# The Understanding of Merger Control in Turkey In Light of the EU law

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## ABSTRACT

In the global world, mergers and acquisitions is an effective way for multinational corporations to enter into foreign markets and increase their market power. There are many reasons for mergers. However, mergers are subject to competition law. They must be scrutinised and permitted by the competition authorities in order to become valid.

The EU is an economical and political community.There is rules and regulations to trade within the common market which covers 30 countries and a huge number of consumers. The Competition rules were regulated by the EC Treaty. Merger control is regulated by the 139/2004 Regulation. The Commission has sole authority. The rationale of merger control is to maintain effective competition and to prevent monopoly where the price, innovation and quality are controlled by few companies. In brief, goods and services at a fair price with high quality is provided through effective competition.

Turkey's membership of the EU is not a new phenomena. In order to be member of the EU, Turkey has to harmonise its law with the EU. The main reason is effective functioning of the EU. This fact was a significant factor to adopt the EU competition law in Turkey. Merger control is regulated by the 1997/1 Communiqué and the Competition Board has sole authority. The competition law has been practised since1998 in Turkey.

## INTRODUCTION

Effective competition is a driving force of liberal economies and it brings benefit to the consumer in terms of fair prices, high quality of goods and services. The aim of merger control is to ensure the competition is not distorted by the merging of companies and provides an even play level for all. By merger companies can shorten the time to increase their market share, expand the market and are able to overcome the relative sector restrictions. As a result of increasing market power, they will be able to raise the price, reduce output or quality of product or diminish innovation. Merger control seeks to prevent this foreseeable impact on the market.

In the EU, the reason to adopt a merger regulation was to prevent "…the Commission's unchecked freedom to develop a system of merger control under Art.81 and 82."[1]The EU `s old merger regulation [2]was repealed and replaced by Regulation 139/2004 this will be referred to as the ECMR. It applies to the enlarged European Union of 27 Member States[3] and the three EEA countries (Iceland, Liechtenstein and Norway) [4]

The Turkish Constitution of 1982 Art 167 attributed to the government the duty " to ensure and to regulate and develop the money, credit, capital, product and service markets, and measures providing and improving healthy and regular procedures to prevent monopolization and cauterization created as a result of activity or agreement in the markets." Therefore, the government is responsible for the economic regulation.

[1] Monti, G (2007) *EC Competition Law*, UK: Cambridge University Press p 247 & Continental Can case is important to need for separate merger regulation. case 6/72 Europembellage and Continental Can v.Commission [1973] ECR 215,[1973]CMLR 199

[2]Council Regulation (EEC)4064/89 of 21 December 1989 on the control of concentration between undertakings(OJ L 395, 30/12/1989)

[3] EC Treaty Art 249 the EU Parliament acting with jointly with the Council. The regulation is directly applicable to all Member Countries.

[4] The new ECMR 139/2004 has been incorporated into the EEA Agreement by the EEA Joint Committee decisions no 78/2004 and decision no 79/2004 on 8th of June 2004

Before legislation by the LPC, competition [rekabet] was protected by the Code of Commerce's Unfair Competition Rules (Art 56-65) and Turkish Civil Code Art 2 (principle of bona fides) [5]

The preparation period of the Custom Union between Turkey and the EC, also economic necessity were backgrounds of enacting the Law on the Protection of Competition (no 4054)[6] (thereinafter it will be referred to as LPC).[7]The LPC was enacted and published in the Official Gazette on 07.12.1994 and came into force on 13.12.1994.The Competition Board (hereinafter the Board) was established in 27.02.1997.

The relationship between the EU and Turkey first started with the Ankara Agreement in 1963.[8] According to Art 16 of the agreement, Turkey shall align its tax and competition law with the EU. Consequently, the LPC was enacted in 1994. The agreement was intended to establish a Custom Union[9] that is affected by the Decision no 1/95 of the Council of Association on 1.1.1996.[10] The decision no 1/95 states that Turkey shall ensure that its legislation in the field of competition rules is made compatible with the EU and is applied effectively. In order to control behaviour of undertakings, Turkey should also adopt a law, which shall prohibit behaviours of the undertakings Art. 85 (new 81) and 86(new 82) of the EC Treaty[11] and apply the case law which was developed by the EU Authorities.

The LPC substantial provisions are Art.4, 5, 6 and 7. Art 4 prohibits certain agreements and concerted practices it is parallel to EC Art.81/1. Art 5 regulates exemptions and parallel to the EC Art 81/3.Art 6 prohibiting abuse of a dominant position and is parallel with Art.82 of EC. Art 7 prohibits creation or strengthening a dominant position by mergers and acquisitions. The 1997/1 Communiqué (hereinafter TMR) regulates merger control in Turkey. The EC Regulation 4064/89 is reference for the TMR.

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[5] Erdem E H Dr (2007) *Articles on Competition Law*, 1st ed, Istanbul: Beta Publishing p 4

[6] Guven, P.(2003)*Control of Mergers and Acquisitions Under Turkish Competition and European Union Law*, Enlarged 2nd ed, Ankara: Yetkin Publishing p 29,31

[7] Rekabetin Korunmasi Hakkinda Kanun (RKHK) was translated as The Law on the Protection of Competition

[8] Agreement Establishing an Association Between the European Economic Community and Turkey (signed in Ankara on 12.9.1963) available at http://www.mfa.gov.tr/agreement-establishing-an-association-between-the-european-economic-community-and-turkey-_signed-at-ankara_-september-1_-1963_.en (9.5.2008)

[9] Ankara Agreement Art 10

[10] Decision No 1/95 of the EC and Turkey Association Council of 22 December 1995 Implementing the final phase of the Custom Union, Official Journal L035, 13.12.1996

[11] Decision no 1/95, Art 39

As a result of harmonisation of the competition law with the EU, the LPC is "…deeply influenced by EC Competition Regulations. Moreover, the European Court of Justice and European decisions are evaluated as precedents under Turkish Competition Law…"[12] In brief, the EU is the source for Turkish Competition Law.

The rationale of this research is to analyse and compare the EU and Turkey merger control regulation. The EU law is the reference for Turkish competition law consequently the merger regulation. Also, Turkey's prospective integration with the EU needs understanding of EU law and its influence over Turkish national law. The main questions are why the competition authorities cleared or blocked a merger? What criteria are being applied? How competition authorities shape the market structure? What are the similarities and differences in substantial and procedural issues?

**a) Methodology:** In order to carry out this research, data was collected using qualitative methodology. Comparative methodology is adopted for number of reason. Firstly, the research question needs a comparative approach to find answers. Secondly, it provides a valuable framework of concepts and provisions in the EU and Turkish law. Thirdly, it is useful to provide and identify solutions of common issues. In addition, it also illustrates the gaps or successes in different jurisdiction.

Comparative methodology was carried out by the black-letter approach because to analyse and comparison is needed to seek primary sources of law such as relevant legislation, case law, articles and authoritative comments. In this research the topic is shaped by the case law and especially competition authorities' decisions.

Pursuant to the research objective, the EU and Turkish merger legislation are analysed. Reference books, articles, the Commission and the Turkish Competition Board (hereinafter the Board) decisions and case law were the main tool in order to make the comparison.

Under Turkish law, unfortunately there are not many resources particularly on merger control. Arslan`s (2007) *Competition Law* explains main concepts of merger control in light of the Board decisions. It gives significant weight the Board jurisprudence. It provides the contrary

[12] Erdem, E H Dr (2007) p 314

decision which was given by the Board in its early decisions. Although the EU law is reference to Turkish competition law, there is little reference to the EU law and sometimes reference is made to the USA case law. Unfortunately, the effect of vertical or conglomerate merger was not examined in detail. Some concepts such as efficiencies were explained in respect of the USA Horizontal Merger Guidelines where the EU and the USA approach are different for efficiencies. Frequently, the author underlines the disadvantage of interpretation of the legislation and its gaps.

Guven`s(2003) *Control of Mergers and Acquisitions Under Turkish Competition and European Union Law* is one of the useful references about the TMR. The book covers the comparison of the 4064/89 ECMR and the TMR. It gives detailed information especially in the Turkish part with numerous case examples. It is mainly based on the similarity between the systems. There is also reference to national legislation with extensive explanations such as the Telecommunication Law and the Capital Market Law. The effects can be seen on the Turkish law. Such as "term undertaking "this is defined differently than other legislation and the control and change of control terms was introduced into Turkish law. It provides the understanding of terms and concept in the TMR with reference to the EU law.

Erdem`s (2007) *Articles on Competition Law*, the ECMR 139/2004 was analysed with the critics of the TMR. Some suggestions made by the author was the acceptance of the SIEC test or to bring clear definition on change of control.

Esin& Lokmanhekim`s(2003)*M&A Transaction Under Turkish Law*, provides pre-merger stages such as letter of intent, due diligence and binding offer under Turkish law. However, merger control was examined under the "Official Permission" which was brief.

Inan N, Piker M P.`s (2007) *Competition Law Manual*, gives a brief framework of mergers in Turkey with some case examples. However, the procedural issues were explained in more detail than substantial issues in merger cases. However, Akyuz H B`s(2007)*Mergers and Acquisitions within Turkish Competition Law*, explains the concept of mergers and acquisitions with national law provisions such as the Tax Law, Turkish Commercial Code. The merger control was explained in general framework without details.

Competition law has been practising for more than 10 years in Turkey. *The Discussion Paper about Reviewing 1997/1 Communiqué (November 2007)* was prepared by the Board and based on the Board's experience. The changes in the ECMR and the OECD and International Competition Network Reports and harmonising competition law with the EU were reasons to prepare this paper. It notices the gaps in the TMR and the Board's effort to overcome the gaps in practice. In order to have a effective merger control the Board has planned future changes in the TMR as concept of control, definition of JV, thresholds, notification time, notification form, ancillary restriction. It also states that relevant guidance will be prepared in the future.

In addition a number of articles have been used in this work. Some of them are:

Erdogan, T`s (2007) `*Case Comment Decision of Turkish Competition Authority on Migros/Tansas acqusition*` as the author stated ,who was an expert in this case, it was the first case buyer power was examined in the retail market by the Board. It provided an extensive view about the Board's approach the buyer power.

Eryurekli, P`s (2001)`*Most Frequent Questions in Merger and Acquisition Notifications*` especially examined the questions which was caused the confusion in practice. It provided the clear answers about the compulsory notification if only one party exceeds the thresholds.

Ismen, T`s (2001) ` *The Criteria of Control and Its Importance to Define Mergers and Acquisition* ` evaluated the concept of control with consideration to the language and interpretation by the TMR.

Inan, N`s (2000*)` The Fundamental Problems of Merger and Acquisition Rules*` The author evaluated problems about the turnover and market share thresholds. It suggested that only total turnover should be taken into account.

In addition, the Board's online database provided an extensive resource for this research where the Competition Law Journal and the Board's expert's thesis are available. However, except for the relevant market notice there are no further notices on substantial and procedural issues in Turkey leads confusion as to what the TCB thinks. This study is mainly based on the case examples.

In the EU part, Bellamy&Child`s(2001&2008) *European Community Law* is one of the main resources. It provides the general principles with clear, simple, systematic methodology with the jurisprudence of the Commission and the community court.

However, Jones & Sufrin`s (2008) *EC Competition*, the general framework was illustrated by the Commission`s notices and landmark case examples.

Monti`s (2007) *Competition Law* has a straight forward and critical approach. It explains the Commission approach with precise analysis in the merger procedure rather than providing definitions.
Korah, V`s (2007)*An Introductory Guide to EC Competition Law*, the EU practice was illustrated with landmark cases rather than defining the terms.

Kokkoris, I `s (2006) `*Buyer Power Assessment in Competition Law: Boon or a Menace?* ` brought different aspects regarding buyer power of merged entity rather than countervailing factors. Also, Horner's (2006)`*Unilateral Effects and the EC Merger Regulation-How the Commission Had its Cake and Ate it To*` examines the analyses unilateral effects under dominant test and underlines the SIEC test which focus on anti competitive effect of merger by sophisticate economic analyses.

Also, the Commission online database and notices are significant guidance to understand the Commission's approach. However, case law is significantly important where the fundamental rules set out by the CFI and ECJ. For example, in *Genchor/Lonhro*, collective dominance and the Commission's burden of proof were established. In *Tetra Laval/Sidel*, vertical and conglomerate effect of mergers are analysed in detail and the rules set out regarding the burden of proof to block the merger under these effects. In *Airtours*, tacit collusion criteria and the rules governing the burden of proof for collective dominance was reaffirmed.

This comparison study is in four chapters. Every chapter has three divisions: the EU, the Turkish law and comparison parts.

Chapter 1 starts with definition of undertaking .Concept of concentration will be analysed which are merger, acquisition and JV. The merger control starts where there was a concentration thereby, identifying that transaction is fundamental.

In Chapter II, jurisdiction will be examined where the competition authorities have sole competence over the transaction. The thresholds, territorial scope of the regulation and calculation of turnover and exclusion of jurisdiction will be explained.

In Chapter III, the competition authorities make prospective analyses to permit or prohibit a transaction. This chapter is divided into three sections: market definition, competitive assessment and countervailing factors. Firstly market definition will be examined; after the tests will analysed which are main criteria to appraisal of merger. Following that, market shares and horizontal, vertical and conglomerate effect of mergers will be analysed. Lastly, countervailing factors will be seen where the anticompetitive effect of merger can be balanced.

