and natural monopoly in some telecommunications markets, in particular fixed telephone network and fixed telephone services. In addition, even after the liberalization to be started at the end of 2003, it would continue to be natural monopoly in these markets due to its infrastructure. These factors caused several concerns that TTAŞ could use its power, which it has in the markets where it has a dominant position, in GSM services market. Moreover, in the provision of services to TTI, it could apply different and discriminatory conditions that are not provided for other operators. Such concerns were also expressed by Turkcell and Telsim.

The Board considered these concerns, but decided that the merger would not lead to the creation of a dominant position or the strengthening of an existing dominant position and, accordingly, would not cause significantly reduction of competition in GSM services market across whole country or in a part of it. Thus, on 18 December 2003, it gave permission to the merger of İŞ-TİM and AYCELL.

3.3.5. TNT Logistics[168]

On 13.07.2004, Koç Holding Inc.Co. ('Koç Holding'), Ram Foreign Trade Inc.Co. ('Ram') and Temel Commerce and Investment Inc.Co. ('Temel Commerce') signed a Share Sale and Purchase Agreement with TNT Logistics Holdings B.V. ('TNT'), David Lamolinara and Hans-Joachim Koch in order to transfer their 50 % shares of TNT Logistics and Distribution Services Inc.Co. ('TNT Logistics') to these three parties.

[168] TNT Logistics Decision No. 04-63/928-221, 30.09.2004.

Within the framework of the examination, the relevant product market was determined as logistics services market, which consists of a number of services rendered over supply chain such as planning and control of goods flow. The relevant geographic market was determined as the boundaries of Republic of Turkey.

In the Notification Form, only the turnover of TNT Logistics was stated as Koç Holding, Ram, Temel Commerce, TNT, David Lamolinara and Hans-Joachim Koch had no activities in the relevant market in Turkey. According to this, the turnover of TNT Logistics was 63.535.763.364.674TL in 2003. Therefore, it was concluded that this acquisition transaction was subject to authorization, as the turnover threshold was exceeded.

The fact that the parties to the acquisition had activities in the relevant product market only through TNT Logistics, they had no market shares and the market share of TNT Logistics was 3%. In this respect, it was also concluded that the notified transaction would not create a dominant position or strengthen an existing dominant position.

In the light of the facts and evaluations, on 30.06.2004, the Board gave a conditional permission to the transfer of shares, provided that the non-competition clause found in the Share Sale and Purchase Agreement was abolished. According to this, non-competition clause was envisaged to be applied for three years after the end of the joint venture, which continued to be exist until the Agreement.

3.3.6. Joint Venture aimed at supplying LPG[169]

On 2 November 1998, the establishment of a joint venture by 39 firms, which operate in the distribution of Liquefied Petroleum Gas (LPG), with an aim of supplying LPG was notified to the Competition Authority.

As a result of the assessment, it was concluded that the small firms would be dependent on the joint venture and purchase-sale agreements would constitute de facto exclusiveness in vertical sense. On the other hand, due to insufficient economic

[169] Joint Venture aimed at supplying LPG Decision No. 99-26/230-138, 27.05.1999.

resources, small firms could not carry out LPG production and import operations alone. Therefore, there was no risk of horizontal coordination between the small firms and the joint venture in the supply market.

However, Aygaz, Primagaz and Demirören groups had sufficient resources for supplying LPG individually. This situation meant that these three groups would operate in the same relevant product market with the joint venture and cause the possibility of a cooperation restricting competition in a wide range of activities such as producing, importing, wholesale distributing, trading and marketing of LPG.

Moreover, according to the specific provision in the Shareholder Agreement, the purchase-sale agreement to be signed between the parties and the joint venture did not prevent distribution companies to obtain LPG from other resources (including imports) when they need it. This provision caused the possibility of a serious competition coordination in horizontal sense. As far as these undertakings' capital shares in the joint venture and dominance in the decision-making bodies were concerned, and their current market shares in the LPG distribution market were taken into account, it seemed impossible for the joint venture to operate in LPG supply market as an autonomous purchaser and seller.

Therefore, according to the Board, the joint venture contract in question should be regarded as a cooperation agreement between the parties to the joint venture. Indeed, this agreement provided the basis for the determination of price and other sale conditions between the parties. Furthermore, it should be noted that the big groups, which participate in the joint venture and have the ability to enter into the supply market individually, could easily control the supply and distribution of LPG in the market via the joint venture, which has a customer portfolio of 92% in the distribution market.

In the light of these facts, the Board concluded that the joint venture in question did not emerge as an autonomous economic entity and it had restrictive effects on competition. Accordingly, the joint venture was not regarded as a concentrative joint venture. Therefore, the Board decided that the notified transaction

was a cooperation agreement, rather than a merger or an acquisition within the meaning of the Act. In this context, it prohibited the transaction on 27 May 1999.

3.4. The Effect of Merger Control Rules on Privatization Process

Although the treatment of privatization transactions is not explicitly stated in the Act, based on the power assigned by the Act to issue communiqués and make the necessary regulations as to the implementation of the Act, the Competition Authority regulates the acquisitions carried out via privatization by a specific Communiqué.[170] This Communiqué applies to the acquisitions conducted through privatization by the Presidency of Privatization Administration or by the other public institutions or organizations.

3.4.1. Acquisitions via Privatization which are subject to Pre-notification

The acquisitions via privatization which fall within the scope of the Communiqué must be notified to the Competition Authority and the Board's opinion must be taken before the announcement of tender conditions to the public:[171]

a) where the market share of the undertaking or the unit, which is used for producing goods or services, to be privatized in the relevant product market exceeds 20%, or

b) where the turnover of the same undertaking or unit exceeds 20 trillion TL, or

c) if the abovementioned thresholds are not exceeded, where the undertaking to be privatized has judicial or de facto privileges.

Upon this pre-notification, the Board will deliver its opinion which evaluates the results of such privatization in the relevant market and, if the undertaking to be privatized has any judicial or de facto privileges, the situation of these privileges after the privatization. Accordingly, the Board's opinion will constitute the basis for the preparation of tender conditions document.

[170] Communiqué No. 1998/4 on the Procedures and Principles to be pursued in Pre-notifications and Authorization Applications to be filed to the Competition Authority for the Acquisitions via Privatization in order to become legally valid.

[171] *ibid.*, the first paragraph of Article 3.

If the Board does not deliver any opinion at the end of this period, this shall mean that the Board's opinion regarding the case in question is positive.

3.4.2. Acquisitions via Privatization which are subject to Authorization

The acquisitions via privatization which are compulsorily subject to pre-notification to the Competition Authority must get authorization from the Board in order to gain legal validity. On the other hand, the acquisitions via privatization which are not subject to pre-notification but fall within the scope of the Communiqué must also get authorization:[172]

a) where the total market shares, in the relevant product market, of the parties to the acquisition via privatization transaction exceeds 25%, or

b) where their turnover exceeds 25 trillion TL.

Application for authorization will be submitted to the Competition Authority after the conclusion of tender transaction, but before the decision of the Privatization High Council regarding the final transfer transaction of the undertaking or the unit, which is used for producing goods or services, to be privatized. The application will be made in the form of independent files for each bidder that takes place in the Privatization High Council's draft decision to be submitted by the Presidency of Privatization Administration to the Privatization High Council. If the number of bidders in the draft decision is more than three, authorization application for the other bidders cannot be made before the Competition Board's decisions about the acquisition transaction regarding the first three bidders are not notified to the Presidency of Privatization Administration.[173]

Within this framework, the Competition Authority has reviewed 76 privatization transactions since 1999 (see Table 3.1. below). In general, the Board has permitted the establishment of efficient-scale firms while resisting the creation of post-privatization monopolies. In this context, some examples of privatization cases are given below (OECD 2005: 29):

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[172] *ibid.*, Article 5.

[173] *ibid.*, Article 6.

- ✓ In 2000, the Board had rejected the privatization of IGSAS, a state firm that manufactures nitrogenous and composite fertilizers, because the prospective purchaser already had a significant presence in the relevant market. However, in 2003, the second proceeding resulted in the sale of IGSAS without objection to a firm that had no operations in the industry.

- ✓ In 2003, the Board approved the block sale of TEKEL's alcoholic beverages production facilities to a joint venture group. TEKEL had previously been the state's monopoly provider of alcohol and tobacco products but its monopoly was eliminated prior to the tender. The Board permitted the transaction, on the ground that TEKEL's share in the three relevant markets (beer, rakı and other high alcohol drinks, and wine) was either less than dominant and exposed to vigorous new entry that made maintenance of dominant power unlikely.

- ✓ In 2004, the Board authorized the privatization of ESGAZ and BURSAGAZ, two natural gas distribution companies that had been affiliates of Turkey's vertically integrated natural gas company. It permitted the acquisition of the companies by private sector firms without conditions because the highest bidders had not previously operated in the market and the sector was in any event heavily regulated under the Natural Gas Market Law.

3.4.3. Selected Cases

3.4.3.1. The Board's opinion on the privatization of Turkish Telecom[174]

The Board's opinion about the privatization of at least 51% shares of Turkish Telecommunications Inc.Co. ('Turkish Telecom') with block sale in one transaction is given below:

" A. 1. Transforming the cable TV infrastructure, together with all rights regarding ownership and operating, into a separate legal personality and transferring this legal personality at the latest within one year following the transfer transaction of Turkish Telecom.

[174] Competition Board's Opinion on Turkish Telecom No. 04-57/797-M, 02.09.2004.

2. Transforming TTNet internet service provider activities into a legal personality separate from other business units at the latest within six months following the transfer date of Turkish Telecom.
3. Prohibiting the participation of the undertaking, which has a dominant position in GSM mobile telecommunications services market, in the tender alone; this undertaking can participate in the tender within any consortium if this organization has no direct or indirect control right on Turkish Telecom; the participation of the persons or groups, which directly or indirectly control this undertaking, in the Turkish Telecom tender alone, jointly and/or separately within a consortium is possible only if all means, which provide control right in this undertaking and/or in the undertakings having direct or indirect control right on this undertaking, are transferred to other person who is outside of their economic unity after the tender.
4. It would be beneficial to remove the inequality, which results from the Special Communication Tax, between Turkish Telecom and the enterprises benefiting from the infrastructures before the tender, so that the privatization would ensure more competitive market structure in the future.

B. After the purchaser candidates become definite, in case discrepancies and drawbacks contrary to the Competition Act are determined in the evaluation made pursuant to Article 5 of the Communiqué 1998/4, conditions and obligations related to the transfer would be imposed or the transfer would not be permitted, thus it is necessary to mention this matter in the terms of tender contract so as to inform the undertakings which will participate in the tender."

The privatization process of Turkish Telecom was concluded on 21 July 2005 by the permission of the Board to the acquisition of Turkish Telecom by Oger Telecoms Joint Venture Group, which gave the highest bid in the tender. In its decision, the Board decided that the acquisition in question would not lead to the creation of a dominant position or the strengthening of an existing dominant position, on the ground that the current market structure would not be changed as a result of

the transaction, as Oger Telecoms Joint Venture Group had no business activity in the relevant markets.[175]

3.4.3.2. The Board's permission to the privatization of TÜPRAŞ[176]

On 11 January 2005, the privatization of TÜPRAŞ by transferring 51% of TÜPRAŞ share belonging to the Presidency of Privatization Administration with block sale method was notified to the Competition Authority. Turkish Petroleum Refineries Inc.Co. ('TÜPRAŞ') is mainly operating in the refining market. In addition, it also takes place in markets regarding petrochemical sector due to its operations in Gulf Petrochemical Complex, and operates in transportation field as far as the operations of DİTAŞ (Maritime and Tanker Business Inc.Co.) are concerned.