In chapter IV, the procedural issues will be examined in the merger procedure. Notification, time limit and power of competition authorities are main concepts.

## CHAPTER I INTERPRETATION OF CONCENTRATION

### 1 CONCEPT OF UNDERTAKING

#### 1) UNDER THE EU

The ECMR aims at control of mergers between undertakings. "The concept of undertaking is one of the fundamental building blocks of Community competition law."[13]
Therefore, it is important to point out what constitutes an undertaking.

The ECJ held that "The concept of an undertaking compasses every entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed" [14] It covers two concepts "entity" and "economic activity". An economic activity is "…an expanding concept including any activity aimed at the production, distribution or exchange of goods or services, regardless of its duration or whether there was an intention to make a profit."[15]

The term entity covers natural and legal persons and state bodies. The principle of non-discrimination is applied between the public and private sector.[16]

**a) State bodies:** The EC Treaty Art 86 states that public undertaking to which the Member States grant special or exclusive rights too are subject to the EC Treaty. They are subject to competition rules unless the competition rules obstruct the performance of the task assigned to them.

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[13] Amato G,Ehlermann C D ,Komninos A (2007*)EC Competition Law A Critical Assessment*, USA :Hart Publishing p 3
[14] Case C-41/90, Holfner/Macrotron,[19991]ECR I-1979 para 21
[15] Amato &Ehlerman , p 594 & Goyder G D(2003) *EC Competition Law*, 4th ed New York :Oxford University Press p 60
[16] ECMR Preamble Art 22

To what extend the governments activities are subject to competition rules? To answer that question, qualification of the public authority activities are important. "The well-established principle that public authority activities are not caught by the EC competition rules…"[17] because it does not significantly affect trade between Member States. The activity has an economic nature when "it faces actual or potential competition by private companies, thus enabling a strong presumption for the economic character of any activity."[18]

Fenin[19]was a major association for medical goods and equipment and its major buyer which was a group of public bodies which purchase for SNS (Spain's hospitals). FENIN claimed that the SNS was abusing its dominant position by delaying payment up to 300 days. Fenin who lost the case against SNS in front of the European Commission, appealed to the CFI and later appealed to the ECJ.

It was held by the ECJ that SNS purchased goods and equipment not for economic activity but was used them free of charge to all patients in medical care and it foundation was social security contributions. Therefore, it was not an undertaking for the purpose of EU Community competition law.

A state entity is not an undertaking if it exercises traditional activities.

Alternatively in the Pavlov case[20] the pension fund "…itself determined the amount of contributions and benefit and operated on the basis of principle of capitalization…carried on economic activity in competition with the insurance companies…"The pension fund was an undertaking in terms of competition law.

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[17] Amato&Ehlerman, p 594

[18] Winterstein A ` *Nailing the Jellyfish:Social Security and Competition Law*` [1999]ECLR 324-333 p 4 available at http://ec.europa/eu/comm/competition/speeches/text/sp2001_029_en.pdf (28.2.2008)

[19] FENIN v European Commission Case-2005/03 P[2006] All ER(D)(140 July) & in the AOK Bundesverband the problem whether the sickness funds associations imposing a maximum price on medicinal product was contrary to the Treaty Art.81 or not. In relation to funds associations, two pharmaceutical companies brought proceedings against for their loss. The ECJ referred to the similarity of the Poucet de Pistre case and stated that the funds associations were not an undertaking because it fulfils an exclusively social function which is full functioning of the German security system and entirely non profit making. Moreover, the funds were not in competition with one another or private instructions. Case AOK Bundesverband and Others v Ichthyol-Gessellschaft Cordes, Hermani&Co and Other Cases(joined cases C 264-01, C-306/01, C-354/01 and C-355/01)

[20] ECJ Pavlov and Others v Stichting Pensionfonds Medische Specialisten (Joined cases C-180-184/98) 2000 All ER (D) 1192

The Wouters[21] case, lawyers were assessed as undertakings.

**b) Subsidiaries:** The actual situation is considered between the parent and its subsidiaries. Whether the subsidiary enjoys real autonomy or is controlled by the parents. [22]

Natural persons can be determined as an undertaking. However, employers and trade unions are not undertakings.[23]

## 2) UNDERTAKING [Tesebbus] UNDER TURKISH LAW

The LPC Art 2 states "…any undertakings operating in or affecting markets for goods and services…"[24] is within its scope. Art.3 of the LPC defines undertaking as "Natural and legal persons who produce, market and sell goods or services in the market, and units who can decide independently do constitute an economic whole"[25] The non-discrimination principle applies to public and private undertakings.[26]

The rules previously defining the undertaking now are superseded by the terms of the LPC. The High Court of State explained [27] that even though internet providers are not an "undertaking" under the Act of 406, the existing economic activity should be considered an

[21] Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten and another(Case C-309/99)[2002] All ER (D)233 (Feb) Wotuers and Savelberg were members of the Netherlands Bar and wanted a partnership with two accountancy companies. It was not permitted because they were not notaries, tax consultants or patent agents. The Bar of the Netherlands is a body and is governed by public law and serves public interests. The Court analyzed that the public interests were necessary for essential functions of state"…ensuring that individuals have proper access to the law and to justice." Therefore, The Bar was not an undertaking but lawyers were undertakings because they offer their services for a fee and take financial risks.

[22] Viho Europe BV v European Commission (Parker Pen Ltd, intervening) CFI Firs Chamber (Case T-102/92)[1995] All ER(EC)371 para 47-51

[23] Goyder, p 62

[24] The quotation of LPC or the Turkish Merger Regulation was taken from the Turkish Competition Board official translation. The LPC is available in English at http://www.rekabet.gov.tr/esayfa/html# ;the Turkish Merger Regulation (The Communiqué 1997/1) and other Communiqués are available in English at http://www.rekabet.gov.tr/eteblig.asp. On 1/5/2008

[25] LPC Art 3

[26] Preamble of the LPC Art 2 states competition rules must be applied to all undertakings which have economic operations regardless of the undertakings belonging to public institutions or to a private person.

[27]The High State of Court [Danistay ]10.Presidency[10.Daire] Case no 2001/2113 decision no 2004/5849 & in terms of competition law, to have a separate legal entity was not enough to assess an undertaking as economically independent in the market & another decision of the High State Court 10.Presidency Case no :[Esas no] 2002/4495 decision no:[Karar no]2003/4374 available at http://www.danistay.gov.tr/kerisim/container.jsp downloaded on 19/4/2008

undertaking in the concept of the LPC. Moreover, qualification of legal entity is not a requirement for the purpose of the LPC.

It should be noted that, the scope of an undertaking can be different in another legal context and should be considered in concept of the LPC.

**a) State Bodies:** In the ASKI[28]case, the Turkish Competition Board (hereinafter the Board) adopted two criteria:

A) Formal criteria are economic independence and constituting an economic whole;

B) A functional criterion is economic activity regardless of legal status or regardless of economic stage of production, distribution and marketing.

ASKI was a public corporation which dealt with the sewerage and water system in Ankara. It had an independent budget, independent power of decision, separate resources of income and separate management. As a result it is an independent undertaking. The Board assessed that ASKI fulfilled the mentioned criteria and therefore is a public undertaking in terms of the LPC.

The Board further assessed that, unless a public entity exercises its public law power it should be considered as an undertaking. "Public institutions fall within the LPC, if they have the ability for independent power of decision"[29]

However, the Board decided that social insurance services provided by the Association of Pension Funds[30] were not an economic activity because:

A) Social characteristics of services,
B) Compulsory contribution to the social security system.

[28] TCB cases no:D4/1/M.H.A.-01/1 (pre examination) decision no 01-12/114-29 on 13.03.2001. published at Official Gazette on 04.01.2002 and no 24630 available on http://www.rekabet.gov.tr/pdf/01-12-114-29.pdf downloaded on 27/1/2008
[29] Guven ,p 128
[30] The Association of Pension Funds [Emekli Sandigi]

C) Amount of services and insurance premiums may be disproportionate. Moreover, the reimbursement costs of prescriptions as prescribed minimum prices in practice cannot be assessed as an economic activity…"[31]

**b) Subsidiaries:** If a subsidiary has a separate legal entity but is controlled by the parent company it will not be assessed as an undertaking. In *BIAK* [32]case, Dogan Yayin Holding AS`s defense was, it was a subsidiary of the group and in a separate market. The TCB assessed that in reality it was controlled by the corporate group (Dogan Sirketler Grubu Holding A.S) therefore they constitute a single economic unit in the relevant product market. The Board took into account "control by the parent company" rather than a separate legal entity.

However, in another decision the Board fined the parent and its subsidiary without assessing the existence economic unit between them.[33]

## 3) COMPARISON

Both systems interpret undertaking broadly and take into account "economic activity". State owned corporation is an undertaking unless it uses its public power. [34] The activity in question is whether it is an essential function of the state. Both systems evaluate the concept of control by the parent on its subsidiary to assess the subsidiary as an undertaking.

# II CONCEPT OF CONCENTRATION

## 1) UNDER THE EU

[31] TCB case 2003-1-45 Decision no 03-44/501-221 decision date 19.6.2003 available at http://www.rekabet.gov.tr/pdf/03-44-501-221.pdf downloaded on 29/1/2008
[32] TCB decision no 99-13/99-40 dated 04.03.1999 available http://www.rekabet.gov.tr/pdf/99-13-99-40 dowloaded on 30.1.2008
[33] TCB Case no E2-D1-97/2 decision no : 93/750-159 dated 26.11.1998 Official Gazette 9.12.2000 no 24255 available at http://www.rekabet.gov.tr.pdf/93-750-159.pdf downloaded on 16/2/2008
[34]Craig P, Burca De G(2007)*EC Law Text, Case and Materials*, 4th ed, New York: Oxford University Press , p 953 & The High Court of State, 10 Presidency , case no [esas no] 2001/4817decision no[karar no] 2003/4770 on 5.12.2003 " State undertakings activities are within the Competition law unless its core activities are aimed marginal interest of public."

The meaning of concentration is imperative. When a concentration falls within the scope of the ECMR, it is compulsory to notify the Commission. Art 3 of the ECMR states that:

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

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

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

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

These operations are namely; merger, acquisition and joint ventures. The Commission Consolidated Jurisdictional Notice (hereinafter CCJN) states that "The test in the Art 3 is centred on the concept of control; the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria."[35]

**A) Mergers:** Mergers occur when two or more previously independent undertakings fuse into a new undertaking and cease to exist as separate legal entities. In the Mitsubitsu Bank/Bank of Tokyo, these two amalgamated into The Bank of Tokyo –Mitsubitsu.[36]Mergers also occur when one undertaking is absorbed by the other.

[35] The Commission Consolidated Jurisdictional Notices, para 7
It combines and updates the Commission's Notices 1) on the concept of concentration 2)the concept of full-function of joint venture 3) the notice on undertaking concerned and 4) the notice on calculation of turnover
[36] Case no IV/596 available at http://eu.europa.eu/comm/competition/mergers/cases/decisions/m596_en.pdf. downloaded on 10/2/2008

Mergers can be on a legal or de facto base. De facto merger may arise, when two or more independent undertakings"…establish contractually a common economic management or the structure of a dual listed company. If this leads to a de facto amalgamation of the undertakings concerned into a single economic unit, the operation is considered be a merger" [37] There must be a permanent and an economic management.

**B) Acquisition of Control**

**1) Concept of Control**

Concentration" covers acquisition of control. Control is the main criterion to identify the transaction as a concentration in terms of the ECMR. The ECMR Art 1(b) "captures cases of change of control."[38]

The ECMR 1(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.*

2. Control *shall be constituted by rights, contract or any other means which either separately or in combination and having regard to the consideration of fact or law involved. Control is conferring "the possibility of exercising decisive influence on an undertaking* in particular by:

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

[37] CCJN para 10 & in the COMP/M.2824-Ernest&Young/Andersen Germany case de facto merger occurred. The Commission investigated whether E&Y Germany and Anderson Germany were a single entity for the purpose of the Merger Regulation. Andersen Germany was a former member of the global firm. And Andersen Global was "…no longer able to discharge its core contractual obligations of the members firms` practices worldwide, their commercial policies and their management…" Also former members do not need to wait the global firm consent to join the other networks. E&Y was assessed a single entity too because it has"… a clear permanent
economic centralised management… centrally formulated policies and centrally provided services… sharing of risks [regarding insurance and reputation] and [sharing of] revenues on the basis of referrals...the central co-ordination and facilitation of standards, strategies and initiatives and the provision of common services…These elements indicate a decisive degree of common economic management and common financial interest." para 21, 19 available at http://ec.europa.eu/comm/competition/mergers/cases/m2824_en.pdf downloaded on 10.2.2008

[38] Craig P, p 1046

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

*3. Control is acquired by persons or undertakings which:*

*a )are holders of the rights or entitled to rights under the contracts concerned; or*

*b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom,*

Generally, control is acquired by acquisition of assets or shares. It can be occurred by contract or by any other means. "Control may also be acquired by a person who already controls at least one other undertaking or alternatively, by a combination of persons (which control another undertaking) or undertakings.

In the ECMR, "person" covers public bodies, private entities and natural persons.[39] Natural person must "carry out further economic activities on their own account or if they control at least one other undertaking."[40]

The main point is change of control of an undertaking. The change of control can be sole to joint or joint to sole control. In *AMB/Rodutch*[41]case, Rodutch was jointly controlled by AMB and Royal though EPIC. The purchase of 33.33% shares by AMB provided complete control over Rodutch.

The acquisition of control either sole or joint may cause the change of quality of control. There must be a change in the composition of the control structure of the company.[42] "Art 3/1,

[39] CCJN para 12
[40] CCJN para 12& cases IV/M.82 Asko/Jacobs/Adia. Mr.Jacobs was considered as an undertaking who as private Swiss investor whose interests are industrial chocolate, sugar confectionery and coffee. However in Case COM/M3762 Apax /Travelex Mr.Dorfman was not considered an undertaking concerned because he did not carry out any economic activity other than Travelex. Cases available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3762_20050616_20310_en.pdf and http://ec.europa.eu/comm/competition/mergers/cases/decisions/m82_en.pdf respectively. downloaded on 19/2/2008
[41] C IV/M.771-AMB/Rodutch available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m771_en.pdf downloaded on 22.2.2008
[42] CCJN para 83

a concentration only covers operations where there is a change of control in the undertakings concerned."[43]

The meaning of control is the possibility of exercising decisive influence on an undertaking. Art 3/2 gives examples particularly in two ways:

a) the ownership of assets or right to use assets,
b) to be effective for the composition, voting or decision of organs over an undertaking.

It may happen by rights or contracts. The control is merely the possibility of exercising decisive influence on strategic decisions. "Choosing who sits on the decision making bodies of a company are a basic strategic decision" [44] "…that influence must be effective."[45] Thereby, control for the purpose of the ECMR-despite corporate or securities law-is any possibility of exercising decisive influence."[46]

An acquisition consists of part of one or more undertakings regardless of legal entities only those parts should be taken into account with regard to the seller. Market turnover could be clearly contributed. (Art5/2**)** They can be separate legal entities or internal subdivisions such as a unit or specific assets, brands and licences which can constitute a business.[47]

The question is who is using the power or enjoying the control over the undertaking. Therefore "…control can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies…" [48]

[43] CCJN para 7
[44] Cementbouw Handel& Industrie BV v European Communities (Case T-282/02 [2006]All ER(D)356 (Feb) paragraph 17
[45] Ibid ,para 57-58
[46] Walther M&Baumgartner U, "*Joint Venture Review under the new Merger Regulation*" The European Antitrust Review 2007 p 24 available at http://media.gibsondunn.com/fstore/documents/pubs/2007_Antitrust_Rev-WalterBaumgartner-Joint_Venture.pdf. downloaded on 13.01.2008
[47] Dabbah, M M (2004) *EC and UK Competition Law, Commentary, Cases and Materials*, UK: Cambridge University Press p 454 & COMP/M 1882.Pirelli/BIC. The acquisition included the production unit, distribution and technology unit and IPR owned by the BICC. Also Pirelli acquired 6 target companies s and acquired sole control by Share Purchase Agreement. Available at http://europa.eu/comm/competition/mergers/decisions/m1882_en/pdf on 20.2.2008

[48] CCJN para 13&Cenemtbouw v Industries BV v Commission ( case T-282/02) paragraph 72

Acquisition of control shall happen on a lasting base that affects the structure of the market.[49] In *DaimlerChrysler/Deutsche Telekom JV*[50]"…the agreement to terminate after twelve years which can extend for a one-year period .This was not a bar to the JV being established on a lasting basis."

Control can be acquired by other means i.e economic dependence. "…very important long term supply agreements or credit provided by suppliers or customers, coupled with structural links, confer decisive influence."[51] On de facto basis the Commission examines whether it has changed the control on a lasting basis or not.

"Although it is not expressly stated in the Regulation, options to acquire shares will not normally be regarded as conferring decisive influence."[52]

The acquisition of control may occur on contractual bases. The characteristic of a change is a contract of long duration; consequently a structural change in the market.[53] For example, in the disposal of a part of Iberia`s Latin American assets via Andes, the existence of vehicle transaction and holding of the assets acquired for a limited time (2 years) and the management for 42 months was not a long lasting base.

However, in *Lehman Brothers/SCG/Starwood/LeMeridien*[54], control occurred by the management agreement for 10-15 years was enough for the lasting base.

**2) Types of Control:**

[49] Preamble of ECMR para 20
[50] Case COMP/M.2903 DaimlerChrysler/Deutsche Telekom JV http://ec.europa.eu/comm/competition/mergers/cases/m2903_en.pdf downloaded on 24/2/2008
[51] CCJN para 20
[52] Verloop,P (1999) *Merger Control in the EU ,A Survey of European Competition Law*, The Hague: Kluwer Law International, 3rd revised ed ,p 6 &Bellamy &Child (2001) 367 &Case IV/M.259 British Airways/TAT dated on 27/11/1992.BAT acquired 49.9%of shares and TAT had 50.1% and BA had options to purchase the outstanding shares at any time up to 1st April 1997. Since it is not certain whether they option will be exercised the possible second transaction will not be taken into account for the current operation. Available at http://ec.europa.eu/comm/competition/mergers/cases/m259_en.pdf downloaded on 24/2/2008 following that after 4 years time BA had exercised this option. (Case IV/M.806 British Airways/TAT (II) )
[53] CCJN para 18
[54] Case no COMP/M- 3858 Lehman Brothers/SCG/Starwood/LeMeridien. Control occurred through a management agreement and relied on the duration of the management of the hotels (10-15 years) between Starwood and Newcon. Available at http://ec.europa.eu/comm/competition/mergers/cases/m3858_20050720_20310_en.pdf downloaded on 24/2/2008

**a) Sole Control:** It usually happens on a legal basis when the majority of voting rights is acquired. Acquisition of more than 50 % of share capital leads to sole control. "A classic acquisition of control is where100 percent of share capital is acquired."[55] Such as in *FIAT/ERGOM* case.[56]

It may also be acquired by a qualified minority on de jure (legal) or de facto (actual) bases.[57] Under the ECMR, in spite of the majority of share capital, it may not confer decisive influence because the minority shareholders may have a veto right in strategic decisions of the undertaking.

In *Ford/Hertz*[58] the Commission evaluated de jure control. Ford had 49% voting rights and power to appoint 4 directors on the Hertz Board where the decision was taken by the majority. Ford had power to convert the shares type C to B by agreement with the other shareholders in Hertz. It provided Ford with a majority on the Hertz Board .Therefore, acquisition of 5 % of shares from Commerzbank did not imply a change in the quality and degree of decisive influence because Ford already exercised it.

Equally, the minority share holders in reality may not be able to use this right effectively. For instance, in *Arjomari and Wiggins* case,[59] Arjomari had 39% of the shares in Wiggins. However the remaining shares where held by 107.000 shareholders and was widely dispersed. The Commission found that Arjomari possibly held the majority at the shareholding meeting and it was likely that Arjomari had control of the undertaking.

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[55]Bellamy&Child (2001) European Community Law of Competition in P.M.Roth QC (eds) 5th ed, London: Sweet&Maxwell p 366

[56] Case no: COMP/M.429-FIAT/ERGOM sole control was acquired by way of purchase of shares. Fiat acquired 100 % of the shares and has sole control over the ERGOM. available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4929_2007120_20310_en.pdf downloaded on 10.2.2008

[57] CCJN para 55

[58] Case IV/m397-Ford/Hertz available at http://ec.europa.eu/comm/competition/mergers/decisions/m397_en.pdf downloaded on 19/2/2008

[59] Case no IV/M025-Arjomari-Priox SA/Wiggins Teape Appleton plc. Available at http://eu.europa.eu/comm/competition/mergers/cases/decisions/m25_19901210_300_en.pdf downloaded on 10/2/2008 also similar case No IV/M.765-Adia/Ecco , Finecco was controlling shareholder of Ecco and the Comission taken into account the majority of the votes in annual general meeting for last 3 years and despite of minority shareholders, Finecco had majority of votes and sole control of Ecco.

**b) Joint Control:** It occurs when two or more persons or undertakings are able to exercise decisive influence over another undertaking. "…the latter has to take into account the potentially different interests of the other party or parties."[60] Consequently, the shareholders have the power to block actions on strategic decisions of the company. It requires co-determination of the shareholders on a commercial policy.

When parent companies have to agree on concerning major decisions for JV, there will be joint control. [61]

It is established where the parent companies have equality in voting rights or appointment of decision making bodies. The principle of equality is crucial and none of the companies had a casting vote. As seen in, *Gec Marconi/Alenia,*[62] both parties had 50-50 shares and right of representation on an equal basis in management and decision making bodies of the new JV.

It can be established on de jure or de facto bases. In the *Ericson/Nokia/Psion/Motorola* [63]case Ericsson, Nokia and Psion jointly controlled Symbian .It was characteristics of joint control over ,i.e. the power to block any key decisions. Then Motorola purchased shares. (23.08%, 23.08%, 30.77% and 23.08 % respectively) Obviously, the transaction caused a change in the structure of control. According to the Shareholder Agreement any strategic decision would take by 67% of voting rights. Also there was no agreement for the companies to have joint collective action. There was no de jure sole control.

The next step was assessing de facto joint control .There was absence of prior existence of strong common interests and a prior link between the parent companies, absence of contribution of vital policies and also the possibility of increasing JV shareholders in the future. Even though there was a change in the structure of control; considering those factors

[60] Case no IV/M.0023- ICI/Tioxide available at http://ec.europa/eu/comm/competititon/mergers/cases/decisions/m23_en.pdf 10.02.2008
[61] CCJN point 63
[62] Case IV/M.1258 –Gec Marconi/Alenia available at http://ec.europa.eu/comm/competititon/mergers/cases/decisions/m1258_en.pdf downloaded on 23.02.2008 and also Case No IV/JV.22-Fujitsu/Siemens available at http://ec.europa.eu/comm/competition/mergers/decisions/jv22_en.pdf downloaded on 23.02.2008
[63] Case No IV/JV.12-Ericsson/Nokia/Psion/Motorola .Possibility of changing coalitions between the minority shareholders will normally exclude the assumption of joint control.(para 17) available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/jv12_en.pdf downloaded on 23/2/2008

could not lead to a joint control over Symbian on de facto base as well. Subsequently, it did not constitute a concentration within the meaning of the ECMR.

It may exist through veto rights. The minority shareholders operate them. It is illustrated by agreement, statues of the JV, special quorum, and approval by a body on strategic decisions of the undertaking. The strategic decisions are usually appointment, dismissal of senior management and approval of the budget, which is accomplished by its commercial policy.

The mere existence of the veto rights is enough because the regulation requires the possibility of decisive influence not actually exercised. Veto rights should be related to strategic commercial policy, appointment of senior management or determination of budget or business plan.[64]

**C) Joint Ventures:**

JV refers to "association of firms or individuals formed to undertake a specific business project."[65] Alternatively, it is "…an agreement by which two or more undertakings (the `parents`), in order to achieve a particular commercial goal, integrate part of their operations, and put them under joint control…The entity set up by the parents may take the form of a jointly controlled subsidiary company, but it may only be a joint committee or a partnership." [66]

The problem with JV is, "whether they should be treated by analogy with cartels, and be regarded as essentially a `behavioural` problem to be dealt with under Art 81, or as a `structural` problem, to be dealt with under the Merger Regulation"[67] Therefore, it is imperative to point out what constitutes a full function of JV on a lasting basis for the ECMR.

[64] CCJN para 64-73
[65] http://ec.europa.eu-EU/Competition /Glossary:J- dowloaded on 23.2.2008
[66] Jones A, Sufrin B(2008)*EC Competition Law*, 3rd ed, New York: Oxford University Press p 1094
[67] Craig, p 1046

The 4064/89 Merger Regulation had cooperative and concentrative joint venture[68] distinction but this confusion of artificial classification was rectified and replaced by the term full functionality.

ECMR Art 3/4 states that *"The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the paragraph 1 (b).*

**1) The Full Function Joint Ventures:** Two conditions should be met. Firstly, joint control by the parents, secondly full functionality on a lasting basis. Therefore, full function joint ventures will fall within the scope of the ECMR if they have a Community dimension.

According to Korah[69], a JV cannot be an autonomous economic entity because it is controlled jointly by the parent companies. However, it does not affect the full functionality of the JV. It may seem contrary but "…it is sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect."[70] "Joint venture may be a full function undertaking…economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions."[71]Otherwise, the meaning of Art 3(4) cannot be fulfilled.

The competition concern for JV is, they may engage in collusion especially where the parents companies have extended activities on upstream or downstream activities. It is called the" spin-over effect" which expressed in Art 2 (4) of the ECMR. Such coordination will assessed according to Art.81 (1) and (3) of the Treaty on merger procedure.

The Commission takes into account:

- Sufficient resources to operate within a market
- Whether a joint venture can be on the market by its own access or presence
- Sale/Purchase relations with the parents

[68] The Regulation 4064/89 Art 3(2)
[69] Korah, V.(2007) *An Introductory Guide to EC Competition Law and Practice,* 9th ed, Oxford: Hart Publishing p 393
[70] CCJN para 93
[71]Cementbouw Handel& Industrie BV V European Communities(Case T-282/02)CFI [2006] All ER(D) 356 (Feb) para 62

- JV`s duration.