TÜPRAŞ is the only producer in the refining market. Approximately 70% of Turkey's consumption is supplied by the production of TÜPRAŞ and the rest is provided by imports. The fact that TÜPRAŞ is the only refinery company operating in Turkey, its transfer via privatization method to the private sector is regarded as a transfer transaction subject to authorization of the Competition Board in terms of both market share and turnover thresholds.

Koç Group, which participates in the joint venture group giving the highest bid in the privatization tender, operates in petroleum markets by OPET and in LPG markets by AYGAZ in Turkey. OPET, together with its participations, carries out retail and wholesale operations in petroleum distribution market, produces and markets mineral oil, and deals with international trade of maritime fuels and petroleum products. OPET is a petroleum company which has the second large storage capacity. AYGAZ, the leader LPG distribution-company in Turkey, renders services on supplying, storing, freezing and distributing LPG to houses and commercial and industrial customers. ***Shell Overseas B.V.*** ('SHELL'), the other partner of the joint venture, is a global energy firm. It is operating in Turkish energy markets through its subsidiaries. These operations mainly include black and white products, the distribution of LPG and mineral oils.

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[175] Turkish Telecom Decision No. 05-48/681-175, 21.07.2005.

[176] TÜPRAŞ Decision No. 05-71/981-270, 21.10.2005.

As a result of the assessment, the ‘refining market’ in which TÜPRAŞ operates was defined as the relevant product market. With regard to the structure of the partnership, it was determined that SHELL had only 10% shares in the partnership. Although this share ratio gave it the right to appoint one member to Board of Directors, it did not have a veto right denoting the existence of joint control. Therefore, from the concentration analysis perspective, it was concluded that only the amalgamation of Koç Group and TÜPRAŞ should be taken into account.

In the light of these findings, when the acquisition transaction was addressed within the scope of Article 7 of the Act, it was concluded that imports is rival to the production of TÜPRAŞ and, in this context, OPET and AYGAZ are directly competitors to TÜPRAŞ with their import-oriented storage capacities and their imports. Thus, acquisition of TÜPRAŞ by Koç Group would strengthen the existing dominant position of TÜPRAŞ. On the other hand, it was concluded that this amalgamation would not cause significantly reduction of competition regarding the supply of petroleum products (refining and product imports).

With regard to LPG market, however, the Board gave conditional permission to the acquisition transaction. The reason was that LPG differed from other petroleum products as it was essentially an intermediary product for TÜPRAŞ and the surplus product was supplied to the market as a final product. Also in the past, TÜPRAŞ came into the foreground as an importer, rather than the producer. However, the shifting tendency of LPG distribution-companies to direct imports in the recent years caused a decrease in the amount of LPG imports by TÜPRAŞ. On the other hand, in 2004, the biggest LPG importer except TÜPRAŞ was AYGAZ.

While the share of TÜPRAŞ in imports was gradually decreasing, it was concluded that its position in LPG imports to Aegean Region had not changed due to the logistic problems emerged in the supply of LPG and, if any measure was not taken, the amalgamation of TÜPRAŞ and AYGAZ would lead to significantly reduction of competition in the supply of LPG in this region. Therefore, the opening of LPG import-oriented facilities of TÜPRAŞ İzmir Refinery to direct imports by the distribution-companies for 3 years was stipulated as a condition to the acquisition of TÜPRAŞ by Koç-SHELL partnership.

Consequently, on 21 October 2005, the Board gave permission to the privatization of TÜPRAŞ by transferring 51% of TÜPRAŞ share belonging to the Presidency of Privatization Administration with block sale method to Koç-SHELL joint venture group.

3.5. The effects and outcomes of the application of merger control rules in Turkey

In the light of the comparative analysis of Turkish merger control rules with the EUMR, it can be said that merger control regime of Turkey is in harmony with the Community rules to a large extent. The main reason is that the legislators were inspired from the EU's anti-trust provisions as a model when preparing the Act. Similarly, the Competition Authority issued the secondary legislation in line with the principles laid down in the EUMR.

Indeed, this compliance with the Community rules is also confirmed in the Commission's Regular Progress Reports. While the level of enforcement of merger control rules by the Competition Authority is found satisfactory in these reports, Turkey is mainly criticized for its state aid rules. With regard to merger control rules, from 1998 Regular Report to 2006 Regular Report, Turkey has never been criticized about its merger control rules. In 2005 Regular Report, the Commission underlined that the Competition Authority has a sufficient administrative capacity to ensure antitrust enforcement and merger control. (Regular Report 2005: 68) In 2006 Regular Report, the Commission not only reiterated this sufficient capacity, but also emphasized that "the Competition Authority continued to play an active role in merger control; especially important were privatization cases which made its presence more visible among market actors. With regard to legislative alignment, the Competition Authority amended the merger control regulation in order to allow for fines regarding mergers not notified to the Competition Authority. Furthermore, if it is detected that merger approval is based on misinformation by applicants, the Competition Authority may re-launch merger investigation and prohibit the merger." (Regular Report 2006: 39)

However, in 2005 Regular Report, it was emphasized that the Authority's exclusive competence to enforce antitrust rules is seriously restricted by the existence of anti-competitive provisions in other legislation, and the Authority's remarks concerning drafts of all types of legislation which may have an impact on competition are often not taken into account. In this respect, the sector regulatory authorities such as the Energy Market Regulatory Authority, Telecommunications Authority, and the Banking Regulatory and Supervision Authority were criticized for not ensuring effective cooperation and use of consultation mechanisms with the Competition Authority in order to prevent any competition distortions in their respective regulated markets. (Regular Report 2005: 68)

In fact, legislation regarding the energy markets includes the legal basis for the Competition Authority's exclusive power to deal with the concentrations to be conducted in the regulated markets. For example, the Competition Board reserves the right to issue authorizations with respect to any merger or acquisition to be carried out in the electricity market within the scope of Article 7 of the Act No. 4054.[177] Similarly, the provisions regarding the freedom of competition, non-abuse of dominant position, and mergers and acquisitions set out in the Act shall also apply to legal entities, which will operate in the natural gas market.[178]

With regard to capital markets, Capital Market Board has the authority to issue regulations with respect to capital increases, mergers and transfers resulting in significant changes in the share distribution of the companies.[179] In this context, it requires the companies to submit several documents, including the authorization of the Competition Board, before the implementation of the merger.[180]

On the other hand, as mentioned before, there is an important derogation from the competition rules in the banking sector. In mergers, disintegrations and transfers of banks to be carried out pursuant to the provisions of Banking Law, on the

[177] Electricity Market Law No. 4628, Article 8(b).

[178] Natural Gas Market Law No. 4646, Article 7(a)(1).

[179] Capital Market Law No. 2499 (as amended by Law No. 4487), Article 16/A.

[180] Capital Market Communiqué on Merger Transactions Serial:I No:31, Article 11.

condition that the market share of the total assets of the banks subject to merger or integration does not exceed 20%, the related provisions of the Act No. 4054 shall not be applied.[181]

As regards the telecommunications sector, while the provisions of the Act No.4054 are reserved in the establishment and maintenance of a competitive environment in this sector, the Competition Board is required to initially take into account the opinion and the regulations of the Telecommunications Authority in its examinations and investigations as well as in its all decisions, including its decisions on mergers and acquisitions, regarding the sector.[182]

Within this framework, in order to reinforce the Competition Authority's exclusive competence to enforce antitrust rules, the Draft Act, which would introduce several amendments to the existing Competition Act No. 4054 , envisages the introduction of a specific provision which regulates the administrative proceedings and makes it compulsory to take the Competition Authority's opinion in the drafting process of all types of legislation which may affect the competition conditions in the markets for goods or services. Besides, it also underlines that the Competition Authority can resort to judicial review of the administrative proceedings and regulations, which impede, restrict or distort competition in these markets, for the annulment of all or a part of them.[183]

Consequently, it can be said that the Competition Authority has a satisfactory capacity to enforce the merger control rules effectively and has the vision to improve the application of these rules not only by aligning them with the Community acquis in the light of the developments on merger control rules in the EU, but also by participating in competition law network at international level. Within this framework, the relevant statistics on the implementation of merger control rules by the Competition Authority are evaluated below.

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[181] Article 19, Banking Law No. 5411.

[182] Article 16 of the Law No. 4502 amending the Telegraph and Telephone Law No. 406.

[183] Article 6 of the draft Act amending the Act on the Protection of Competition No. 4054.

Table 3.1. Closed Merger and Acquisition Files

Year	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	-	-	14	19	35
TOTAL	**68**	**100**	**86**	**103**	**106**	**122**	**170**

Source: Turkish Competition Authority, Annual Report 2005.

As the figures show in Table 3.1., there is a steady increase in the number of concentrations during 1999-2005 period. While the number of mergers and joint ventures remained limited only to 111 cases, the companies mainly engaged in acquisitions in 644 cases (including privatization figures) as their business strategy. This can be explained by the fact that the acquisition of an existing firm having an established production facility, distribution networks and a particular customer base is less costly than spending on R&D and investing in new facilities.

Table 3.2. Merger and Acquisition Decisions

Year	Permission	Conditional Permission	Prohibition	Out of scope – Below Threshold
1999	23	1	1	44
2000	49	2	1	47
2001	39	2	-	45
2002	65	-	-	38
2003	77	2	-	27
2004	86	3	-	33
2005	130	6	1	33
TOTAL	**469**	**16**	**3**	**267**

Source: Turkish Competition Authority, Annual Report 2005.

As the figures indicate in Table 3.2., the Board gave permission to most of the transactions falling within the scope of the Act (96%) without condition during 1999-2005 period. While 16 cases were permitted with conditions, only 3 transactions in 488 cases were prohibited. This can be explained by the Board's approach in favor of the approval of transactions that establish efficient-scale operations able to compete with imports (OECD 2005: 25). Indeed, in the assessment of concentrations, the Board takes into account the factors such as the need for maintaining and developing effective competition within the country in relation to the actual and potential competition of undertakings based in or outside the country.[184]

On the other hand, the number of the transactions which fall out of the scope of the Act or remain below the thresholds is relatively high (267 cases). Moreover, the decrease in the number of these cases is very limited. This can be explained by two reasons. First, the legislation may not be comprehensible enough to be understood accurately by the companies. Second, the calculation of the market share threshold may be problematic for companies, in particular for small firms. Therefore, they would like to be prudential for not acting contrary to the law and submit their notifications to the Board in order to get negative clearance for legal certainty.

With regard to conditional permissions, less than half of the conditional cases entailed substantive requirements affecting the disposition of assets. The remainder involved ancillary provisions in acquisition agreements. In this context, some examples are given below (OECD 2005: 26):

- Examples of substantive condition cases: DSM's 2003 acquisition of Roche's vitamins and chemicals division provides an example of this kind, as the Board approved the transaction subject to DSM's divestiture of its interest in an existing joint venture with BASF to produce animal food enzymes. Similarly, in 2004, Syngenta, a manufacturer of seeds and crop protection products such as fungicides and herbicides, was permitted to acquire Advanta subject to divestiture of Advanta's operations in the sunflower seed market.
- An example of an ancillary condition case: Cargill's acquisition in 2002 of Cerestar, Montedison's starch and sweeteners subsidiary, is an example of

[184] Communiqué 1997/1, Article 6.

this type. The Board approved the transaction, on the ground that no competitive concerns were presented by the acquisition itself due to the presence of large buyers and alternative sources of supply, together with an absence of entry barriers. However, it required that a non-compete provision against Cerestar be reduced from three to two years because the transaction involved no transfer of specialized know-how. Another provision that prohibited Cerestar from taking more than a 5% share in any rival firm was altered to prohibit only the taking of a controlling share.