Firstly, a full function of JV must have sufficient resources. "…JV 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."[72]

A JV should have production, technology, distribution facilities, management, workforce, assets, and resources**.** Usually, three years given to completed it. The Commission does not require" a new joint venture to be fully functional from scratch; rather joint ventures are granted a period of up to three years"[73]

*Burda/Hachette/JV* [74] independency from the parent company for staff and management will not change the creation of JV. In *Toray/Murata/Teijin*[75], notification was made on 5.11.2002 then the parents companies started to transfer their respective R&D, and marketing and sales activities. The transfer of manufacturing activities in future time did not affect full-functionality.

Secondly, it must not be auxiliary to their parent companies` or business activities. JV itself should access the market. In *RSB/Tenex/Fuel Logistic*[76], the JV had no assets (apart from some office equipment) and workforce which would be completed when the JV is

[72] CCJN para 94&Case COMP/M.3097-Maersk Data/Eurogate IT/Global Transport Solutions JV,Case COMP /M.3084-Siemens/Sequa/JV, Case COM/M.4232-Scottish & Newcastle/Kuehne Nagel/JV , in Case COMP/M.3764-Belgacom/Swisscom/JV. Joint Venture BICS in communication sector, joint venture is able to bill its customers.

[73] Dunn G. Baumgartner U` *Joint Venture Review Under the New EC Merger Regulation*` p 24 & CCJN Point 97

[74] Case no COMP/M.4122-Burda/Hachette/JVavailable at http://ec.europa.eu/comm/competititon/mergers/cases/m4122_en.pdf downloaded on 5.3.2008

[75] Case no COMP/M.2763-Toray/Murata/Teijin available at http://ec.europa.eu/comm/competititon/mergers/cases/m2763_en.pdf downloaded on 5.3.2008 notification date is 5.11.2002 and transfer of manufacturing facilities is 1.4.2003 In Amadeus/GGL/JV, JV has sufficiency of workforce, financial resources, and its management for an initial time. After the initial time, the joint venture will be independent on the market because it will have the necessary licences its own name, together with its own brands and an independent business policy which give it power to decide on its customers and its prices of goods or services. [75] Case No COMP/M.2794-Amadeus/GGL/JV available at http://ec.europa.eu/comm/competition/mergers/cases/m2794_en.pdf downloaded on 5.3.2008

[76] Case No IV/M.904-RSB/Tenex/Fuel Logistic http://ec.europa.eu/comm/competition/mergers/cases/m904_en.pdf downloaded on 8.3.2008

economically viable. Also, the parents had no future plan for such a development. Therefore, the JV was auxiliary to their parents and did not constitute a concentration.

In addition, JV is not full-function if it is limited to the distribution or sales of its parent companies product when it acts as an agent.[77] On the contrary if the parent companies act as JVs agent, JV will be still assessed as a full function.[78]

Thirdly, the sale and purchase relationship with the parent companies is important especially if the parent companies are strong in the upstream or downstream market. For the initial period does not affect the full functionality.

Also, the Commission considers special conditions of the market [79] like in *BP/Nova Chemicals*[80] .It was held that, to procure styrene feedstock for five years from its parent did not alter the full functionality because its competitors also vertical integrated in the market and the length of supply arrangement was reflect of the industry in styrene market.

The volume of sales to the parent is considered on a case-by case basis. However, the Commission assumes that "if the JV achieves more than 50% with third parties, it will be a typical indication of full-functionality."[81] The rationale is whether JV stands in the market and has a normal commercial relationship with its parents.

To purchase from the parent is important and it depends on the value is added to the products or services by JV. As a result, JV can be a sales agency of the parents or trading company. In *BP/Nova Chemicals*, the minimum volume of styrene feedstock for five years (70%-80%) and

[77] CCJN para 95
[78] Case No COMP/JV.54-Smith&Nephew/Beiersdorf/JV. JV will manufacture most of the products in its own manufacturing facilities or will buy them from third parties and will rely on products made by the parents only to a limited extend. Apart from expected its own sales 40-60%and marketing force remain 40-60% will be trough "the parents" sales organisation by Smith&Nephew to hospitals; by Beiersdorf to pharmacy tunnel. So, in the case parents assesses as JV`s agent. The case is available at http://ec.europa.eu/comm/competition/mergers/decisions/jv54_en.pdf. Dowloaded on 7/3/2008 also Case no IV/M.1227 Cargill/Vandemoortele-JV Although JV will use Vandemoortele`s sales force, later the parent will acts as an agent for the JV. Available at http://ec.europa.eu/comm/competition/mergers/decisons/m1227_en.pdf downloaded on 07.03.2008
[79] CCJN para 97
[80] Case No COMP/M.3578-BP/Nova Chemicals/JV available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3578_20050701_20310_en.pdf downloaded on 05.03.2008
[81] CCJN para 98-100

importantly, processing of styrene by the JV adds significant value (around 30%) and it is not just passing through the import of parent companies. The JV had full-functionality.

Fourthly, a JV must be on a lasting basis. It may be constituted for indefinite or finite time. A JV agreement, which will last twenty years and be renewed for a ten-year period is found sufficient for a lasting basis.[82]

**2) UNDER TURKISH LAW**

Art 7 stipulates mergers and acquisitions. "*Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or part of the country or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited."*

The LPC Art 7.2 "*The Board shall declare, via Communiqués to be issued by it, the types of mergers and acquisition which have to be notified to the Board and which permission has to be obtained, in order them to become legally valid."* Pursuant to this and Art 27(f) of the LPC the Board has issued the Communiqué no 1997/1[83] which regulates the merger control in Turkey (hereinafter TMR (Turkish Merger Regulation)) The TMR Art 2 states that mergers and acquisition are deemed where;

a) *"merger of two or more independent undertakings*

[82] Case No COM/M.2773-Nestle/L`Oreal/Innev available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2773_en.pdf downloaded on 5.3.2008 Also in Lehman Brothers/Starwood/LeMerdien 10-15 years was sufficient for JV duration however not a period of 3 years. Case No IV/M.722-Teneo/Merrill Lynch/Bankers Trust .Besides that, creation of JV for disposal of Iberia`s Latin American assets within 3 years has assessed not on a lasting basis. Available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m722_en.pdf downloaded on 23.2.2008

[83] Communiqué on the Mergers and Acquisitions Calling for Authorization of the Competition Board, ( 12.08.1997: Official Gazette no 23078) Amended by the Competition Board Communiqué no .1998/2, 1998/6 and 2000/2 the translation was taken from the Competition Board's translation which is available at http://www.rekabet.gov.tr/eteblig.asp

*b) control or acquisition, by any undertaking or person, of the assets of another undertaking, or the whole or a part of its partnership shares, or the means granting it the power to have a right in the management*

*c) Joint ventures which emerge as an autonomous economic entity possessing labour and assets to achieve their goals, and which do not have the aims or effect of restricting competition between the parties, or between the parties and the joint venture."*

**A) Mergers (Birlesme):** Merger and acquisition were regulated in the several acts. [84] For instance, according to the Turkish Commercial Code (TCC) Art 146 defines that a merger and acquisition occurs:

1) Two or more commercial companies amalgamate into a new company or one or more undertakings accede to the commercial company.

2) There must be incorporated companies, which were specified in TCC Art 136.

3) In terms of mergers and acquisition within TCC, it must be agreed and occur between especially specified incorporated companies in the TTC (TCC Art 147)[85]. Otherwise, it would not be regarded as a merger or acquisition under the TCC.

According to the TCC, in the principle of universal succession there is amalgamation of assets and liabilities in a merger case. Also, the partnership would continue automatically in the new or transferred company. Naturally, change of control arises from it and it can be subject to the Board's permit. "Mergers always change the control when the undertakings are independent."[86]

Despite the definition of mergers in other legislation "the competition law is based on economic facts and activity in order to protect competition hence the essences of the implementation of the rules has an economic nature. Therefore, mergers should be considered

[84] Turkish Commercial Code(Art 146-151 ) Turkish Code of Obligations(Art 179-180) Banking Law (Art 19)
[85] In addition, as stated by the article, an open company, a commandite company, a joint stock company and a joint stock commandite companies are considered the same sort of company by means of the TTC.
[86] Inan, N, Fundamental Problems About Mergers and Acquisition Rules, Journal of Competition, no:2 Year 2000 p 19

as an economic term rather than legal."[87] "The LPC focuses on the economic side of the operation."[88]

If companies make a corporate agreement; bring their resources together without amalgamating of assets and liabilities; they will not be assessed as a merger [89] in terms of the TCC. Conversely, the Board has determined that the acquisition of production units is a merger despite not being mergers and acquisition in terms of the TCC. [90]

Therefore, merger and acquisition should be defined by terms of the competition law. The LPC and TMR specially refer to "merger and acquisition of independent undertakings". The meaning of independent undertakings by the competition law is economic independence rather than legal independence. Economic independence is "an undertaking must have an autonomous management and accounting; have power to make decisions as regarding its economic plans and must govern its production finance and sales policy according to its own economic aim and benefits. In short, it must not be under the economically control by another undertaking."[91]

The rationale is if the undertakings are not independent, change of control cannot occur and the control would be the same as before merger and acquisition. Subsequently, it does have a major effect on the level of concentration in the market.[92]Whereas, the Board took into account legal entity as a criteria of independent undertaking in its early decisions and it did not considered the concept of independence.[93] Nevertheless, the Board has changed the criteria in the following decisions. For example, Toros Gubre acquired four companies. Including the acquirer, all companies were under direct or indirect controlled by Tekfen Holding A.S. and the Board decided that, although the parties had separate legal entities, they

[87] Sanli K C(2000) `*Invalidity of decisions of Association of Undertakings and Agreements contrary to the Prohibited Activities under the Law on Protection of Competition*` Ankara: Turkish Competition Board, Thesis Series no :3 Published no:49, p 321available http://www.rekabet.gov.tr/word/Keremcem/12.2.Bolum.3.kisim.doc. (8.2.2008)

[88] Arslan, I Y. (2007) *Competition Law Theory, Practice and Regulations*, Enlarged 4th ed, Ankara: Ekin Publishing p 538

[89] Guven p 105

[90] TCB decision no 52/377-41 date 12.2.1998; Decision no 99-5/41-16 date 04.02.1999 available at http://www.rekabet.gov.tr/pdf/52-377-41.pdf and http://www.rekabet.gov.tr/pdf/99-5/41-16.pdf respectively. downloaded on 9.2.2008 in those decision relevant product markets did not analysed.

[91] TCB case no D4/1/M.H.A.-01/1 decision no 01-12/114-29 date 13.03.2001 available at http://www.rekabet.gov.tr/pdf/01-12-114-29.pdf on 27.1.2008

[92] Pelin, p 107

[93] TCB decision no 42/278-23 dated 10.12.997 (Milta /Bosstay) available at http://www.rekabet.gov.tr/pdf/42-278-23.pdf downloaded on 06.02.2008

were in the same economic unit. As a result they constituted one undertaking in terms of LPC. In addition parties in the transaction must be independent undertakings .Therefore, the transaction within the same economic unit falls out scope of the LPC. [94] Now the Board applies economic independence criteria.

**B) Acquisition of Control (Devralma):** TMR Art 2(b) expresses:

> *"b) control or acquisition, by any undertaking or person, of the assets of another undertaking, or the whole or a part of its partnership shares, or the means granting it the power to have a right in the management*

*For the purpose of this Communiqué, control may be brought about by rights, contracts or any other means which, either separately or combination, de facto or by law, grant the opportunity of exercising decisive influence on an undertaking, and in particular by an ownership right or an operative right to use on all or part of the assets of an undertaking, or by right or contracts which ensure decisive influence on the composition or decision of the bodies of an undertaking.*

*Control shall be deemed to have been acquired by the holders of rights, or person or undertakings entitled to use the rights under a contract, or in spite of not having such right and power, have de facto power to exercise such rights."*

The TMR states "control or acquisition" which seems either of control or acquisition are enough for the merger control. However "only acquisition of assets or shares without acquisition of control do not constitute an acquisition which is subject to the TMR"[95]The High Court of State also stated that, the control must be acquired.[96]

[94]TCB case no 2005-1-125 decision no 05-75/1018-284 .decision date 28.10.2005 Available at http://www.rekabet.gov.tr/pdf/05-75/1018-284.pdf downloaded on 22.12.2007 also Decision no 99-12/93 Decision no 03.03.1999: D4/1K.T.S.-98/3 Decision no 89/705-147 dated 5.11.1998
[95] Guven, p 191
[96] The High Court of State, 10 Presidency date 26.3.2002 case no [esas no]:1998/5649 decision no [karar no] 2002/846

**1) Concept of Control:** The acquisition or control occurs in the case of acquisition of assets, partnership shares or other means which grant rights in management. It states two particular ways:

1) Ownership of assets or operative rights on the assets
2) Having decisive influence on the composition or decisions of the bodies of an undertaking.