Table 3.3. Sectoral Distribution of Merger and Acquisition Decisions (2005)

SECTOR	M / A
Glass and Glass Products	-
Iron-Steel	7
Non-Iron Metals	1
Electricity-Gas-Water	5
Construction, Cement and Other Construction Materials	12
Chemicals, Petrochemicals, Petroleum Products, and Manure	24
Mine and Mining	1
Plastic and Rubber Products	-
Clay and Ceramic	-
Media and Publication, Record and Cassette	10
Office Machines and Computer	5
Electric-Electronic	5
Paper Pulp, Paper and Paper Products	3
Telecommunications	4
Medical Instruments, Precision and Optical Instruments	2
White Goods, Furniture, Toys, Sport Equipments, Musical Instruments, Jewelry	3
Foodstuffs and Beverages	14
Machine and Equipment Production	5
Agriculture and Livestock, Forest Products, Water Products	2
Textile and Ready-to-Wear Products, Leather and Leather Products	10
Tobacco Products	1
Transportation	17
Tourism	7
Financial Services (banking, insurance and other financial institutions)	10
Land, Aviation, Maritime and Railway Vehicles	9
Health, Education, Sports, Other Services and Self-employment Activities	6
Other	7
TOTAL	**170**

Source: Turkish Competition Authority, Annual Report 2005.

As the figures demonstrate in Table 3.3., in 2005, the sector where the highest concentration exists is the Chemicals, Petrochemicals, Petroleum Products, and Manure Sector (24 cases). It is followed by Transportation Sector (17 cases), Foodstuffs and Beverages Sector (14 cases), and Construction, Cement and Other Construction Materials Sector (12 cases). On the other hand, the sectors where the lowest concentrations exist are Non-Iron Metals Sector (1 case), Mine and Mining Sector (1 case), and Tobacco Products Sector (1 case). Finally, there were no concentrations in Glass and Glass Products Sector, Plastic and Rubber Products Sector, and Clay and Ceramic Sector.

Table 3.4. The Distribution of Merger and Acquisition Notifications according to the Parties, Except Privatization (1997-1999)

Domestic - Domestic	66
Domestic - Foreign	35
Foreign - Foreign	34
TOTAL	**135**

Source: Turkish Competition Authority, 1st Annual Report, 05.11.1997-31.12.1999.

As the figures show in Table 3.4., for 1997-1999 period, while the number of the notifications regarding concentrations between Turkish firms constitutes 49% of the total transactions, the notifications in relation to the concentrations between Turkish and foreign firms represent 26%, and the concentrations between foreign firms denote 25% of the total transactions.

Table 3.5. The Distribution of Merger and Acquisition Cases according to the Parties (2003)

	Joint Venture	**Merger**	**Acquisition**	**Total**
Domestic - Domestic	1	1	20	**22**
Domestic - Foreign	2	-	13	**15**
Foreign - Foreign	2	2	28	**32**
TOTAL	5	3	61	**69**

Source: Turkish Competition Authority, Annual Report 2003.

On the other hand, in 2003 (Table 3.5.), the concentrations between foreign firms constitute 46% of the total transactions. In addition, the concentrations between Turkish and foreign firms represent 22%, and the concentrations between Turkish firms denote only 32% of the total transactions.

When compared with the 1997-1999 period, it should be noted that the trend in the concentrations has reversed in terms of the parties to the concentrations and there has been a remarkable increase in the number of concentrations between foreign firms. Together with the concentrations between Turkish and foreign firms, this demonstrates an important entry of FDI in Turkey.[185] Moreover, this also means that the Competition Authority gives priority to substantive issues in the assessment of the concentrations. Therefore, it does not resort to economic protectionism. As a response to the question which was raised at the end of the previous Chapter, it can be said that Turkey is more open to foreign investment than many of the EU member states. However, this does not necessarily mean that Turkey is more European than most Europeans. The reason is that it is in need of more FDI in order to finance its current account deficit on a sound basis.

In fact, the reactions come from the society, especially from the trade unions. It is quite normal that these reactions are related to the privatizations, rather than the mergers and acquisitions in general. For example, Petrol-İş Trade Union ('Petrol-İş') sued the TÜPRAŞ case to the 13th Division of the Council of State for the annulment of the decision of the Privatization High Council and of the decisions regarding the

[185] This trend can be explained by two main factors. First, Turkish economy, which gradually more integrated into the global economy, has the motivation for economic growth. As the resident undertakings are in need of foreign capital in order to make investments exceeding their own financial resources, to increase their market shares or to enter into new markets, they established alliances with the international companies. On the other hand, it is also a factor that those international companies find Turkey attractive within the context of their strategies for entering into new market. Secondly, global developments and economic crises which affected Turkish economy had an important role in the increasing share of foreign capital in mergers and acquisitions. Economic recession, low profit margins, increasing operating and borrowing costs in the aftermath of financial crisis also compelled the resident undertakings to engage in foreign partnerships. However, foreign capital inflow generally occurs in the form of acquisitions or joint ventures. Therefore, this raises questions about the contribution of foreign capital to national economy. (DPT 2000: 14)

tender, tender announcement and tender specifications.[186] It also requested the annulment of the authorization decision of the Competition Board. The main argument was that "both oil workers and the society had lost against the global firms, which conduct their business strategies with only profit-making motive according to the global market rather than the national market. There was also a public loss, as the sale price was lower than expected. Moreover, it deprived Turkey of the future public revenues." (http://www.bianet.org/2005/09/12/67089.htm) However, the Council of State's Plenary Session of the Administrative Law Divisions rejected the objection of Petrol-İş and approved the decision of the 13th Division of the Council of State, which rejected the requests of Petrol-İş for the annulment of above-mentioned four decisions. In addition, it did not take a decision for the stay of execution of the Competition Board's decision. Consequently, the Council of State approved the privatization of TÜPRAŞ. (http://www.sabah.com.tr/2006/07/13/_eko89.html) As mentioned above in selected cases, the Competition Board made an analysis of substance and gave permission to the privatization transaction by attaching a condition in relation to LPG imports in Aegean Region. Therefore, it would be inappropriate to accuse the Competition Board of disregarding public interest.

With regard to the privatization of ERDEMİR, Chamber of Mechanical Engineers ('CME') sued the case to the Council of State by claiming that the transfer of ERDEMİR had no legal basis, as the Competition Board took its decision by 8 members while it had to take it by 7 members. The 13th Division of the Council of State concluded that the Board should have taken its decision by 7 members and decided for the stay of execution of the decision of the Privatization High Council. It grounded its decision on the stay of execution of the Board's authorization, on which the decision of the Privatization High Council was based. (http://www.radikal.com.tr/haber.php?haberno=193301) Indeed, the number of the

[186] Actually, this was not the first time that Petrol-İş sued the privatization of TÜPRAŞ. It was successful to prevent the transfer of 65,76% of TÜPRAŞ shares via privatization with block sale to Efremov Kautschuk GMBH (Zorlu-Tatneft Group), when the 10th Division of the Council of State approved the decision of Ankara 10th Administrative Court, which annulled the decision of tender commission, on 26.11.2004. Petrol-İş had claimed that the decision of tender commission was based on incomplete information, as only information about Tatneft was provided. Thus, the actual financial structure of Efremov was not reflected. Based on the same argument, it had also sued the Competition Board's decision. (Sabah, 26.11.2004, <http://www.sabah.com.tr/2004/11/26/eko96.html>)

members of the Board had been reduced from 11 to 7 by an amendment in the Act No. 4054 in July 2005.[187] The President of the Board of Directors of CME, in his written statement regarding the issue, said that "The decision of the 13th Division of the Council of State once again showed that the enterprises, assets and services, which have strategic importance and provide large revenues to the public, are privatized in a big hurry without sufficiently evaluating whether the transaction is in the public interest or not, thereby irreparable errors are made". (http://www.dunyagazetesi.com.tr/news_display.asp?upsale_id=262337&referrer=rss) As regards the error in procedure, Prof. Dr. Aydın Ayaydın drew the attention to the Board's other decisions by stating that "The real danger is in the merger and acquisition decisions. The authorizations of the Competition Board for the change of control in the companies were not conveyed to the Council of State. The mergers, which exceeded 60 days time, were finalized for the parties. However, these decisions will be debated too much from the administrative law perspective. All types of administrative and professional decisions taken by the Competition Board with 8 signatures can become invalid, even if they did not supervised by the Council of State. Therefore, the merger and acquisition decisions taken by 8 signatures can also be void." (http://www.sabah.com.tr/2006/03/17/yaz1356-30-118.html) Consequently, it should be noted that the stay of execution is related to the procedure, rather than the substance. Therefore, this judgement should not raise any doubts about the competence of the Board in the examination of privatization cases.

Telecommunications sector often confronts with disputes between GSM operators. For example, in 2003, Aria declared that it would withdraw from Turkey due to the failure of roaming agreement with other operators and appealed to International Arbitration against Turkey for a compensation of 2,5 billion US dollar. In the meantime, upon the application of Aria, the Board initiated an investigation and, as a result of the investigation, imposed a fine of 21 trillion 822 billion TL on Turkcell, and a fine of 8 trillion 580 billion TL on Telsim. (Ağaç, July 2003, <http://www.telepati.com.tr/temmuz03/haber25.htm>) After a while, in such a contested environment, the merger of Aria (İŞ-TİM) and AYCELL was implemented in 2003. This merger was discussed too much, as it was announced after Italian

[187] The Act No.5388 amending the Act on the Protection of Competition No. 4054, Article 3.

Prime Minister Silvio Berlusconi's visit to Prime Minister Recep Tayyip Erdoğan. The argument was that the government's decision was influenced by the international politics, rather than the commercial concerns. Within this framework, it was claimed that Italy's forthcoming EU Presidency had affected the process. (June 2003, <http://www.telepati.com/izbirakanlar/aycell-aria-93.htm>) Despite these debates on political reasons, as mentioned above in selected cases, the Board made an analysis of substance in Aria-AYCELL merger and gave permission to the transaction with an aim of assuring effective competition in GSM services market, in which Turkcell and Telsim have high market shares.

In 2005, with regard to the transfer of 55% of Turkish Telecom shares via privatization with block sale to Oger Telecoms Joint Venture Group, Chamber of Electrical Engineers and Haber-İş Trade Union sued the case to the Council of State. While the former requested the stay of execution of the decisions of the Competition Board and the Council of Ministers, the latter demanded the stay of execution of the decision of tender commission. (Kuvel, http://www.zaman.com.tr/?hn=255141&bl=ekonomi%20&trh=20060210) Similarly, Haber-Sen Trade Union ('Haber-Sen') also sued the case to the Council of State for the annulment of the decision of the Competition Board. The President of Haber-Sen stated that "There is no such privatization to foreigners in any European countries. Through the privatization process, Turkish Telecom, which is a de facto state monopoly, transformed into a private sector monopoly owned by foreigners." (http://www.sabah.com.tr/2005/08/01/eko97.html) However, the Council of State's Plenary Session of the Administrative Law Divisions decided that the objections were not reasonable and rejected these three appeals.

In fact, the arguments on the privatization should focus on substantive issues. There are two variables for achieving successful privatizations: market structure (existence of competitive markets), and country conditions (existence of market-friendly macroeconomic conditions and sufficient regulatory capacity). In this context, regulatory capacity denotes the cooperation between the privatization administration, competition authority and sectoral regulatory authorities. If this cooperation is not achieved, the privatization transactions become unsuccessful. Moreover, the existence of a regulatory authority itself is not sufficient to ensure

economic efficiency and welfare increase in the market after privatization, unless the competition policy is implemented effectively. Last but not least, as it is the case in most of the developing countries, the privatization policy should not be regarded as a revenue source in order to finance budget deficits and it should not grant privileges, which remove competitive market structure, to make the privatization transactions attractive. (Gökdemir 2003: 51-53)

Table 3.6. Fines imposed on Mergers or Acquisitions
(1999-2005)

	Year	Amount
The fines imposed on managers	**1999**	
	2000	243.360.000
	2001	
	2002	2.471.845.900
	2003	8.091.657.000
	2004	1.188.317.600
	2005	3.625*
The fines for failure to notify in due time**	**1999**	
	2000	1.825.200.000
	2001	6.643.728.000
	2002	15.994.297.000
	2003	30.054.726.000
	2004	20.795.558.000
	2005	11.600*

* The fines imposed in 2005 are denominated in YTL. In addition, the fines, which are re-imposed by the Board in relation to the annulled decisions by the Council of State, are not reflected in this table.
** As the related provision in the Act was amended in 2005, the figure regarding 2005 includes the fines which are imposed in cases where merger or acquisition transactions subject to authorization are implemented without the authorization of the Board.
Source: Turkish Competition Authority, Annual Report 2005.

Finally, as the figures indicate in Table 3.6., with regard to concentrations, the Board imposed fines only in relation to managers and non-notified cases during 1999-2005 period. The absence of fines imposed for the submission of incomplete, incorrect or misleading information, and of periodic penalty payments imposed for non-compliance with the termination of infringement and the prevention of on-the-spot inspection means that the sanctions are sufficiently deterrent to ensure that the undertakings concerned comply with the merger control rules.

Last but not least, it should be mentioned that the Competition Authority prepared a Draft Act, which would introduce several amendments to the Act No. 4054. The text of the Draft Act was published on 19 April 2005. The main amendments envisaged in Article 4 and Article 5 of the Draft Act in relation to mergers and acquisitions can be enumerated as following:

1. Article 7, which governs the mergers and acquisitions, was re-written in such a way that now it covers not only the mergers and acquisitions, but also the joint ventures. Moreover, the revised Article introduces a single framework based on the concept of 'concentration' to cover these three types of business strategies as it is used in the EUMR.

2. Another issue aligned with the EUMR is the change from the dominance test to competition test in the assessment of concentrations. As mentioned above, in the current situation, any concentration aimed at creating or strengthening of a 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, is prohibited. With the amendment, concentration transactions, which result in significantly reduction of competition in a market for goods or services, are prohibited.

3. In the current situation, as of the date the Board is notified of merger or acquisition agreements, the Board makes a preliminary examination within 15 days and according to the result of this examination it permits the transaction or decides to deal with the transaction under final examination. According to the new provision, the time period for the preliminary examination is extended to "30 working days" and as a result of this examination the Board may permit, prohibit, conditionally permit the transaction or decide to deal with the transaction under final examination. As it can be noticed, the time period for preliminary examination is not only extended, but also calculated in terms of "working days". Such an extension is introduced to ensure that the Board has more sufficient time for an adequate evaluation of a notified concentration. Secondly, now it will be explicitly stated in the Act rather than in the Communiqué that the Board may

prohibit or conditionally permit a concentration transaction as a result of its preliminary examination.

4. As mentioned before, in the current situation, scrutiny of merger and acquisition transactions under final examination is subject to standard procedures applicable to any investigation under the Act. According to standard procedures, investigations are concluded within 6 months at the latest. In cases where it is deemed necessary, the Board may grant an additional period of 6 months only once. Furthermore, the types of decisions to be given by the Board at the end of an investigation regarding mergers and acquisitions are not explicitly stated in the Act. The Draft Act now introduces a separate procedure for the investigation of concentration transactions. According to this, final examination should be concluded within 3 months at the latest. Besides, as it is the case in preliminary examination, now it will be explicitly stated in the Act rather than in the Communiqué that the Board may permit, prohibit or conditionally permit the transaction as a result of its final examination.

5. Moreover, the Draft Act also sets a new obligation for the Board to take the opinions of the parties concerned before giving the decisions on prohibition or conditional permissions.

6. As mentioned above, non-notified merger and acquisition transactions, whose notification to the Board is compulsory, are regulated in a separate provision (in Article 11) other than the Article 7 of the Act. The Draft Act now attaches this provision to Article 7 as Article 7/A. In addition to this, it has a different emphasis on non-notified mergers and acquisitions. In the current situation, when the Board is informed about a non-notified concentration transaction, which has to be notified to the Board, it examines the transaction on its own initiative and takes the necessary measures, including fines.[188] According to the Draft Act, when the Board is informed about a concentration transaction subject to authorization was implemented without its authorization, it shall deal with the transaction under final examination on its own initiative and

[188] See Sentim Case on pages 105 and 106 in order to evaluate the deficiency of this provision.

take the necessary measures, including fines. Therefore, "authorization of the Board" becomes a matter of primary importance.

Consequently, along with the introduction of a single framework based on the concept of 'concentration', the most fundamental change in the existing application of the Act is the shift from dominance test to competition test in parallel to the EUMR. In fact, apart from the EUMR, there were also some discussions about the insufficiency of dominant test in the assessment of concentrations under Turkish merger control rules.

According to Gülergün, for example, in recent years, the concept of dominant position is identified with the market power in the recent years. Moreover, dominance test became a static evaluation process where mainly the relative size of the firms in the relevant market is considered and economic techniques are not sufficiently used in the assessment of concentrations. However, the evaluation of concentrations should focus on price analysis to determine whether the price would significantly increase as a result of the concentration or not. Because the main concern regarding the control of concentrations is to prevent the reduction of consumer welfare due to price increase. Based on these arguments, he suggests the adoption of competition test in the assessment of concentrations. (Gülergün 2003: 209 and 213)

On the other hand, Karacehennem argues that there is no essential change in the shift from dominance test to competition test in the assessment of concentrations. It is obvious that some concentrations may result in reduction of competition in the relevant market without creating a dominant position. However, "significantly" reduction of competition as a result of a concentration is possible if that concentration has a dominant position in the market. Therefore, such an economic power which causes "significantly reduction of competition in a market" has the same characteristics with the dominant position. Indeed, the measures such as the determination of market power (market share, demand structure, sunk costs, product dependency, vertical integrity, entry barriers) and group advantages are used both in the determination of dominant position and significantly reduction of competition in a market. Moreover, the EU continues to use the measure regarding "the creation

or strengthening of a dominant position" in the evaluation of concentrations. Thus, he recommends that, in line with the aim of harmonization with EU acquis, it would be more beneficial to maintain this measure in the application of Turkish merger control rules. (Karacehennem 2005: 9)

Öz also draws attention to the fact that the shift to "competition test" in the EU stems from the annulment of the Commission's recent decisions by the ECJ and the inadequate applicability of "dominance test" to the control of concentrations in a number of markets in Europe. However, whether the Competition Authority has similar reasons for such a change is not clear, and at least there is no indication that the current Act makes competition test impossible or there are no decisions indicating that the dominant test remains inadequate. Therefore, she underlines that such an amendment would remain on paper, if Competition Authority has no simultaneous planning for introducing a series of guidelines to explain the proposed economic techniques to the undertakings with explicit examples, and for increasing the administrative capacity to apply these economic techniques. (Öz 2005: 77)

With regard to conditional permissions, Aslan states that conditional permissions should be given if the parties concerned undertake commitments and, otherwise, the authorizations should be rejected in order to ensure certainty for administrative procedures. Besides, the obligation to take the opinions of the parties concerned before giving the decisions on prohibition or conditional permissions and the opportunity to submit commitments would lead to a mechanism, which is similar to the negotiation process with MTF, for the first time in the application of the Act. However, this may cause uncertainties. Therefore, the authority to which the parties concerned would apply should be explicitly determined. Alternatively, this mechanism can be a part of the preliminary inquiry and implemented upon the request of the parties. (Aslan 2005: 4)

Together with these criticisms, it would be appropriate to make a comparative analysis of merger control rules of the CEECs with Turkish legislation in order to evaluate whether these proposed amendments by the Draft Act are necessary to comply with the Community acquis or not. In this respect, merger control rules of the CEECs will be scrutinized in the next chapter.

CHAPTER IV

4. MERGER CONTROL IN THE EX-CANDIDATE COUNTRIES WHICH BECAME NEW MEMBER STATES

4.1. The effect of EU membership process on the introduction of merger control rules in the CEECs

As it is known, after the collapse of Soviet bloc, the CEECs left the communist system and initiated several reforms for transition to market-based economy. From the outset, the EU perceived the importance of the new phase of European history which was opened with the fall of the Berlin Wall in 1989, and it moved quickly to create new links with the CEECs by removing import quotas, extending trade preferences, and reaching agreements on trade, cooperation, and finally on association (Commission 2001: 12). Within this framework, Table 4.1. demonstrates the accession processes of the CEECs below.

Table 4.1. The Accession Processes of the CEECs

Country	Application for full-membership	Negotiations (starting date)	Negotiations (end date)	Membership
Czech Rep.	January 1996	March 1998	February 2002	May 2004
Estonia	November 1995	March 1998	February 2002	May 2004
Hungary	March 1994	March 1998	February 2002	May 2004
Latvia	October 1995	February 2000	February 2002	May 2004
Lithuania	October 1995	February 2000	February 2002	May 2004
Poland	April 1994	March 1998	February 2002	May 2004
Slovak Rep.	June 1995	February 2000	February 2002	May 2004
Slovenia	June 1996	March 1998	February 2002	May 2004

Source: Delegation of the European Commission to Turkey, <http://www.deltur.cec.eu.int/default.asp?pId=3&lang=0&prnId=1&fId=4&ord=0&docId=278&fop=1>

Although these CEECs applied for full-membership later than Turkey that made its application for full-membership on 14 April 1987, they became new Member States in May 2004. Besides, Bulgaria and Romania will join the EU in January 2007. Even the date of the Association Agreement, which was signed between Turkey and the EU in 1963, is considered, the comparison of the CEECs with Turkey gains importance within the framework of this thesis.

As mentioned in the previous Chapter, the main catalyst for the introduction of the Act No. 4054 and, accordingly, the merger control rules was the relationship between Turkey and the EU. Along with other obligations, the compliance with the competition rules of the EU was stipulated in the implementation of the Customs Union between Turkey and the EU. Therefore, the EU's anti-trust provisions were taken as a model and incorporated into the Act. Turkey also further aligned its legislation with the Community *acquis* by issuing detailed secondary legislation.

Within this framework, several questions can be raised for a comparison. Firstly, did the obligations stipulated for Turkey in the context of the implementation of the Customs Union ensure that Turkey adopted merger control rules earlier than the CEECs? Secondly, similar to Turkey, did the relationship between the CEECs and the EU have an effect on the introduction of merger control rules? Finally, when the merger control rules of the CEECs are compared with Turkish legislation, are there any differences between them? In this Chapter, the possible answers of these three questions will be discussed.

First of all, 1998 Regular Reports are examined below, as these reports were the first reports published by the Commission to assess the progress achieved by the candidate countries. As the findings indicate in Table 4.2., all CEECs had their respective competition authorities and competition legislation at the early years of their relationship with the EU. In 1998 Regular Reports, while the Commission recommended necessary amendments for further alignment, it mainly criticized the CEECs for insufficient legislation on state aids, the absence of a State aid monitoring authority, the weak enforcement of the competition laws, inadequate administrative capacities, and the lack of well-qualified staff.

Table 4.2. The Situation of the CEECs in 1998 Regular Progress Reports

Country	Europe Agreement (Date of Signature)*	Europe Agreement (Official Journal)**	Competition Legislation	Competition Authority
Bulgaria	08.03.1993	31.12.1994	Exist	Commission for the Protection of Competition
Czech Republic	04.10.1993	31.12.1994	Exist	Office for the Protection of Economic Competition
Estonia	12.06.1995	09.03.1998	Exist	Competition Board
Hungary	16.12.1991	31.12.1993	Exist	Office for the Protection of Economic Competition
Latvia	12.06.1995	02.02.1998	Exist	Competition Council
Lithuania	12.06.1995	20.02.1998	Exist	Competition Council
Poland	16.12.1991	31.12.1993	Exist	Office for the Protection of Competition and Consumers
Romania	01.02.1993	31.12.1994	Exist	Competition Council
Slovak Republic	04.10.1993	31.12.1994	Exist	Anti-monopoly Office
Slovenia	10.06.1996	26.02.1999	Exist	Office for the Protection of Competition

*<http://presidency.finland.fi/doc/eu/enl_5chro.htm>
** The dates on which the Europe Agreements are published in the Official Journal of the EU.
Source: European Commission, Regular Progress Reports, 1998.