Control is regardless of the way either law or de facto bases must grant the opportunity of decisive influence over an undertaking. The control may be gained by management agreement such as in *Bosch/ Rexroth case*.[97]

"To assess the change of control within the meaning of the competition law, its essence is not the percentage of shares in the transaction but whether the acquirer has decisive influence over the management of the undertaking relating to the shares."[98]

Decisive influence is "an undertaking has an effect on the determination of another undertaking's commercial policy in order to act for its own interests. The consideration is not only on a legal base but also on actual circumstances."[99]

The TCB examined the meaning of "decisive influence" in transfer of Fida Film shares to Bosphorus Investment.[100]After the transaction the previous owner was entitled to appoint one member of four to the Board of Directors and according to the Shareholders Agreement he had a right of veto on any important decision which was classified as purchase of new assets, to grant encumbrance on the assets or grant guarantee rights in favour of a third person loan commitment, to make an agreement relating to shareholders and dissolution of company. However, the Board decided that, the veto right was aimed to protect the financial interests of

[97] TCB case no D3/1/B.G.-01/1 decision no 01-10/106-26 Robert Bosch GmbH/Mannessman Rexroth AG – in the case Rexroth would manage by Bosh for 10 years consequently Rexroth would be control by Bosch because of the agreement provided a decisive influence over the company. Available at http:// http://www.rekabet.gov.tr/pdf/01-10-106-26.pdf downloaded on 17/4/2008
[98] TCB case no 2006-2-153 decision no 06-91/1163-344 Dreiundvierzigste "Media"/Dogan Yayin Holding A.S decision date 15.12.2006 available at http://www.rekabet.gov/tr/pdf/06-91-1163-344 downloaded 06.02.2008
[99] Guven, p 195
[100] TCB case no 2007-2-177 Bosphorus Investment BV/ Fida Film Yapim ve Dagitim Reklamcilik A.S. decision no 07-87/1100-425 decision date 22.11.2007 available at http://www.rekabet.gov.tr/pdf/07-87-1100-425.pdf downloaded on 07.2.2008

himself and foremost it did not provide decisive influence on the direction of company. Nevertheless the control had been changed and the transaction fell within the meaning of Art 2(b) of the TMR.

Also, TCB has underlined the importance of "decisive influence" and stated that "…to determine the existence of joint control; the undertakings must have a decisive influence on the JVs decision making organs regardless of having equal capital shares or equal rights….". In the case "decisive influence" referred to the strategic decisions of the JV.[101]

The control may be gained by the representation at the decision making organs as in *Hedef Holding/Alliance UniChem Plc (AU)*[102]case. The shares were divided A and B. According to the Shareholders Agreement, AU would acquire 25% of B shares. The Executive Board's decisions with regard to the management of the company would require a majority of B votes. In addition, the appointment or dismissal of the chief executive or the executive director would need approval of B shares. Furthermore, it provides AU ability to nominate three members in eight of the Executive Board.

In addition, also the organ of the company is important to be represented. For example, in the TCC, the Executive Board and Control Committee are compulsory organs not Supervisory Committee [103] and the Executive Board holds the control because it is a representative and executive organ. However, the control can also be gained trough the Supervisory Committee over the undertaking.[104]

Change of control is in essence the existence of a concentration and as a result of merger control.[105] The Board in *Paksoy/Kaksan*[106] examined both companies` and shareholding

[101] TCB case no D1/1/I.A.Y.-01/1 decision no 02-57/748-304 decision date 27/9/2002 the case is Art 4 investigation about concerted practice. The strategic decisions were , selling , purchasing , renting or operating of the mining fields, approval of budget and approval of capital investment plans, transfer of technology available at http://www.rekabet.gov.tr/pdf/02-57-748-304.pdf downloaded on 09.04.2008
[102] TCB decision no D1/1/C.D.-01/4 decision no 01-06/54-17 decision date 30.01.2001 available at http://www.rekabet.gov.tr/pdf/01-06-54-17.pdf downloaded on 10.04.2008
[103] Turkish Commercial Code Art 312 and Art 347
[104] TCB case no D3/1/P.U.-00/7(Acquisition) decision no 00-36/399-225 date 26.09.2000 available at http://www.rekabet.gov.tr/pdf/00-36-399-225.pdf. downloaded on 22/4/2008
[105] TCB case 2006-2-42 decision no 06-31/373-95 available at http://www.rekabet.gov.tr/pdf/06-31-373-95.pfd downloaded on 10.2.2008
[106] TCB case 2007-2-176 decision no 07-79/992-387 dated 18.10.2007 available at http://www.rekabet.gov.tr/pdf/07-79-992-387.pdf downloaded on 07/2/2007 Similarly, the TCB has assessed the change of control in Tusas/TIA, Tusas was holding 49 % of the partnership shares in TIA and had acquired

structure. Paksoy `s two shareholders were actually controlled by SB who had all together 79.32% of the share in the company and also SB was in sole control in Kaksan. Consequently, both the undertakings were under SB`s sole control. It was held that; amalgamation of Kaksan in Paksan would not change the control therefore the operation would not fall under the TMR.

In Turkish law, "in order to speak of a merger or acquisition by means of competition law, control over an enterprise shall change either hands or its nature; the latter meaning shifting from sole control to joint control, or vice-versa"[107] The acquisition of 49% shares from Levi Strauss (LS)Istanbul which was jointly controlling by LS International. The acquiring firms were also indirectly controlling by LS International. By the transaction; the LS Istanbul's control would changed from the joint control to sole control of LS International. Therefore, change of structure of control also falls within the TMR. [108]

The assets subject to acquisition can be tangible or intangible. In Hexagon/Transmetal[109] case, the acquisition of Transmetal `s whole assets and its provision of services, employees, know how, customer portfolio and transfer of registered trade mark to Hexagon TR led to a change of control of Transmetal and the transaction was an acquisition within the meaning of Art 2(b) of the TMR.

**2) Types of Control**

**a) Sole Control (Tek Kontrol)**

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42 % and 7% of shares from Lockheed Martin and General Electric. The Board underlined "the change of control" in TIA and compared the control before and after the transaction. Tusas was already controlling TIA and held that the transaction was out of its scope. (Case no 2004-3-149 decision no 04-81/1157-290 TUSAS/TAI decision date 23.12.2004 available at http://www.rekabet.gov.tr/pdf/04-81-1157-290.pdf downloaded on 07.02.2008)

[107] Esin G I & Lokmanhekim S T(2004*) M&A Transactions Under Turkish Law*, 1st Ed, Istanbul:Beta Publishing p 120

[108] TCB case no 2005-3-21 Levis Strauss Istanbul/ Levis Straus International decision no 05-14/167-60 decision date 11.03.2005 LS Netherland, LS Poland, LS Praha, LS Hellas AEBE were acquiring companies.(49% of shares, each held 1 share respectively) available at http://www.rekabet.gov.tr/pdf/05-14-167-60.pdf downloaded on 09.04.2008

[109] TCB case 2007-2-40 Hexagon Metrology Mak.Tic.ve San.Ltd.Sti/Transmetal Mak.Tic.San.A.S. decision no 07-53/594-200 decision date 20.06.2007 available at http://www.rekabet.gov.tr/pdf/07-53-594-200.pdf downloaded at 07.02.2008 & TCB case D.4/1/A.I.-98/4 Tedas Genel Mudurlugu decision no 87/693-138 date 16.10.1998 transfer of the operating rights falls within the Communiqué. Available at http://www.rekabet.gov.tr/pdf/87-693-138.pdf downloaded on 07.02.2008

The Board decided that[110] acquisition of 51% of partnership shares is enough to have sole control over the undertaking. It was considered that, the type of shares to enable to have control on the Board of Directors and General Shareholders` Meeting. It was decided that, acquisition of 51% of shares is sufficient to have decisive influence over the undertaking.

The Board assessed de facto sole control where Jacob`s shares in Adecco would be increased from 23 % to 29% by way of acquisition from Akile Finance SA[111]. The Board adopted the Commission Notice [112] to obtain de facto sole control where the minority shareholders are likely to achieve majority, whereas the remaining widely dispersed shares are unlikely to be represented at the shareholders` meeting. The determining of existence of the sole control, the presence of shareholders in the shareholders meeting in the previous years will be evidence. The attendance of the shareholders, the minority shareholders` stable majority votes taken into account and the large minority has taken sole control. The Board took the General Meeting records of the last five years and assessed that to obtain 26% of shares would be enough to have de facto control over Adecco. It also considered that, the General Meeting is the decision-making organ in the company and the shareholders do not have the veto or privilege rights.

The Board applied negative sole control in CFK/Keytrade. [113] CFK Holdings acquired 50% of shares from Keytrade. Before the transaction Keytrade`s 50% shares belonged to one shareholder and after transaction CFK would have 50% of shares and veto right and four natural persons would have 50% of shares. The TCB applied the CCJN to assess negative control. It was determined that, neither in the General Share Holders Meeting or the Executive Director Board, CFK did not have power to impose the decisions but could create a deadlock situation by the veto right. In addition the other shareholders had no legal or de facto basis for cooperation. Therefore, CFK had negative sole control of Keytrade.

[110] TCB decision no 99-21/166-85 (Dogus Holding&T.Garanti Bankasi&Tansas) decision date 28.04.1999 Official Gazette 31.05.2000 no:24065 available at http://www.rekabet.gov.tr/pdf/99-21/166-85.pdf downloaded on 11/2/2008

[111] TCB case no 2006-4-42(Acquisition) Jacobs Holding AG/Akila Finance SA decision no 06-27/319-74 date 14.06.2006 available on http://www.rekabet.gov.tr/pdf/06-27-319-74.pdf downloaded on 1/5/2008

[112] Notice on the Concept of the Concentration under the Council Regulation 4064/89 point 14 reference case Societe Generale de Belgique/Generale de Banque (Case IV/M.343)

[113] TCB case no 2007-3-141 decision date 07-85/1038-400 decision date 8.11.2007 CFK Holdings Inc/Keytrade AG available at http://www.rekabet.gov.tr/pdf/07-85/1038-400.pdf downloaded on 07.02.2008

**b) Joint Control (Ortak Kontrol)** Joint control exists when two or more undertakings have a decisive influence over another undertaking. Therefore, the parties must agree on the strategic decisions of the undertaking controlled.

The joint control may be established though equal voting rights, equal representation on the decision making organs, veto rights or when the minority shareholders act jointly. [114]

Joint control may be established by agreement. In *Martur/HCP*[115] where the parent company (HCP) had 20% shares but by agreement was entitled to appoint 1 member in five to the Executive Board. Foremost, strategic decisions relate to the business activities of JV would require HCP `s affirmative votes. The Board assessed the existence of joint control.

The Board decided that, only one or two parent companies had veto rights. Therefore it did not constitute joint control.[116]

In this form of control, normally the companies have voting rights on the decision making organs of the JV, proportionate to their capital shares. However, the undertaking may have equal voting rights regardless of their shares according to the Shareholders Agreement. Equally, the joint control exists when the undertakings are equally represented at the decision making organs of JV.

Minority shares or privileged shares are also important when the privileged vote or equal representation at the decision making organs or veto rights by the Articles of Association provide joint control. Veto rights must be related to strategic decisions of the undertaking.[117]

In *OPET/Enron*[118], a veto right provided a joint control. Enron acquired 7.75% of shares from OPET and had an option to purchase up to 16.67%. This amount of transfer did not give

[114] Guven, pp 218-220
[115] Decision no 2008-4-32 decision no 08-16/171-60 decision date 21.2.2008 Martur/HVB Capital Partners AG available at http://www.rekabet.gov.tr/pdf/08-16-171-60.pdf downloaded on 11.4.2008
[116] TCB decision no D4/1/O.P.-98/2,(D1/2/OP.-98/2) LPG Ortak Girisim. Decision no 99-26/230-138 decision date 27.05.1999. There were 39 parent companies. Aygaz group could use a negative vote and block the decision. available at http://www.rekabet.gov.tr/pdf/99-26-230-138.pdf downloaded on 17.4.2008
[117] Guven pp 218-219
[118] TCB case number D1/1/C.S.-00/5 OPET Petrolculuk AS/Enron Coorperation decision no 00-20/201-110 decision date 30.05.2000 available at http://www.rekabet.gov.tr/pdf/00-20-201-110.pdf downloaded on 09.04.2008

Enron any right to affect day-to day management of OPET. However, according to the Declaration and Shareholders Agreement Enron had 1 A Group privilege share which provided a veto right at the General Meeting and the Board of Directors for the long time strategic decisions such as the dividend distribution, amendment of Articles of Association, capital increases, winding of company. In addition, Enron was able to obtain all information of the legal, financial and commercial transaction of OPET. The Board decided that, the OPET would be jointly controlled by Ozturk Family and Enron.

**C) Joint Venture (Ortak Girisim):** JV can be in many forms. It can either have legal entity or an ordinary partnership. In addition, it may be formed by acquisition of an existing company to form joint control.[119] "The competition law is interested in economic relationship behind JV, even if it has a legal entity."[120] The importance of JV in competition law is that the rivals may create a joint venture to eliminate the competition or the parents by controlling of the JV independently can determine prices, production, distribution and sales. [121] Either way competition would be significantly impeded.