On the other hand, with regard to merger control, the Commission generally gave the number of concentration notifications dealt by the relevant competition authorities of the CEECs. However, it criticized only Czech Republic, Estonia, Latvia and Poland in relation to merger control. According to this, Czech Republic had gaps in the definition and notification of mergers (Regular Report 1998: 23), Estonia's competition law did not provide for full merger control (Regular Report 1998: 24), Latvia had gaps in the notification of mergers (Regular Report 1998: 26), and the enforcement of the current antitrust law of Poland should concentrate efforts on hard-cartels and important mergers (Regular Report 1998: 25).

As regards Turkey, the Commission stated that Turkey had made great efforts to align with Community competition law, adopted a Competition Act that complied with Community legislation and incorporated the EU's anti-trust provisions in December 1994, established a Competition Authority that started to work in November 1997, and published four communiqués on mergers and acquisitions, notifying agreements and block exemptions for exclusive distribution agreements and exclusive purchasing agreements. However, the Commission emphasized that the alignment with the Community rules should be completed and criticized Turkey for its insufficient efforts to align the state aids rules and to ensure that commercial monopolies comply with the Community legislation. (Regular Report 1998: 33)

When the Commission's evaluations about the CEECs are compared with its comments on Turkey, it can be concluded that Turkey had a comparative advantage against Czech Republic, Estonia, Latvia and Poland in relation to merger control rules. On the other hand, it can be said that the EU demonstrated the same attitude in its assessments on competition rules and criticized both the CEECs and Turkey for their inadequate implementation of state aids rules.

From a different perspective, 1998 Regular Reports also revealed that Turkey did not have a comparative advantage of having a competition authority and adopting competition legislation earlier than the CEECs, although it had a longer relationship with the EU. The main factor in this situation was Turkey's own delay in its compliance with the obligations stipulated in the context of the implementation of

the Customs Union. Another factor regarding how the CEECs caught up with Turkey was the relationship between the CEECs and the EU.

Indeed, this situation stems from the fact that the EU stipulated similar obligations to the CEECs in Europe Agreements as it had done before in the Association Agreement with Turkey. In Europe Agreements, the EU used the same format for all CEECs and included the same provisions regarding the competition rules and the approximation of laws. According to this, all CEECs committed to adopt the necessary rules for the application of the principles laid down in the relevant articles of the Treaty regarding the agreements, decisions and concerted practices which has the effect of prevention, restriction or distortion of competition; the abuse of dominant position; and the state-aids within three years of the entry into force of the Agreement.[189] With regard to the approximation of the laws, all CEECs also committed to approximate their existing and future legislation to that of the Community and endeavour to ensure that their legislation would be gradually made compatible with that of the Community.[190] Consequently, as an answer to the second question, it can be said that, similar to Turkey, for the CEECs the main catalyst for the introduction of competition acts and, accordingly, the merger control rules was also their relationship with the EU.

In 1999 Regular Reports, while the Commission continued to criticize Czech Republic as the parliament had not yet adopt the amendments removing the remaining gaps in the definition and notification of mergers (Regular Report 1999: 33), and Estonia as the legislation did not cover yet full merger control (Regular Report 1999: 33); it mentioned the progress achieved by Latvia as the Competition Council had approved and published methodological guidelines on how to compile notifications of collusion and statements of merger (Regular Report 1999: 34), and the progress achieved by Poland as it achieved a reasonable level of alignment in the field of mergers (Regular Report 1999: 33).

Finally, Czech Republic adopted a new Act on Competition in January 2001 which contained the main principles of acquis, including merger control (Regular

[189] This provision is stated in Article 62 or Article 64 of the Europe Agreements.

[190] These provisions are stated in Articles 67-68 or Articles 69-70 of the Europe Agreements.

Report 2001: 53), Estonia adopted a new Competition Act in October 2001 which introduced merger control rules (Regular Report 2001: 44), and Latvia adopted a new Law on Competition of 2001 which contained the main principles of Community anti-trust rule, including merger control (Regular Report 2001: 54).

In 2003 Comprehensive Monitoring Reports, the Commission used the same format for the CEECs, which would become new Member States in May 2004, and stated that these CEECs had adopted legislation containing the main principles of Community anti-trust rules as regards restrictive agreements, abuse of dominant position and merger control.

In 2006 Monitoring Reports, as regards Bulgaria, the Commission stated that in most chapters of the acquis either Bulgaria was ready or preparations were being made to resolve the last outstanding issues by accession, and it only enumerated those chapters, including competition policy, without any assessment (Monitoring Report 2006: 17); and as regards Romania, the Commission addressed only to the state-aid enforcement record (Monitoring Report 2006: 22).

As mentioned in the previous Chapter, from 1998 Regular Report to 2006 Regular Report, Turkey has never been criticized about its merger control rules. Moreover, in both 2005 and 2006 Regular Reports, the Commission underlined that the Competition Authority has a sufficient administrative capacity to ensure antitrust enforcement and merger control. (Regular Report 2005: 68; Regular Report 2006: 39)

4.2. Comparative analysis of the merger control rules of the CEECs with the Turkish legislation

As the information demonstrates in Table 4.3., similar to Turkey, all CEECs have separate competition authorities and their merger control rules are regulated within their respective competition acts. However, except Czech Republic, Latvia, Romania and Slovak Republic, the other CEECs have also other relevant legislation for mergers and additional approvals of other relevant regulatory authorities may be needed. As mentioned before, in Turkey, there is an important derogation from the merger control rules in the banking sector.

Table 4.3. The Competition Authorities and the Relevant Legislation of the CEECs

	Competition Authority	Legal framework for Merger Control	Other Relevant Legislation for Mergers
Bulgaria	Commission for the Protection of Competition	The Law on the Protection of Competition	In banking and insurance, and telecommunications sectors. Prior approval of the respective privatization authority.
Czech Republic	Office for the Protection of Economic Competition	Act No. 143/2001 Coll. on the Protection of Economic Competition	There is no other relevant legislation for mergers.
Estonia	Competition Board	Competition Act of 2001	Specific additional requirements under the Credit Institutions Act and the Securities Market Act.
Hungary	Office for the Protection of Economic Competition	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices	Special rules under the Act on Credit Institutions and Financial Enterprises, the Act on Insurance Institutions and Insurance Business, and the Act on Radio and Television Broadcasting. Pursuant to the Act on Electric Energy, the approval of the Hungarian Energy Commission is also required.
Latvia	Competition Council	Competition Law of 2002	No, but the specific regulatory authorities shall be involved in merger clearance proceedings and additional permissions may be required from those.
Lithuania	Competition Council	The Law on Competition of the Republic of Lithuania	There are some legal acts indirectly regulating mergers in particular sectors such as electricity, gas, heat energy and water supply, banks, insurance, telecommunications, transportation, medical services. The supplementary merger control in these sectors usually means the necessity to comply with registration requirements, to get the appropriate license/ approval or just to notify certain official institution.

(Table 4.3. continued)

Poland	Office for the Protection of Competition and Consumers	The Law on Competition and Consumer Protection	Additional approvals of another administrative body (this pertains to the radio and television broadcasting and telecommunications sectors, pension funds, insurance and pharmaceutical companies, and banks). Provisions which contain special merger control provisions to be applied by the Competition Authority, partly replacing conflicting provisions of the Competition Law (this pertains to investment funds and national investment funds).
Romania	Competition Council	Competition Law no. 21/1996	Competition Council has recently issued several regulations and instructions applicable to certain agreements concluded in particular sectors. In case of mergers, no such particular legislation has been issued.
Slovak Republic	Anti-monopoly Office	Act No. 136/2001 Coll. on Protection of Economic Competition	The Competition Act governs all concentrations and there is no specific merger control within particular sectors. However, in certain sectors, a change in control over an undertaking is subject to the prior / subsequent notification / approval of the relevant regulatory body. For example, prior approval from the National Bank of Slovakia is required under the Act on Securities and Investment Services, the Insurance Act, the Banking Act, the Act on Stock Exchange, and the Act on Collective Investments.
Slovenia	Office for the Protection of Competition	Act on the Prevention of the Restriction of Competition of 1999	Mergers in the public media sector are specifically regulated by the Media Act. Although Competition Act is applicable also in case of concentrations of publishers of public media, the Media Act sets forth a number of specific limitations and requires a special approval by the Ministry of Culture.

(Table 4.3. continued)

			Competition Act applies to mergers in the financial sector. In addition, the laws regulating banks, insurance companies, stock-broking companies and funds management companies require an approval from the regulatory bodies for the acquisition of "qualified shareholding". Qualified shareholding is defined as 10%, 20%, 33% and 50%. The Post and Electronic Agency and Competition Protection Office shall cooperate in analyzing relevant markets and determining significant market power. However, the Post and Electronic Agency has exclusive competence for assessing the significant market power and defining the relevant markets. In gas and electricity markets, the Agency for Energy may be involved in the assessment of mergers.
Turkey *	Competition Authority	The Act on the Protection of Competition No. 4054	In mergers and transfers of banks to be carried out pursuant to the provisions of Banking Law No. 5411, on the condition that the market share of the total assets of the banks subject to merger or integration does not exceed 20%, the related provisions of the Act No. 4054 shall not be applied. Besides, the Telegraph and Telephone Law No. 406 provides that the Competition Board should take into consideration the opinion of the Telecommunications Authority and its regulations in its merger or acquisition decisions.**

Source: Merger Control (2006).
*   The information about Turkey is included into the Table by the author for a comparative analysis.
** Hergüner Bilgen Özeke's remark in Merger Control 2006. (Merger Control 2006: 385)

As the information shows in Table 4.4., there are both similarities and differences between the merger control rules of the CEECs and the Turkish legislation. While Estonia, Hungary, Romania, Slovak Republic and Slovenia have specific deadlines for filing the notification, Bulgaria has a specific deadline only for the concentrations take place on the basis of a publicly announced tender or bid procedure. On the other hand, Czech Republic, Latvia, Lithuania and Poland have no specific deadlines for the filing. Notification prior to the implementation of a concentration is accepted by these countries. As mentioned before, the deadline for prior notification is not stated in the Turkish Competition Act and one of the Board's decisions was annulled by the 13th Division of the Council of State due to this deficiency in the legal basis.

While, similar to Turkey, Latvia and Slovenia use either turnover or market share thresholds for compulsory notification, the other CEECs use only turnover thresholds.

Except Hungary, Poland and Slovak Republic, the other CEECs examine the concentration transactions under two phases. Hungary, Poland and Slovak Republic scrutinize the concentration transactions under a single phase, but they may extend the standard period. As mentioned above, Turkey also evaluates the concentration transactions under two phases: preliminary examination and final examination.

With regard to non-notification sanctions, similar to Turkey, all CEECs impose fines. On the other hand, Poland has a different practice. According to this, as of 1 May 2004, there are no fines on undertakings for the failure to notify. However, fines up to 10% of the revenue in the preceding financial year can be imposed on undertakings for closing a transaction without a clearance and breaching the suspension requirement.

In addition to fines, Bulgaria, Czech Republic, Hungary, Lithuania, Poland, Romania and Slovak Republic may take measures for restoring the effective competition, including de-merger sanction. Except Bulgaria, Estonia and Poland which have no invalidity sanction in their competition acts, the other CEECs may also deem non-notified transactions null and void.

On the other hand, when Turkish Competition Board is informed about a non-notified concentration which has to be notified to the Board, it examines the transaction on its own initiative. As a result of the examination, if the Board considers that the concentration in question falls within the scope of the Act, together with fines and other measures deemed necessary, it decides that the transaction be terminated and all de facto conditions committed contrary to the law be eliminated.

Table 4.4. Merger Control Rules of the CEECs

	Filing Deadline	Notification Thresholds	Examination Deadline	Non-notification Sanctions
Bulgaria	Prior to completion. Where the concentration takes place on the basis of a publicly announced tender or bid procedure, the notification must be filed within seven days upon publication of the results of such tender or bid.	Aggregate Bulgarian turnover of the parties exceeds BGN15 million.	Phase 1: one month. Phase 2: three months.	• Imposition of a fine. • Measures for the restitution of the pre-concentration status, including divestment of the combined capital, shares or assets, as well as termination of joint control. • However, no authority to declare a non-notified transaction as invalid. The Law on Commerce can be applied against such an administrative breach.
Czech Republic	No specific deadline for the filing.	Either (i) the parties' combined aggregate Czech turnover exceeds CZK1.5 billion and the Czech turnover of each of at least two of the parties exceeds CZK250 million; or (ii) the Czech turnover of one party exceeds CZK1.5 billion the worldwide turnover of another party exceeds CZK1.5 billion.	Phase 1: one month. Phase 2: four months.	• Imposition of a fine. • Imposing on the parties the obligation to "de-concentrate" or taking other measures for restoring effective competition in the relevant market. • Imposing on the parties the duty to cancel the agreement pursuant to which the merger occurred.
Estonia	Within one week of the conclusion of the agreement, announcement of the public bid, or	The parties' combined worldwide turnover exceeds EEK 500 million, the worldwide turnover of two parties exceeds EEK 100 million, and	Phase 1: 30 days. Phase 2: four months.	• Imposition of a fine. • There is no direct provision in the Competition Act establishing that a transaction directed at the concentration

(Table 4.4. continued)

	acquisition of control.	at least one party is active in Estonia.		is invalid in case merger control rules are not complied with. However Estonian law also generally states that a transaction contrary to a prohibition arising from law is void if the purpose of the prohibition is to render the transaction void upon violation of the prohibition.
Hungary	Within 30 days from the earlier of (a) the publication of a tender offer, (b) the conclusion of an agreement, or (c) the acquisition of the controlling rights.	(i) The parties' combined Hungarian turnover exceeds HUF 15 billion, and (ii) the Hungarian turnover of each of at least two parties exceeds HUF 500 million.	Transactions with no or de minimis overlap: 45 days. All other transactions: 120 days. Note: These periods may be extended by 60 days.	• Imposition of a fine. • Measures for restoring the effective competition by setting an appropriate deadline for doing so, are: ordering the separation or alienation of the merged undertakings or assets and business units; termination of joint control; or any other obligation to restore competition. • If merger control consent is mandatory to entering into the agreement, an agreement made prior to such approval shall be deemed "non existent".
Latvia	No specific deadline for the filing.	Combined Latvian turnover of the parties exceeds LVL25 million, or the parties' combined market share in a relevant market exceeds 40%.	Phase 1: one month. Phase 2: four months from the submission of a complete notification.	• Imposition of a fine. • Competition Law contains a general stipulation that transactions executed without a notification shall be void.

(Table 4.4. continued)

Lithuania	Prior to implementation.	Aggregate Lithuanian turnover of the parties exceeds LTL30 million and the Lithuanian turnover of at least two parties exceeds LTL5 million.	Phase 1: one month. Phase 2: four months from the submission of a complete notification.	• Imposition of a fine. • Measures for restoring the previous situation or eliminating the consequences of concentration (to sell the enterprise or a part thereof, the assets of the undertaking or a part thereof, shares or a part thereof, to reorganise the enterprise, to cancel or change contracts, etc.) • All the transactions and actions of the undertakings/ persons participating in concentration shall be deemed null and void if they were finalized without the notification or prior the clearance from the Competition Council was received.
Poland	No specific deadline for the filing.	Aggregate worldwide turnover of the parties exceeds €50 million, unless the seller did not generate at least €10 million in Poland in each of the last two fiscal years prior to notification, and the transaction does not result in the creation or strengthening of a dominant position.	Two months (may be extended by 14 days if parties offer commitments).	• As of 1 May 2004, there are no fines on undertakings for the failure to notify. However, fines up to 10% of the revenue in the preceding financial year can be imposed on undertakings for closing a transaction without a clearance and breaching the suspension requirement. • Imposing de-merger sanction. • There is no invalidity sanction.

(Table 4.4. continued)

Romania	Within 30 days from the date of signing the binding agreement.	Aggregate Romanian turnover of the parties exceeds € 10 million and each of the parties has Romanian turnover exceeding € 4 million.	Phase 1: 30 days (may be extended). Phase 2: five months.	• Imposition of a fine. • After assessing non-notified transaction, the Competition Council can either: (i) grant a clearance; or (ii) in case it finds that the transaction raises significant competition issues, it can require the parties to modify the respective terms of the transaction in order for such to become compatible with a normal competition environment.
Slovak Republic	Within 30 business days from the date of announcement of a public offer, execution of an agreement or acquisition of control.	Aggregate worldwide turnover of the parties exceeds SKK1.2 billion and at least two parties have Slovak turnover exceeding SKK360 million each; or one party's worldwide turnover exceeds SKK1.2 billion and another party's Slovak turnover exceeds SKK500 million.	60 business days, but can be extended by up to an additional 90 business days.	• Imposition of a fine. • In addition to fines, in a case where the concentration was not notified to the Office and was capable of being prohibited, the Office may also order de-merger of the combined undertaking.
Slovenia	Within one week of (a) the conclusion of an agreement, or (b) the announcement of a public bid, or (c) the acquisition of a controlling interest.	The aggregate Slovenian turnover of the parties exceeds SIT8 billion in each of the last two years; or a combined market share exceeding 40% in a market affected by the transaction.	Phase 1: 30 days. Phase 2: 90 days.	• Imposition of a fine. • Non-notified transactions, which result in a prohibited concentration, are null and void. Competition Act entitles the Competition Authority to file a lawsuit requesting from the court of general jurisdiction to declare such a transaction null and void.

(Table 4.4. continued)

Turkey *	Prior to implementation. (preferably 30 days before the implementation)	The total market share of the parties in the relevant market exceeds 25% or the total turnover of the parties exceeds 25 trillion TL	Phase 1: 15 days Phase 2: six months at the latest (an additional period of six months may be granted for once)	• Imposition of fines and periodic penalty payments. • Non-notified transactions which are resulting in a prohibited concentration are terminated and all de facto conditions committed contrary to the law are eliminated.

Source: Merger Control (2006).
* The information about Turkey is included into the Table by the author for a comparative analysis.

CONCLUSION

As a result of the examination of M&As as a business strategy and the analysis of merger control rules of the EU, Turkey and the CEECs, the following consequences were attained as a response to the specific questions, which were raised in the introduction of this thesis.

There are different economic, financial and managerial motivations for firms to enter into M&As deals. Through M&As, firms may enter a new market or a new country and acquire strategic assets, benefit from economies of scale, have access to more finance, diversify their operations to reduce risks, and achieve synergetic gains regarding their sales, operations, investments and managements. Moreover, a merger may compel rival firms to "defensive" mergers or small firms may engage in such mergers against larger firms so as to survive in an environment where an intensive competition prevails.

Along with these motives, economic globalization is another important factor in the increasing value and number of M&As activities. Liberalization of trade and capital, FDI promotion, deregulation of strategic sectors and privatization of state-owned enterprises, and globalization of production by MNEs have contributed to this trend. All these processes have restructured national economies towards market-based economy, enhanced the level of integration and interdependence of national economies, and transformed the world economy into a global marketplace. Accordingly, intensified competition and market pressures both at the national and global level force the firms to restructure themselves, particularly through (cross-border) M&As, in order to continue to exist.

With regard to cross-border M&As, several driving forces can be enumerated in addition to government-related factors such as liberalization, deregulation and privatization processes. While economic expansion in home countries leads to capital accumulation available for investment abroad, economic boom in host countries

increases the profitability of potential target firms. On the other hand, firms may engage in cross-border M&As in order to concentrate on their core business activities with an aim of strengthening their global competitiveness. Besides, the companies having firm-specific intangible assets would like to exploit them through geographical diversification in the form of FDI, whereas the companies lacking of sufficient intangible assets would like to obtain them by acquiring an existing local firm having those assets. Finally, in response to the fast changing market structures and competition conditions as a result of the technological changes and innovations, firms may embark on M&As as a quick and easy way to react competitors and enter into new sectors as well as to bear large R&D costs.

It is obvious that all these factors are significant for firms to survive in such a competitive environment. However, these business restructurings have also negative social consequences. For example, the merging entities generally expect to increase their efficiencies and reduce their costs as a result of the merger. Therefore, they cut the number of their staff and many employees lose their jobs. In cases where a national company is acquired by a foreign investor, after a while, the new owner of the company may take a decision to close the company and its production facilities or move the location of the company to another country. This may also lead to large numbers of lay-offs.

In this context, governments are confronted with a dilemma in their policies against M&As activities. On the one hand, they try to attract more direct investment, including M&As, to create more employment and increase the competitiveness of their national economy. On the other hand, they encourage domestic firms to enter into M&As deals against their foreign competitors and even they may resort to economic protectionism against foreign takeovers in some sectors deemed to have national strategic value, such as energy and banking sectors. This problem exists even in the EU where there are no borders but a single market, which is supported by a common competition policy. It is seen that either the old big member states or the new member states may resort to economic protectionism and violate single-market rules in spite of the Commission’s power to sue these infringements to the ECJ. On the other hand, as the figures demonstrate in Table 3.4. and 3.5., the remarkable

increase in the number of concentrations, in which at least one of the parties is a foreign firm, denotes that Turkish Competition Authority gives priority to substantive issues in its assessments and does not resort to economic protectionism.

The control of mergers is one of the main pillars of the EU competition policy which has two principal objectives: the maintenance of competitive markets and the achievement of the single market. In addition to the general goals pursued by any competition system, such as industrial efficiency, optimal allocation of resources, and consumer benefits, EU competition law also aims at enhancing the global competitiveness of the European industry. In this respect, EU merger control regime has facilitated the restructuring of the European industry and supported efficiency-enhancing reorganizations by ensuring a single procedure that reduces administrative costs, bureaucracy and legal uncertainty. Within this framework, a proposed concentration with a Community dimension is assessed by the Commission rather than to be evaluated by different Member States having different procedures.

There are specific turnover thresholds to be used to determine whether a proposed concentration has a Community dimension or not. Concentrations with a Community dimension are 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. The Commission takes its decisions within strict time limits. As a result of its examination, the Commission may give clearance to the notified concentration unconditionally or with conditions and obligations. However, if the notified concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, the Commission may decide that the transaction is incompatible with the common market and prohibit it.

Relevant statistics show that the progress achieved in the accomplishment of the single market objective has a positive impact on M&As activities within the EU. In this context, there are three important periods in which merger activities significantly boosted within the EU: the launch of the Single Market in 1993, the introduction of the euro in 1999, and the last enlargement in 2004. As the figures indicate in Figure 2.3., there is a close relationship between the increase in the

number of M&As and the progress achieved in the level of economic integration of the EU. Indeed, integration of regional markets in Europe has created opportunities for European companies to expand their operations through M&As and benefit from economies of scale. In this respect, removal of the legal, regulatory and technical barriers to the four freedoms of movement (people, goods, services, and capital) has given the European companies the opportunity to enhance their competitiveness by significantly reducing their costs and increase their efficiencies.

Last but not least, examination of the selected cases proved that the judicial review of the Commission's decisions by the CFI and the ECJ has always provided guidance to the implementation of the EUMR. Their judgements not only clarified the conceptual uncertainties in the interpretation of the EUMR, but also compelled the Commission to revise and improve the EUMR, and restructure its organizational structure in order to increase its administrative capacity.