**1) Joint Control:**

The Board assessed one of its decisions, in the absence of joint control; the transaction was assessed as an acquisition within the meaning of Art 2(b) of TMR.[122] It was criticised that"the Board should have decided that it was not merger and acquisition within the meaning of the LPC."[123] However, in other decision the Board has assessed that; according to Art 2(b) three requirements must be fulfilled at the same time:

1) There must be joint control
2) JV must be an autonomous economic entity
3) JV must not aim to effect any restricting competition between the parents or between the parents and JV. Otherwise, this transaction would be assessed as a "concerted practice"

[119] Decision no 2002-3-9 decision no 02-14/149-65 decision date 12.3.2002 Baymak Makina ve Ticaret AS/Beteiligungs GmbH available at http://www.rekabet.gov.tr/pdf/02-14-149-65.pdf downloaded on 11/4/2008
[120] Arslan p 619
[121] Guven P, p 229
[122] Case no D1/M.A.K.-00/1(negative clearance) decision no 00-10/98-48 decision date 08.03.2000 SMS AG/Mannesmann AG available at http://www.rekabet.gov.tr/pdf/00-10-98-48.pdf on 11.4.2008
[123] Arslan p 621 the author stressed the important of joint control at p 661

according to Art 4 on demand it would be assessed under Art.5 of the LPC. The Board had granted an individual exemption pursuant to Art 5 of the LPC. [124]

**2) Autonomous economic entity**: In order to achieve its commercial goal it must have enough assets and organisation as an economically independent firm on the market. In *Netcell*,[125] the criteria were set to determine existence of an autonomous economic entity. Firstly, the JV should have separate accounting, employees, management and financial resources and its own commercial policy. Consequently, it is important who are the main suppliers and main customers and whether there is any integration of business activity with the parents. It will not be autonomous JV; if business activity is limited to parent activities such as R&D, production or distribution and the JV would be dependant on the parent commercial policy. Fundamentally, the JV must add value to products.

In the case, the main buyers were the parent companies and the JV was financially dependent on the parents. Therefore, the Board assessed that the JV was not an autonomous.

In *Yatas/Cauval Industries*[126], reference was made to the EU. The main criterion stated was" whether or not the JV behaves as an independent actor in the market." With regard to purchases or sales from the parents it is important that these amounts have reached significant volume. However, sales or purchases for an initial time does not damage JV`s autonomous entity.

An initial time depends on characteristic of the market but in normal conditions it should not exceed three years.

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[124] TCB case no DI/H.G.K.-00/2 (Exemption) decision no 00-39/434-240 decision date 17.10.2000 Anadolu LPG Industrial Association Member of Undertakings (Sanayiler Dernegi Uyeleri) / Anadolu LPG Temin ve Dagitim AS. available at http://www.rekabet.gov.tr/pdf/0039-434-240.pdf on 11.4.2008 also early decision where those requirements was not considered decision no D4/1/M/O.-98/10 decision no 80/617-119 decision date 20.08.1998 available at http://www.rekabet/gov/tr/pdf/80-617-119.pdf & similar case decision no 99-5/40-15 decision date 04.2.1999 at http://www.rekabet.gov.tr/pdf/99-5-40-15.pdf downloaded on 11/4/2008

[125] TCB case no 2002-2-46(preinvestigation-exemption) decision no 02-56/697-281 decision date 19.9.2002 available at http://www.rekabet.gov.tr/pdf/02-56-697-281.pdf downloaded on 11/4/2008 &Also in *Birlesik Yayin/Biryay/Yaysat* "newspaper and magazine delivery market", not having enough distribution networks, transportation systems and only 10 employees, JV was not an autonomous entity. Case no D2/2/B.E.-99/1 decision no 00-26/292-162 decision no 17.07.2000 available at http://www.rekabet.gov.tr/pdf/00-26-292-162.pdf on 12.04.2008

[126] TCB case no 2005-3-138 decision no 06-87/1125-328 decision date 06.12.2006 available at http://www.rekabet.gov.tr/pdf/06-87-1125-328.pdf downloaded on 06.02.2008

To consider the long term sales to the parents, JV` s active participation in the market, percentage of its sales and whether it was made under normal market conditions is considered. In the case, parent companies would be the exclusive distributor. In addition the parents would be the purchaser. (At a maximum of 10% profit) and the existence of an agreement for indefinite time for distribution and dependence on the parents for IPS lead to absence of autonomic entity of JV.

As in the EU, the JV might not have all resources at the beginning. The TCB has assessed that considering the parents agreement and plans for fulfilment of JV; transfer of the workforce in the future does not affect the JV`s autonomous economic entity. [127]

**3) In absence of the aims or effect of restricting competition:** The TMR applies coordinative and concentrative JV criteria**.**

In the *Netcell* case, the Board explained that, whether or not the JV had taken over the parent's previous business or entered into a new business on behalf of the parents or the parents have business in the same market. Upstream or downstream or neighbouring markets will be considered. In this case, the JV was in the same market with five rival parents companies who were facilitating the possibility of coordination.

The Board assessed that[128], the parent companies were actual or potential competitors. Joint venture agreements should be carefully assessed because naturally there is always a risk to be a coordinative or a concentrative JV. Therefore it should be assessed according to Art 4.

**3) COMPARISON:**

The difference between the ECMR and the TMR is; the ECMR requires (Art 1(b)) acquisition, by person/s who are already controlling one undertaking. Whereas, the LPC 7 and the TMR (Art 2(b)) just requires "acquisition by any undertaking or person." It was criticised

[127] TCB case no D1/1/H.G.K.00/1 (joint venture) decision no 00-2/14-7 decision date 13.01.2000 Tup-Gaz Sanayi ve Ticaret A.S/Butangaz A.S available at http://www.rekabet.gov.tr/pdf/00-2-14-7.pdf downloaded on 12/4/2008

[128] TCB case no D1/1/A.O.-99/6 decision no 99-21/173-92 available at http://www.rekabet.gov.tr/pdf/99-21-173-92.pdf downloaded on 11/4/2008

[129]because transaction may be prohibited even though "any person" has no economic activity. Nevertheless, it would be unlikely to cause structural change or create entry barriers to the market.

In the case of an acquisition by a natural person, the ECMR requires they must have "further economic activities on their own account or control at least one other undertaking" Whereas, under TMR there is no such requirement.[130]

It has been suggested in the doctrine[131], that the TMR should be adjusted "concentration concept" as same as the EU.

Unlike the ECMR the TMR does not state the change of control but the Board applies the same criterion in practice and uses the EU law as reference. Foremost, the Board has planned [132]adoption of the ECMR Art 3 in order to underline the control notion and eliminate confusion. "Change of control over the undertaking in the transaction must use as a criteria, this interpretation which fits the competition law principles"[133]

Assessment of options to acquire of shares is uncertain that the option will be exercised in the future and the transaction should be examined at that time. Therefore it does not refer to change of control in both systems.[134]

Both systems have some differences with regard to the transactions which do not constitute a concentration.

1. In both systems [135]the undertakings whose normal activities are transactions and dealing with securities for their own account or for accounts of others, hold on a temporary basis

[129] Arslan, p 540
[130] As seen when the private equity company's 66.2 %shares in Mars Sinema were acquired by five natural persons. TCB case no 2006-2-42 decision no 06-31/373-95 decision date 28.04.2006 Is Girisim Sermayesi Ortakligi A.S available at http://www.rekabet.gov.tr/pdf/06-31-373-95.pdf downloaded on 10.2.2008
[131] Arslan , p 540 and 550 ; Guven , pp 191-192
[132] Turkish Competition Board (2007) *Discussion Paper about reviewing 1997/1* Communiqué [1997/1 Sayili Teblig`in Gozden Gecirilmesi Hakkinda Tartisma Metni ] p 8 available at http://www.rekabet.gov.tr/pdf/TartismaMetniNihaiHali.pdf downloaded on 12.4.2008
[133] Ismen T(2001) `*The criteria of control and its importance to define mergers and acquisitions*` The Competition Law Journey, Issue 5 p 31
[134] TCB case no 2005-2-13 (negative clearance) decision no 05-39/529-130 decision no 13.6.2005 available at http://www.rekabet.gov.tr/pdf/05-39-529-130.pdf downloaded on 14.4.2008

securities acquired with a view to reselling them without using voting rights on the competition policy of the undertaking issuing the securities, are excluded. The ECMR provide one year for holding securities which can be extended by the Commission. The TMR does not state such a time limit.

2.In the case of liquidation, control of an acquisition by liquidator by a Member state's laws on insolvency, winding up, cessation of payments, composition or analogous proceeding does not constitute a concentration in the ECMR[136] However, TMR states that, acquisition is carried out by a public institution or an organisation as required by law with an aim of liquidation, winding up, cessation of payments, composition, privatization or similar reason does not constitute a merger or acquisition.[137] The difference is that Turkish law explicitly adds privatization.

3.Acquisition by financial holding companies that they are only prevent their investment and not using their voting rights to determine the competitive conduct of the undertakings are excluded by the ECMR[138]However, it is not excluded by the TMR.

4. Different from the ECMR, The LPC Art 7 excludes the merger and acquisition by way of inheritance.

In Turkish law, there is no notice on concept of concentration. However, the TCB applies to the Commissions` Notices. In practice sole control or joint control is same in both systems. As in the EU, existence of veto rights is important even if not actually exercised.

The ECMR Art 2/4 states that, JVs substantial assessment will be done under Art 81(1) and (3). Therefore, whether or not the JV and its parent are in the same, upstream or downstream or neighbouring market is important. Exemptions may be granted by the Commission in the merger procedure.

However, the TMR does not explicitly state which article is applicable about JVs coordinative effects. It was suggested that, full function JVs should be assessed pursuant to Art 7 of the

[135] The ECMR Art 3/5(a); the TMR Art 3 (a) )
[136] The ECMR Art 3/5(b)
[137] The TMR Art 3(b)
[138] The ECMR Art 3/5(c)

LPC and the TMR. If it is not full function they fall within the scope of Art 4 (concerted practices) of the LPC.[139] Therefore, in practice in a JV case, the parties demand a negative clearance decision for merger and exemption for concerted practice at the same time which is the same in both systems.

Interestingly, Art 7 of the LPC does not state JV as mergers or acquisition but the TMR regulates it. Additionally**,** full-functionality is a criterion for JV under the ECMR but the TCB applies coordinative and concentrative classification. However, the Board has planned to adopt "full functionality " in addition it states that adding the words "JV constitutes a concentration " as in the EU but it is not yet clear about the coordinative effects whether it should or should not be assessed in the procedure of the merger regulation. [140] In my opinion, coordinative effects should be examined under Art 4 regardless if they are concentrative or cooperative.

Under the EU a concentration must be on a lasting basis. However, the Turkish merger regulation does not state it. In case of JV, duration is considered under the heading of being an autonomous economic entity[141]

Although there are differences between the two systems, in practice the TCB applies the EU notices and practices as reference for its assessment.

[139] Guven , p 234
[140] TCB (2007) Discussion Paper about reviewing 1997/1 Communiqué, p 8
[141] Case no DI/2/E.C.G.-99/4 (joint venture) decision no 99-22/197/113 decision date 04.05.1999 available at http://www.rekabet.gov.tr/pdf/99-22-197-113.pdf and also case no D4/1/L.K.-01/2(joint venture)decision no 01-44/433-111 http://www.rekabet.gov.tr/pdf/01-44-433-111.pdf downloaded on 12/4/2008

## CHAPTER II JURISDICTION

**1) UNDER THE EU:** The ECMR applies to concentrations, which have "Community dimension". Two conditions should be satisfied:

1) A concentration within the meaning of Art 3
2) The concentrations must meet the turnover thresholds set in Art.1.

When a merger falls within the Community dimension, the Commission must be notified about the transaction. The Commission will have sole jurisdiction, not the Member states.[142] "…the jurisdiction test incorporated within the ECMR is intended to be a bright line test which can be applied relatively simply, objectively and easily"[143] This principle is called "the one-stop-shop principle" and expressed in Art.21.

Undoubtedly, the principle ensures legal certainty and prevents any conflicting assessments at the Community and national level; it is pragmatic for companies because there will be only one authority to notify. In certain conditions referral systems exist between the Commission and Member States competition authorities.

### A) Thresholds

The ECMR jurisdiction is based on the Community dimension and it exists when the given turnover thresholds are exceeded. Turnover will be a determinative factor to find the economic size of "the undertaking concerned" in the transaction. There are three criteria: worldwide, EU- wide turnover and two-third rules .According to Art 1/2;

[142] ECMR Art 21/2
[143] Jones&Sufrin p 967

**a) Worldwide turnover thresholds:** The combined aggregate worldwide turnover of all the undertakings concerned must exceed EUR 5000 million; and

**b) EU-wide turnover thresholds:** The aggregate EU –wide turnover of each of at least two of the undertakings concerned must exceed EUR 250 million;

**c) Two-thirds rule:** each of the undertakings must not have individually achieved more than two thirds of its aggregate EU-wide turnover within one and the same state. Otherwise, the Commission will not have jurisdiction over the transaction.

Art 1/3 extends the Community dimension where:

a) **Worldwide turnover threshold**: The combined aggregate worldwide turnover of all the undertakings concerned must exceed EUR 2 500 million;

b) **EU-wide turnover threshold:** The combined aggregate turnover of all the undertakings concerned in at least three EU member states must exceed EUR 100 million;

c) In each of three of those same Member states, the aggregate turnover of each of at least two of the undertakings concerned must exceed EUR 25 million

d) The aggregate EU–wide turnover of each of at least two of the undertakings concerned is must exceed EUR 100 million

**e) Two-thirds rules:** Each of the undertakings concerned must not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. Otherwise, the Commission will not have jurisdiction over the transaction.

Art 1/3 extends the Community dimension and two-thirds rule in Art1.2 and 1.3 exclude purely national transactions which are subject to national competition authorities. (Hereinafter NCA)

In the absence of Community dimension the Commission can also have a jurisdiction. The transaction must be capable of being reviewed by at least three member states. Before any notification to NCAs, the Commission must be informed by the parties. The Commission transmits the submission to the NCAs and there must not be any disagreement about Commission's jurisdiction within 15 working days.[144]

**B) Territorial Jurisdiction:**

The Commission's geographical jurisdiction covers over both EU and EEA[145] countries. When a concentration has exceeded the given thresholds, it is deemed to have a Community dimension irrespective of the place of seat or principal field of activities but they must have substantial operations in the Community. This means that, the Commission has jurisdiction over foreign transactions.[146]

In the *Gencor v Commission* [147]merger was prohibited. One of the arguments was that the concentration did not fall within the Commission jurisdiction because its economic activities were in a non- EU country (South Africa). It was held that ***"****The concentration in the instant case would be implemented and would alter the competitive structure throughout the world. The Commission's competence therefore derives from the classic rules of international jurisdiction… Application of the regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the community. "*

Foremost, world wide sale activities were carried out through one of Lonhro`s subsidiaries which was based in Brussels. Gencor and Lonhro each carried out significant sales and exceeded the Community-wide dimension which shows "substantial activity" in the common market. It was considered that the impact of the transaction in the EU and EEA area would lead to a creation of a dominant duopoly in the world platinum and rhodium market. As a

[144] The ECMR Art 4/5 & COMP/M.4071-Apollo/Akzo/Nobel IAR available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4071_20060529_20310_en.pdf downloaded on 31/3/2008
[145] EEA Agreement Art 57/2(a)
[146] The Preamble of the ECMR Art 10
[147] Gencor Ltd v European Commission (Germany Intervening) ( CaseT-102/96) Court of First Instance[1999] All ER (EC)289 para 69 and 90 ( Case no M.619 Gencor/Lonrho)

result, effective competition would be significantly impeded in the common market and the Commission had competence over the transaction.

The merger may affect more than one country or continent. Therefore, the EU has bilateral agreements with the USA, Canada and Japan[148] in the field of competition to exchange information and coordinate their enforcement activities.

In 1998 the Positive Comity Agreement[149] brought deferral or suspension of the enforcement activity but excluded both the parties' merger control laws. "…mergers are not within the scope of this agreement; neither EU nor USA merger regulation permits merger investigation to be deferred or investigated."[150]

In the *Boeing/Mcdonnell Douglas (MCD)*[151], Boeing had acquired control of MCD which are both USA based. They share the world jet aircraft market with Airbus. Airbus is a European based company and is the third largest aircraft manufacturer. The Federal Trade Commission had cleared the merger. Contrarily, the EU Commission initiated an investigation because Boeing and MCD had existing fleet in service in the EEA(78%) this would strengthen their dominant position .Finally the Commission approved the transaction conditionally.

The Commission exercised its extraterritorial jurisdiction regardless of the nationality of the corporation and took into account the possible effect of the transaction which could end oligopoly of Boeing.

The Commission's exclusive jurisdiction has some exceptions:

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[148] In 1991 and 1998 agreements were made between the USA and the EU for the coordination, cooperation and the avoidance of conflicts in competition law enforcement. The USA in 1991 and in 1998 ;Japan in July 2003 and Canada in June 1999 available at http://ec.europa.eu/comm/competition/international/bilateral

[149] Art II/4 (a) and (b) exclusion of the EU and the USA merger control laws, Official Journal L 173 of 18.06.1998 p.0028-0031-1998.

[150] Bellamy&Child (2001) p 362

[151] Case no IV/M.877-Boeing/Mcdonnells available at http://ec.europa.eu/comm/competition/mergers/cases/m877_19970730_600_en.pdf downloaded on 19/3/2008 Also, the case was caused tension between the USA and EU. As it seen "Clinton Warns Europeans of Trade Complaint on Boeing Deal" 18th of July 1997 The New York Times, available at http://query.nytimes.com/gst/fullpagehtml?res=9B07E0D71E38F93BA25754C0A961958260 downloaded on 19/3/2008 & similarly, the Commission and the Federal Trade Commission had reached different conclusions in *GE/Honeywell* where the transaction was cleared by the USA. However the Commission had blocked the merger. Case no COMP/M.2220- General Electric/Honeywell. It was uphold by the CFI on 14.12.2005 In cases T-210/99 and T-210/01 Honeywell v Commission and General Electric v Commission

1) When a concentration threatens to affect significantly the competition in a market within the Member State which shows "the characteristics of a distinct market then the NCA`s will have jurisdiction over the transaction. [152]

2) To protect legitimate interests of the Member States such as public security, plurality of media, prudential rules[153]

3) According to the EC Treaty Art 296[154] the protection of essential interest of Member States

**C) Calculation of Turnover**

Thresholds are based on "the turnover of the undertaking concerned". Firstly, "undertaking concerned" must be identified in the operation; secondly its turnover must be calculated.

In principle, undertakings concerned are the direct participants in a merger or acquisition of control.[155] Undertakings concerned in a merger, acquisition of sole control and setting-up a joint venture is straight forward. In a merger case, each of the merging entities is an undertaking concerned.

In an acquisition of sole control, the acquirer and target companies and setting up new joint venture the parent companies will be the undertaking concerned. In the remaining cases the concept of "acquiring control" will be a determinative factor.[156]

In an acquisition of a pre-existing company; each of the acquiring companies and the pre-existing acquired company is an undertaking concerned.[157] The purchasers of companies who share joint control are the undertaking concerned[158]With regard to the acquisition of control

[152] The ECMR Art 9/3
[153] The ECMR Art 21/4
[154] EC Treaty 296 "the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material…" Case IV/M.1438-British Aerospace/Gec Marconi available at http://ec.europa.eu/comm/competition/mergers/cases/m1438.en.pdf downloaded on 2/4/2008
[155] CCJN para 129
[156] CCJN para 133
[157] CCJN para 130-140
[158] B Bouyssiere B, Beaugrenier (2007)`*A Question of Control*`, Competition Law Inside CLI 6 12(13) 11/12/2003

by a joint venture, full-functionality plays a distinctive role. Otherwise its parent's turnovers will be determinative for the Commission's jurisdiction. [159]

Art 5/2 brings in a provision for acquisition of a part of the company. In this scenario, the seller's turnover is not considered if it is an outright sale unless the seller shares the joint control with the acquirer then, the seller's remaining business is considered as undertakings concerned.[160]

Art 5/2.2 provides a special provision for follow-up deals where the transactions take place within a two-year period between the same persons or undertakings they should be treated as one and the same concentration arising on the date of the last transaction such as *Nestle/Gerber*[161].

After defining the parties the turnover is calculated pursuant to Art 5 which provides "aggregate turnover shall comprise the amount derived by the undertaking concerned in the preceding financial year from the sale of products and provision of services falling within the undertakings` ordinary activities after deduction of sales rebates and VAT and other taxes directly related to turnover. The net turnover is considered because it reflects the real economic strength of the undertaking.[162]The sale or provision of services in the same group is excluded. [163]

The undertaking concerned and also their respective turnover will be calculated. Art 5/4 (b) "Those undertaking in which the undertaking concerned directly or indirectly:

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[159] CCJN para145-148 "When a parent company is acquiring a target company though its subsidiary; the undertaking concerned is the subsidiary unless the subsidiary is a vehicle in the transaction.

[160] CCJN para 136&Case No IV/M.0023-ICI/Tioxide available at http://ec.europa.eu/comm/competition/mergers/cases/m23_en.pdf downloaded on 10/2/2008 parents companies are Cookson and ICI the control had changed from joint to sole control in Tioxide. The seller Cookson`s turnover was not considered because it was not in control of Tioxide anymore. Similar Case no IV/M.806-British Airways/TAT (II) sellers' turnover did not take into account. Available at http://ec.europa/eu/comm/competition/mergers/cases/m806_en.pdf downloaded on 10.2.2008

[161] Case no COMP/M.4688-Nestle/Gerber date 27/07/2007 and the previous notification date was 7/5/2007. Nestle acquired sole control of Gerber (wholly owned by Novartis) by purchase of shares and assets. Gerber had a very small amount of sales in the EU and even so exceeded the worldwide thresholds; it could not exceed the Community –wide turnover because it achieved more than 2/3 of its turnover in Poland. However, the previous transaction between the seller and purchaser (COMP/M.4540) was in the last two years. It was concluded that the latest transaction fell in the Commission` jurisdiction. "…both transactions, although unrelated, are treated as one for the purpose of turnover calculation available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4688_20070727_20310_en.pdf. on 11.3.2008

[162] CCJN para 164

[163] The EMR Art 5/1 and CCJN para167

- 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 undertakings` affairs"

The respective turnovers are attributed to undertaking concerned` subsidiaries; its parents; other subsidiaries of parents and any other subsidiary jointly held by two or more undertakings by all aforementioned undertakings.[164]

Despite the absence of a definition of "group" in the ECMR, the Art 5/4 leads to calculations of the undertaking concerned `s group's turnover which makes easy to reach the thresholds as in the case *Arla/Ingman Foods*[165], Ingman Group `s turnover was added.

Regarding the EU-wide and Member State turnover "the EMR does not discriminate between "product sold" or "services provided" for the geographic allocation of turnover. "The general rule is that turnover should be attributed to the place where the customer is located..."[166] The location can also be determined by the characteristic of action where services are provided or delivery of the goods takes place.[167]

Moreover, the Commission takes into account the legal and economic arrangement for providing services in question. [168] In the *Rynair/Aer Lingus*[169] case the parties business

[164]The ECMR Art 5/4 (c) (d)(e) ; CCJN para 177-178
[165] Case No COMP/M.4323-Arla/Ingman Foods. In the case even though the parent was not in control of Ingman Foods but still holding more than half of shares of it. This fact falls Art 5/4 (b)(i ) available at http://ec.europa.eu/comm/cometition/merger/cases/m4323_20070115_20310.en.pdf downloaded on 20/3/2008
[166] Art 5/1 subparagraph & CCJN points 195-196. CCJN also explain in details for sale of goods and provision of services between para 197-204
[167] CCJN para 196
[168] CCJN para158
[169] Case no COMP/M.4439-Rynair/Aer Lingus the method of geographic allocation of the turnover was argued. To identify the location of customer at the sale of the ticket is not practical because the ticket is sold over the Internet. The place of departure methodology is applied by the Commission for calculation of turnover when the case is selling traditional return tickets. Even if this methodology was applied it would not be within the

practices was considered. To sell two one way tickets (together or separately) were treated as two different departures and allocated two turnovers. As a result of that splitting of the two one way flights of a round trip, the turnover of the two companies exceeded the thresholds in 3 Member States and the Commission had jurisdiction.

The calculation of turnover differs for credit, financial institutions and insurance undertakings[170]

**2) UNDER TURKISH LAW**

The Board has jurisdiction when two conditions are satisfied. Firstly, the transaction must be considered as a merger or an acquisition within the meaning of Art 2 of the TMR; secondly, the thresholds must be exceeded.

When one of the thresholds is exceeded; it is compulsory for the parties to ask permission of the Board. The thresholds are calculated either total market share or total turnover of the undertakings concerned in the relevant product market.

Furthermore, the Privatization Law [171] states one of the principles of privatization is to prevent the negative effect of a monopolist structure.[172] In addition, it is also stipulates the protection of competition [173]The problem was whether the LPC or the Privatization law rules were applicable to privatization by mergers and acquisition and had been asked for a consultation to the High State Court. It was decided that the Privatization Law Art 16 was superseded by the LPC.[174]

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Commission jurisdiction because Aer Lingus did not exceed the turnover thresholds in 2 Member states. The Commission considered both companies business practices.
available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf downloaded on 11/3/2008

[170] The ECMR Art 3; the CCJN para 202-220

[171] Law no 4046, Adopted on 27 November 1994, Concerning Arrangements For the Implementation of Privatization and Amending Certain Laws and Decrees With the Force of Law, date of adoption:24/11/1994 Official Gazette 27/11/1994 Issue 7 available at http://www.oib.gov.tr/basbakanlik/yasa_eng.html downloaded on 15.4.2008

[172] The Privatization Law Art 2(d)

[173] Ibid, Art 16

[174] The High State Court, 1 Presidency , case no [esas ]E.1995/135 , decision no [karar]K.1995/153

The LPC Art 7/2 states the Board shall declare by Communiqués, which type of mergers and acquisitions have to be notified to the Board and which have to obtain permission from the Board in order to become legally valid.

On the base of this article, regarding privatization the Communiqué 1998/4 [175]was established by the TCB. According to 1998/5 the pre-notification and authorization applications must be filed with the Competition authority and later carried out by the Presidency of Privatization Administration or other public institutions that are carrying out the acquisition.