With regard to Turkey, merger control rules laid down in the Act on the Protection of Competition No. 4054 and in the relevant secondary legislation were scrutinized. Although the Act was enacted at the end of 1994, it is seen that the legislative studies regarding competition have a long past than it is supposed. However, examination of the obligations stipulated in the Ankara Agreement, Additional Protocol and Association Council Decision No 1/95 showed that the main catalyst for the establishment of a competition authority as well as the introduction of a competition law and, accordingly, the merger control rules was the implementation of the Customs Union between the EU and Turkey.

In the light of the comparative analysis of Turkish merger control rules with the EUMR, it can be said that merger control regime of Turkey is in harmony with the Community rules to a large extent. The main reason is that legislators were inspired from the EU's anti-trust provisions as a model when preparing the Act. Similarly, the Competition Authority issued the secondary legislation in line with the principles laid down in the EUMR.

In parallel with the EUMR, Turkish merger control rules also cover mergers, acquisitions and joint ventures. However, while the EUMR regulates these three

types of business strategies within a single framework based on the concept of ‘concentration’, the Act does not specify joint ventures together with mergers and acquisitions. Joint ventures are mentioned in the secondary legislation. On the other hand, similar to the EUMR, joint ventures are evaluated on full-functionality basis under the Turkish merger control rules.

The last version of the EUMR, which entered into force in May 2004, is now based on “competition test” in the assessment of concentrations. However, similar to the old version of the EUMR, the Act still envisages “dominance test” in the evaluation of concentrations.

As mentioned above, the EUMR sets specific turnover thresholds to determine whether a concentration has a Community dimension and, accordingly, must be notified to the Commission. However, Turkish merger control rules envisage two types of quantitative thresholds (market share or turnover) for the compulsory notification of a concentration to get authorization from the Board. On the other hand, there is an important derogation from the market share threshold in the banking sector.

In addition to market share or turnover thresholds, Turkish merger control rules also check “change of control” measure for notification. However, while in the EUMR it is explicitly stated that a concentration arises where a change of control results from a merger or an acquisition, there is an implicit expression about the change of control in Turkish legislation. Although the Board’s several decisions constitute a case-law for explaining the change of control, lack of an explicit criterion on the change of control may cause some uncertainties for the undertakings.

Similar to the EUMR, examination of notifications consists of two phases: preliminary examination (Phase 1) and final examination (Phase 2). Although the Act specifically describes Phase 1 procedures, it does not define Phase 2 procedures. Therefore, scrutiny of concentration transactions under final examination is subject to standard procedures applicable to any investigation under the Act.

In parallel with the decision-making powers of the European Commission, the Board also mainly makes three types of decisions in relation to a notified transaction: permission, conditional permission, or prohibition. On the other hand, while the legal basis for conditional permission is explicitly stated in the EUMR, such legal basis is not found in the Act. The secondary legislation gives the Board the authority to decide a conditional permission. This causes some discussions about the legal basis for conditional permissions.

Similar to the EUMR, the Board may also impose two types of sanctions (fines or periodic penalties) on the undertakings in order to ensure compliance with the merger control rules in an effective way. However, unlike the sanctions stated in the EUMR, if a fine is imposed to an undertaking or association of undertakings which have legal personality, an additional fine up to 10% of this fine is imposed to each of the natural persons who undertake responsibility in the management boards.

Last but not least, similar to the judicial review of the decisions of the Commission by the ECJ, the undertakings concerned can appeal to the Council of State for the judicial review of the Board's final decisions, precautionary decisions, decisions imposing fines and periodic penalty payments.

In the light of these findings, it is understood that there is a need for the revision of the Act not only to achieve further alignment with the Community rules, but also to clarify the controversial issues in the application of the Act. In fact, a Draft Act was prepared by the Competition Authority which envisages several amendments in the current Act to remove those gaps and uncertainties. The scrutiny of the Draft Act demonstrated that it not only introduces the concept of concentration and competition test in line with the EUMR, but also addresses most of the disputed matters such as the legal basis for conditional permissions, and the procedures and deadlines to be followed during the examination of concentrations. However, when the criticisms about the Draft Act are taken into account, it is seen that there are some uncertainties about the applicability of competition test and the procedure to be followed by the parties and the Competition Authority in conditional permissions and prohibitions.

Finally, the examination of the Regular Reports prepared by the Commission to evaluate the progress of candidate countries showed that as of 1998 Turkey had a comparative advantage against Czech Republic, Estonia, Latvia and Poland in relation to merger control. From a different perspective, however, 1998 Regular Reports also revealed that Turkey did not have a comparative advantage of having a competition authority and a competition legislation earlier than the CEECs, although it had undertook these obligations at an early stage compared to these ex-candidate countries which applied for full-membership to the EU during 1994-1996 period and all of which became new member states.

The examination of European Agreements signed by the CEECs indicated that for the CEECs the main catalyst for introduction of competition acts and, accordingly, the merger control rules was also their relationship with the EU. Within this framework, comparative analysis of the merger control rules of the CEECs with Turkish legislation showed that there are both similarities and differences between these systems.

Similar to Turkey, all CEECs have separate competition authorities and their merger control rules are regulated within their respective competition acts. However, except Czech Republic, Latvia, Romania and Slovak Republic, the other CEECs have also other relevant legislation for mergers and additional approvals of other relevant regulatory authorities may be needed.

Estonia, Hungary, Romania, Slovak Republic and Slovenia have specific deadlines for filing the notification and Bulgaria has a specific deadline only for the concentrations take place on the basis of a publicly announced tender or bid procedure. On the other hand, Czech Republic, Latvia, Lithuania and Poland have no specific deadlines for the filing. Notification prior to the implementation of a concentration is accepted by these countries.

While Latvia and Slovenia use either turnover or market share thresholds for compulsory notification, the other CEECs use only turnover thresholds.

Except Hungary, Poland and Slovak Republic, the other CEECs examine the concentration transactions under two phases. Hungary, Poland and Slovak Republic scrutinize the concentration transactions under a single phase, but they may extend the standard period.

With regard to non-notification sanctions, all CEECs impose fines. On the other hand, Poland has a different practice. According to this, as of 1 May 2004, there are no fines on undertakings for the failure to notify. However, fines up to 10% of the revenue in the preceding financial year can be imposed on undertakings for closing a transaction without a clearance and breaching the suspension requirement.

In addition to fines, Bulgaria, Czech Republic, Hungary, Lithuania, Poland, Romania and Slovak Republic may take measures for restoring the effective competition, including de-merger sanction. Except Bulgaria, Estonia and Poland, the other CEECs may also deem non-notified transactions null and void. It is interesting that Bulgaria, Estonia and Poland have no invalidity sanction in their competition acts. Thus, lacking of necessary means to restore effective competition at national level raises the question of how these countries can assure that non-notified concentrations, which affect trade between member states and threaten to significantly affect competition within their territories, would not have any negative consequences on the smooth functioning of the common market.

Consequently, the evaluation of the CEECs demonstrated that some aspects of the merger control rules of these new member states not only depart from each other, but also differ from the main principles laid down in the EUMR. Therefore, while maintaining the principal aim of aligning the Turkish merger control rules with that of the EU, the Competition Authority should also take into account the peculiar characteristics of the Turkish system and review the proposed amendments envisaged in the Draft Act. In this context, as it is underlined in the criticisms about the Draft Act, particularly the change from the dominance test to competition test in the assessment of concentrations should be re-evaluated by considering the administrative capacity of the Authority to apply such a competition test and economic techniques.

BIBLIOGRAPHY

ALBORS-LLORENS, A. (2002). **EC Competition Law and Policy**. Willan Publishing, Cullompton.

ASLAN, İ.Y. (2005). “Rekabet Kurumunun Kanun Değişikliği Önerisinin Düşündürdükleri”, *Rekabet Haber Bülteni*, Sayı: 12, pp. 3-6.

ASLAN, İ.Y. (2006). **Rekabet Hukuku Dersleri**. Ekin Kitabevi, Bursa.

BERGQVIST, C. (2003). “The Concept of an Autonomous Economic Entity”, *European Competition Law Review,* Issue 10, pp. 498-503.

COOKE, T.E. (1986). **Mergers and Acquisitions**. Basil Blackwell, Oxford.

COYLE, B. (2000). **Mergers and Acquisitions**. CIB Publishing, Kent.

COX, R., CURRIE, A. & NIXON, S. “In France, Cross-Border Deals Seem Unlikely to Gain Traction”, *The Wall Street Journal*, 04.04.2006.

DALE, R. “Global Pressures Upset Europe’s Ways”, *International Herald Tribune*, 13.06.2000.

DEVLET PLANLAMA TEŞKİLATI. (2000). **Sekizinci Beş Yıllık Kalkınma Planı: Küreselleşme Özel İhtisas Komisyonu Raporu**, Ankara.

ECHIKSON, W. & COHEN, A. “EU Warns Spain on Takeover Law”, *The Wall Street Journal*, 06.03.2006.

ECHIKSON, W. “EU’s Protectionist Rancor Worsens”, *The Wall Street Journal*, 15.03.2006.

ECHIKSON, W. “Tiny State Unites Against Big Takeover”, *The Wall Street Journal*, 17.03.2006.

EROL, K. (2000). **Rekabet Kurallarının Ülke Dışı Uygulaması**. Rekabet Kurumu, Lisansüstü Tez Serisi No: 1, Ankara.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Bulgaria.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Czech Republic.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Estonia.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Hungary.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Latvia.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Lithuania.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Poland.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Romania.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Slovak Republic.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Slovenia.

EUROPEAN COMMISSION. (1998). Regular Progress Report for Turkey.

EUROPEAN COMMISSION. (2005). Regular Progress Report for Turkey.

EUROPEAN COMMISSION. (2006). Regular Progress Report for Turkey.

EUROPEAN COMMISSION. (1999). Regular Progress Report for Czech Republic.

EUROPEAN COMMISSION. (1999). Regular Progress Report for Estonia.

EUROPEAN COMMISSION. (1999). Regular Progress Report for Latvia.

EUROPEAN COMMISSION. (1999). Regular Progress Report for Poland.

EUROPEAN COMMISSION. (2001). Regular Progress Report for Czech Republic.

EUROPEAN COMMISSION. (2001). Regular Progress Report for Estonia.

EUROPEAN COMMISSION. (2001). Regular Progress Report for Latvia.

EUROPEAN COMMISSION. (2006). Monitoring Report for Bulgaria.

EUROPEAN COMMISSION. (2006). Monitoring Report for Romania.

EUROPEAN COMMISSION. (1998). **Merger control law in the European Union: situation in March 1998**. Brussels: Office for Official Publications of the European Communities.

EUROPEAN COMMISSION. (2000). **Competition policy in Europe and the citizen**. Luxembourg: Office for Official Publications of the European Communities.

EUROPEAN COMMISSION. (2001). **The European Union: Still enlarging**. Luxembourg: Office for Official Publications of the European Communities.

EUROPEAN COMMISSION. (2004). **EU competition policy and the consumer**. Luxembourg: Office for Official Publications of the European Communities.

EUROPEAN COMMISSION. **XXIXth Report on Competition Policy – 1999**. SEC (2000) 720 final.

EUROPEAN COMMISSION. **XXXIst Report on Competition Policy – 2001**. SEC (2002) 462 final.

EUROPEAN COMMISSION. **Report on Competition Policy – 2004**. SEC (2005) 805 final.

EUROPEAN COMMISSION. **Report on Competition Policy – 2005**. SEC (2006) 761 final.

EUROPEAN COMMISSION (2004). **Communication from the Commission: A pro-active Competition Policy for a Competitive Europe**. COM (2004) 293 final.

GAUGHAN, P.A. (1999). **Mergers, Acquisitions and Corporate Restructuring**. John Wiley & Sons Inc., New York.

GALLONI, A. "Enel Joins Case Against France in Suez Deal", *The Wall Street Journal*, 02.03.2006.

GÖKDEMİR, B. (2003). AB'ye Tam Üyelik Sürecinde Rekabet Politikasının Rolü ve Önemi Sempozyumu'nda Yapılan Konuşma Metni, 5 Kasım 2003, Rekabet Kurumu, Ankara.

GÜNGÖRDÜ, A. (2003). **AT ve Türk Rekabet Hukukunda Yoğunlaşmalarda Kontrol Unsuru**. Rekabet Kurumu Yayınları, Ankara.

GÜLERGÜN, E.C. (2003). "Türkiye İçin Yoğunlaşma Kontrolü Modeli: Rekabet Testi", Tebliğ Metni, Rekabet Politikası ve Yoğunlaşmaların Kontrolü, 4 Mart 2003, Rekabet Kurumu, Ankara.

HALLIDAY, F. (2001). **The World at 2000**. Hampshire: Palgrave.

HORN, N. (2001) **Cross-Border Mergers and Acquisitions and the Law**. Kluwer Law International, Great Britain.

İNAN, N. (2000). "Birleşme ve Devralma Kurallarının Temel Sorunları", *Rekabet Bülteni*, Sayı: 2.

JACOBY, M. "EU Moves to Enforce Market Rules", *The Wall Street Journal*, 05.04.2006.

KANG, N. & JOHANSSON, S. (2000). **Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation**. OECD Science, Technology and Industry Working Papers, 2000/1, Paris.

KARACEHENNEM, N. (2005). "4054 Sayılı Rekabetin Korunması Hakkında Kanunda Yapılması Öngörülen Değişikliklere İlişkin Taslak Hakkında Düşüncelerim (I)", *Rekabet Haber Bülteni*, Sayı: 12, pp. 6-9.

KATIRCIOĞLU, E. (2000). Türkiye II. Uluslararası Rekabet Sempozyumu'nda Yapılan Konuşma Metni, 6-7 Mart 2000, Rekabet Kurumu, İstanbul.

KAYAR, İ. (2003). **Rekabet Hukukunda Birleşme ve Devralmalarda Kontrol Olgusu,** *Rekabet Hukukunda Güncel Gelişmeler Sempozyumu - I*, 4 Nisan 2003, Rekabet Kurumu Yayınları, Ankara.

MAUDHUIT, S. & SOAMES, T. (2005) "Changes in EU Merger Control: Part 3", *European Competition Law Review,* Issue 3, pp. 144-150.

MERGER CONTROL (2006). Global Legal Group, London.

MOURIK, A. (2000). "Five Years of Community Merger Control", in Aad van Mourik (ed.), **Developments in European Competition Policy.** European Institute of Public Administration, Maastricht.

MOTTA, M. (2004). **Competition Policy: Theory and Practice**. Cambridge University Press, New York.

OECD (2001). **New Patterns of Industrial Globalisation: Cross-Border Mergers and Acquisitions and Strategic Alliances**. Paris.

OECD (2002). **The Role of Competition Policy in Regulatory Reform**. Paris.

OECD (2005). **Competition Law and Policy in Turkey**. Paris.

ÖZ, G. (1999). *Rekabet Politikası ve Özelleştirme Sempozyumu*, 5 Kasım 1999, Rekabet Kurumu Yayınları, Ankara.

ÖZ, G. (2005) "4054 Sayılı Rekabetin Korunması Hakkında Kanun ve Bu Kanun'da Değişiklik Yapılmasına İlişkin Taslak Çerçevesinde Birleşme ve Devralmalar", Banka ve Ticaret Hukuku Araştırma Enstitüsü, 7-8 Ekim 2005, Ankara.

PHILLIPS, D. "National pride, missed connections", *International Herald Tribune*, 11.06.2005.

REVIEW & OUTLOOK "Guarding the Flock", *The Wall Street Journal*, 28.02.2006.

SCHMIDT, V.A. (2002). **The Future of European Capitalism**. Oxford.

STEINER, P.O. (1975). **Mergers: Motives, Effects, Policies**. University of Michigan Press, Ann Arbor.

TAN, T. (1999). *Rekabet Politikası ve Özelleştirme Sempozyumu*, 5 Kasım 1999, Rekabet Kurumu Yayınları, Ankara.

TAYLOR, P. "Lack of haste lays waste to EU policing of internal markets", *International Herald Tribune*, 28.06.2006.

TURKISH COMPETITION AUTHORITY. **1st Annual Report, 1997-1999**.

TURKISH COMPETITION AUTHORITY. **Annual Report 2003**.

TURKISH COMPETITION AUTHORITY. **Annual Report 2005**.

ULU, H. (2004). **Birleşme ve Devralmalarda Ortaya Çıkan Rekabet Sorunları ve Koşullu İzin**. Rekabet Kurumu Yayınları, Ankara.

WESTON, J.F., CHUNG, K.S. & SIU, J.A. (1998). **Takeovers, Restructuring and Corporate Governance**. (2nd ed.), Prentice Hall, New Jersey.

UNCTAD (2000). **World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development**. New York.

Relevant EU Legislation

Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963), *Official Journal C 113, 24.12.1973*.

Additional Protocol (signed at Brussels, 23 November 1970), *Official Journal C 113, 24.12.1973*.

Council Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, *Official Journal L 35/1, 13.02.1996*.

Commission Notice on the concept of concentration, *Official Journal C 66, 02.03.1998*.

Commission Notice on calculation of turnover, *Official Journal C 66, 02.03.1998*.

Commission Notice on the concept of full-function joint ventures, *Official Journal C 66, 02.03.1998*.

Commission Notice on the concept of undertakings concerned, *Official Journal C 66, 02.03.1998*.

Commission Notice on the definition of relevant market fort he purposes of Community competition law, *Official Journal C 372, 09.12.1997, p. 5-13.*

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *Official Journal L 24, 29.01.2004, p. 1-22.*

Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, *Official Journal L 133, 30.04.2004, p. 1-39.*

Commission Proposal for a Council Regulation on the control of concentrations between undertakings, *OJ C 20, 28.01.2003, p. 4-57.*

Green Paper on the Review of the EUMR, COM (2001) 745/6.

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, p. 5-18.*

Relevant Turkish Legislation

The Act on the Protection of Competition No. 4054. *Official Gazette No: 22140, 13.12.1994.*

The Communiqué No. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board.

The Communiqué No. 1998/4 on the Procedures and Principles to be pursued in Pre-notifications and Authorization Applications to be filed to the Competition Authority for the Acquisitions via Privatization in order to become legally valid.

Banking Law No. 5411 (as amended by the Law No. 5472), *Official Gazette No: 25983 re., 01.11.2005.*

Capital Market Law No. 2499 (as amended by the Law No. 4487), *Official Gazette No:23910, 18.12.1999.*

Capital Market Communiqué on Merger Transactions Serial:I No:31

Electricity Market Law No. 4628, *Official Gazette No: 24335, 03.03.2001.*

Natural Gas Market Law No. 4646, *Official Gazette No: 24390, 02.05.2001.*

The Law No. 4502 amending the Telegram and Telephone Law, *Official Gazette No: 23948, 29.01.2000.*

Draft Act amending the Act on the Protection of Competition No. 4054, 19.04.2005. <http://www.rekabet.gov.tr/word/taslakkanun.doc>

Selected Decisions of the European Commission

Case 27/76 United Brands V EC Commission (1978) ECR, p. 207.

Case 85/76 Hoffmann La Roche V EC Commission (1979) ECR, p. 461.

Case No IV/M.1524 *Airtours/First Choice*, 22.09.1999

Case No COMP/M.2220 *General Electric/Honeywell*, 03.07.2001

Case No COMP/M.2283 *Schneider/Legrand*, 10.10.2001.

Case No COMP/M.2416 *Tetra Laval/Sidel*, 30.10.2001

Case No COMP/M.3440 *EDP/ENI/GDP*, 09.12.2004

Selected Decisions of the Turkish Competition Board

Competition Board's Opinion on Turkish Telecom No. 04-57/797-M, 02.09.2004.

Doğan Daily News Decision No. 00-49/519-284, 12.12.2000.

İŞ-TİM – AYCELL Decision No. 03-81/970-399, 18.12.2003.

Joint Venture aimed at supplying LPG Decision No. 99-26/230-138, 27.05.1999.

Ladik Cement Decision No. 05-86/1188-340, 20.12.2005.

Sentim Decision No. 02-57/719-288, 27.09.2002.

TNT Logistics Decision No. 04-63/928-221, 30.09.2004.

Toros Fertilizer-Akdeniz Fertilizer Decision No. 05-05/27-15, 13.01.2005.

TÜPRAŞ Decision No. 05-71/981-270, 21.10.2005.

Yurtiçi Kargo-Geopost GmbH Decision No. 04-38/427-107, 26.05.2004.

Internet Resources

AĞAÇ, F. "Rekabet Kurulu'ndan Turkcell ve Telsim'e rekor ceza".
<http://www.telepati.com.tr/temmuz03/haber25.htm>, accessed on 18.08.2006.

AYAYDIN, A. "Sekiz imzalı Rekabet kararları geçersiz", accessed on 18.08.2006.
<http://www.sabah.com.tr/2006/03/17/yaz1356-30-118.html>

EUROPEAN COMMISSION, "European Merger Control – *Statistics*".
<http://ec.europa.eu/comm/competition/mergers/statistics.pdf>

EUROPEAN COMMISSION, Delegation of the European Commission to Turkey.
<http://www.deltur.cec.eu.int/default.asp?pId=3&lang=0&prnId=1&fId=4&ord=0&docId=278&fop=1>

FINNISH PRESIDENCY WEBSITE, "EU enlargement- a chronology"
<http://presidency.finland.fi/doc/eu/enl_5chro.htm>

KUVEL, S. "Danıştay'ın Telekom vizesi Oger'i rahatlattı", accessed on 18.08.2006.
<http://www.zaman.com.tr/?hn=255141&bl=ekonomi%20&trh=20060210>

"Ladik Çimento davasında karar"
<http://www.haber7.com/haber.php?haber_id=154991 >, accessed on 02.11.2006.

"Ladik Çimento'nun devrine Danıştay engeli"
<http://www.ntvmsnbc.com/news/364118.asp>, accessed on 02.11.2006.

"GSM'de Aycell–Aria Birleşmesi"
<http://www.telepati.com/izbirakanlar/aycell-aria-93.htm>, accessed on 18.08.2006.

"Telekom'da Rekabet Kurulu onayının iptali için dava açıldı"
<http://www.sabah.com.tr/2005/08/01/eko97.html>, accessed on 18.08.2006.

"Danıştay'dan Tüpraş'a iki onay birden"
<http://www.sabah.com.tr/2006/07/13/eko89.html>, accessed on 18.08.2006.

"Tüpraş'ın satışının iptaline onay"
<http://www.sabah.com.tr/2004/11/26/eko96.html>, accessed on 18.08.2006.

"Erdemir'e durdurma: Danıştay'dan ikinci kez fren"
<http://www.radikal.com.tr/haber.php?haberno=193301>, accessed on 18.08.2006.

Danıştay Dergisi, Vol. 110, pp. 380-384.
<http://www.danistay.gov.tr/kerisim/ozet.jsp?ozet=ozet&dokid=24912>, accessed on 02.11.2006.

"Danıştay 13. Dairesi, Erdemir özelleştirmesinde yürütmeyi durdurdu"
<http://www.dunyagazetesi.com.tr/news_display.asp?upsale_id=270899&dept_id=320>, accessed on 18.08.2006.

"Tüpraş Koç-Shell'e gitti... İşçiler ayakta"
<http://www.bianet.org/2005/09/12/67089.htm>, accessed on 18.08.2006.

"Bank of Italy investigated by EU"
<http://news.bbc.co.uk/1/hi/business/4465668.stm>, accessed on 16.07.2006.