The 1998/4 Communiqué regulates procedure: pre-notification and application for authorization. Firstly, when an undertaking or a unit which is subject to privatization and has a market share that exceeds 20% or the turnover exceeds 20 trillion TL in the relevant market even if these limits have not being exceeded by the undertaking or the unit if either have de facto or legal privileges, it is compulsory to take the Board's opinion before the bidding. [176]

Secondly, even though the privatization is subject to pre-notification or not subject to pre-notification but when the parties` market share exceeds 25% or their turnover exceeds 25 trillion TL this will be subject to the Board's compulsory jurisdiction.[177]

The Board's jurisdiction has some exclusion. According to the Banking Law Art 19[178], banks which are subject to mergers and acquisitions, when their sector share of total assets does not exceed 20%, the LPC Art 7, 10 and 11 will not be applicable. In this situation, the Banking Law and the Turkish Commercial Code will be applicable and the Banking Regulation and Supervision Board will have authority.

[175] Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisition via Privatization to Became Legally Valid, Official Gazette 12/09/1998 no 23461
[176] 1998/4 Communiqué Art 3
[177] Ibid, Art 5
[178] Banking Law no 5411; adoption date 19.10.2005 Official Gazette 1/11/2005 no 25983 available at http://www.tbb.org.tr/english/5411.doc 15/4/2008
"…in mergers, disintegrations and transfer of banks to be carried out pursuant to the provisions of this Law, the provisions of Turkish Commercial Code no .6762 and, on the condition that the sectoral share of the total assets of the banks subject to merger or integration does not exceed 20%, the provisions of Articles 7,10 and 11 of the Law No.4054 on the Protection of Competition shall not be applied."

**A) Thresholds:** Thresholds are based on market share and turnover. According to Art 4 of the TMR:

1) the parties (and connected undertakings) aggregate market share within the relevant market within part or the whole of Turkey exceed 25%,

2) the parties (and connected undertakings) aggregate turnover in a part or the whole of Turkey exceeds TL 25 trillion[179](appx $19.3 million )

One of the criteria will be sufficient for the Board's jurisdiction. The Board had decided that only parties' total turnovers in the relevant market in Turkey had exceeded the turnover threshold was sufficient and therefore the transaction fell within the Communiqué. [180] Also in another case, the Board had defined four relevant markets and the thresholds were exceeded in only one relevant market. Therefore, only regarding that market, the transaction had fallen within the Board's jurisdiction. [181]

Also, the only exceeding market share in the relevant markets was enough to established the Board jurisdiction.[182]

According to the TMR, the market share and turnover thresholds must be fulfilled in the relevant market. However, when the parties have no any business activities in the same relevant market, automatically they will not have any turnover or market share. Consequently, the transaction will fall out of the Board's jurisdiction as in *Dubai International/Almatis* case.[183]

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[179] 25 trillion is now equal 25 million YTL. Turkish currency changed as New Turkish Lira (YTL) and six digits has been deleted. ( Act on the Currency of the Republic of Turkey. Act no: 5083. Adopted on 28.1.2004; Official Gazette, no 25363 on 31.01.2004. It is in force from 01.01.2005).

[180] TCB case no 2008-1-4 decision no 08.09/107-35 decision no 31.1.2008 Henkel KGaA/Akzo Nobel NV available at http://www.rekabet.gov.tr/pdf/00-41/450-245.pdf download on 14/4/2008

[181] TCB case no 2007-2-222(Acquisition) decision no 08-08/91-31 decision date 24.1.2008 available at http://www.rekabet.gov.tr/pdf/08-08-91-31.pdf downloaded non 14/4/2008 also decision case no D3/1/Y.T.-02/01 (acquisition) Ileri Iplik Sanayi ve Tic.AS/ Denizler Testil ve Sanayi Tic.A.S decision no 02-02/19-4 decision date 15.1.2002 available http://www.rekabet.gov.tr/pdf/02-02-19-4.pdf downloaded on 14/4/2008 & case 2007-1-92(Acquisition) decision no 07-69/854-322 decision date 06.9.2007 available at http://www.rekabet.gov.tr/pdf/07-69-854-322.pdf downloaded on 14.4.2008

[182] TCB case no 2007-4-156 decision no 08.01/3-2 decision date 3.1.2008 The Thomspon Corporation/Reuters Group PLC available at http://www.rekabet.gov.tr/pdf/08.01-3-2.pdf downloaded on 14/4/2008

[183] TCB case no 2007-1-139(Acquisition) decision no 07-90/1159-452 decision date 13.12.2007 available at http://www.rekabet.gov.tr/pdf/07-90-1159-452.pdf downloaded on 14/4/2008

The TMR states the total market shares or turnovers of the parties must exceed the thresholds. However, if only one party has satisfied one of the thresholds the transaction will be within jurisdiction of the TCB. For example, in *Novartis/AstraZeneca* case,[184] Novartis` Turkish subsidiary had 37% of the market share in the sunflower seed market but AstraZeneca had no business activities. Consequently, exceeding of market share in the relevant market by Novartis the transaction had fell within scope of the TMR.[185]

Consequently, when one party has fulfilled the market share and turnover thresholds and the other party has no economic activity in the relevant market, the transaction should be notified to the Board.[186]

In the doctrine "to prohibit a merger according to Art.7 the precondition is creation or strengthening of dominant position. In which case, when the parties` total market share is less than 25%, regardless of their turnover it is highly unlikely to create a dominant position. Therefore, the undertakings which have merely exceeded the turnover will be permitted." [187]

**B) Territorial Jurisdiction:** Art 2 of LPC states that "any undertakings operating in or affecting markets for goods and services within the Republic of Turkey" will be within the scope of the Act. The Board's territorial jurisdiction is Turkey.

The LPC applies to undertakings which operate in Turkey even though their headquarters are not in Turkey.[188] For example, the parties were based in USA and South Korea .It was held that, the Turkish market would be affected by potential exportation as a result of the merger even though the parties had no production unit in Turkey. However, the Board took the

[184] TCB case no D1/1/E.C.G.-00/3 (Acquisition) decision no 00-41/450-245 decision date 24.10.2000 available at http://www.rekabet.gov.tr/pdf/00-41-450-245.pdf downloaded on 14.4.2008

[186]Eryurekli P(2001) "*Most Frequent Questions in Merger and Acquisition Notifications"* The Competition Law Journey, Issue 6, p 21 & TCB case no D3/1/S.Y.-99/2(Acquisition) decision no 99-27/245-149 decision date 3.6.1999 JT International Holding B.V/R.J.Reynolds Tobacco International Holdings B.V available at http://www.rekabet.gov.tr/pdf/99-27-245-149.pdf downloaded on 14.4.2005 and also TCB case no 2007-2-23 decision no 07-23/209-68 decision no 15/3/2007 available at http:// www.rekabet.gov.tr/pdf/07-23-209-68 .pdf downloaded on 14/4/2008

[187] Inan N(2000)` *The Fundamental Problems of Merger and Acquisition Rules*` The Competition Journal Issue 2 p 19

[188] Preamble of LPC Art 2

amount of sales by the parties and their market share[189]. The market share thresholds were exceeded. Therefore the transaction was within the scope of the LPC. [190]
In another case[191], the relevant market shares exceeded by parties via European based independent retailer `s sale in Turkey and the Board established its jurisdiction.

According to the Decision no 1/95, the EC and the TCB should notify each other and exchange information when each others interest are affected as a result of any anti competitive activity that is carried out on their territory without limiting each others discretion of applying their competition laws.[192] In order to develop cooperation in the field of competition law, The Board has also signed bilateral agreements with competition authorities in Korea and Romania. [193]

**C) Calculation of turnover:** The following undertakings` total market share and turnovers in the relevant product market are taken into account.[194]

a) The undertakings concerned who are carrying out a merger or an acquisition in the relevant product market;

b) The respective turnovers of the undertaking concerned in the relevant product market[195]

[189] In the decision the sale amount and percentage of market share were not stated in the decision.
[190] TCB decision no 99-3/24-6 decision date 28.01.1999 E.I.DuPont de Nemours/Tongkook Synthetic Fibres Co.Ltd available at http://www.rekabet.gov.tr/pdf/99-3-24-6.pdf on 13/4/2008 similar case decision no 64/483-75 Universal Leaf Tobacco Incorperated/Socotab Leaf Tobacco Company Incorporated decision date 07.05.1998 available at http://www.rekabet.gov.tr/pdf/64-483-75.pdf downloaded on 15/4/2008 & Case no D4/1/M.A.-00/4(mergers) decision no 00-48/509-277 decision date 5.12.2000 The Chase Manhattan Corporation/J.P.Morgan& Co.Incorporated available at http://www.rekabet.gov.tr/pdf/00-48-509-277.pdf downloaded on 14.4.2008
[191] TCB case 2003-1-37 (joint venture) Oxeno Olefinchemie GmbH/ Celanese Chemicals Europe GmbH decision no 03-44/500-220 decision date 19.06.2003 available at http://www.rekabet.gov.tr/pdf/03-44-500-220.pdf downloaded on 154/2008
[192] Decision no 1/95, Art 43
[193] A Memorandum of Understanding was singed on 17/11.2005 with the Korea Fair Trade Commission and 12/12/2005 with the Romanian Competition Council available at www.rekabet.gov.tr/bilateral.html# downloaded on 15/4/2008
[194] The TMR Art 4/2
[195] The TMR Art 4/2(b)(c)(d)(e) Those undertakings in the relevant market where the undertakings concerned are directly or indirectly: own more than half the capital or business assets or has the power to exercise more than half the voting rights or have to power to appoint more than half of the members to the supervisory board the board of directors or bodies entitled to represent the undertakings or have to right to manage their affairs

The respective turnovers of undertakings are exactly the same as the ECMR Art 5/4 (b) to (e) which refers to its group. They are its subsidiaries, parents, other subsidiaries of parents and any subsidiaries jointly held by these identified.

According to the TMR, "turnover shall be comprised of the net sales achieved in the preceding financial year."[196] Sales within the same group do not count in the calculation of the turnover. In the case a partial acquisition, the turnover of the transferred part shall be taken into account.

However, the calculation of turnover for banks, private financial institutions, financial leasing companies, factoring companies, intermediary institutions and insurance companies are separately stipulated under Art 4.

**3) COMPARISON**

Regarding jurisdiction, both systems are interested in the effect of the merger on the market and ignore the place of seat or field of activities of the parties. The ECMR states that, the merger must have a "substantial activity" in the common market. The LPC states that, the merger must have affect in Turkey. However, in both systems to exceed the thresholds will be enough to asses the affect or substantial activity.

The Commission's jurisdiction is excluded when a merger relates to "distinct market of a member state" or member states` legitimate interest or security interests. The TCB jurisdiction is excluded by national law i.e the Banking Law.

There is a big discrepancy between the thresholds of turnovers. The respective turnover in both systems is the same which is group` turnover. Both systems take into account net turnover of the previous financial year.

The ECMR takes into account the turnover of the parties and their groups` worldwide and Community wide without referring the relevant market. However, the Turkish merger

[196] The TMR Art 4/3

regulation thresholds are based on the total turnover of undertaking concerned and their respective group in the relevant market.

In Turkish law, there is no notice on calculation of turnover as the EU .However, "to determine the undertaking concerned in the possible scenarios by the Commission notices are taken as a reference by the Board."[197]

In addition, the TMR also takes into account the market shares for the thresholds. On the contrary, the EU takes market shares into account, at the time of substantial appraisal of mergers.

Moreover, in Turkish merger regulation there is no specific formulation about follow up deals as the ECMR Art 5/2 for calculation of turnover. However, in the Board's practice when the transactions are closely connected to each other; it is assessed as one transaction.[198]

[197] TCB (2007) Discussion Paper about reviewing 1997/1 Communiqué, p 17

[198] TCB case no 2007-2-23(Acquisition) Waspel AB/Elbi Electirik Ithalat Ihracat Sanayi ve Ticaret AS /Elmas Electrik Dis Ticaret A.S. decision no 07-23/209-68 decision date 15.03.2007 The transaction was establishing a JV and to transfer of Elbi and Elmas`s assets and capital. These two undertakings were controlling by different natural persons who was in the same family. According to the transfer agreement, Elbi and Elmas was described as "Bugday family" even though they had a separate legal entity. The Board calculated these two undertakings total turnover as one.
available at http://www.rekabet.gov.tr/pdf/07-23-209-68.pdf downloaded on 14.4.2008

## CHAPTER III SUBSTANTIAL ASSESMENT

### 1) UNDER THE EU:

The merger control aims to maintain and protect effective competition on a market where the consumers can have benefits in the form of various, high quality products and services or innovation at competitive prices. By merging, the companies may deprive benefits from the consumer with their increased market power. Therefore, the Commission investigates mergers` compatibility with the common market with aim of maintain the effective competition.

The appraisal has two parts:

a) Definition of the relevant market
b) Competitive assessment

### A) Market Definition

To determine "market" has a crucial importance. "…a proper definition of the relevant market is a necessary pre-condition for the assessment of the effects on competition of the concentration."[199] It is a" tool to identify and define the boundaries of competition between firms…The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face."[200]

The difference with the market definition under Art 81 and 82 is, the Regulation is "essentially forward-looking."[201] The Commission defines the relevant market on a case by

[199] CFI, Airtours plc v EC Commission (Case T-342/99)[2002]All ER(D) 11 (Jun) para 19
[200] The Relevant Market Notice para 1
[201] Bellamy&Child(2001) p 387

case base and is not bound by its previous definitions. "…each market definition analysis remain intimately fact specific."[202]

Its functions are, to identify the actual competitors, to calculate market shares with regard to the market power for the purpose of assessing dominance.[203] It shows the markets which are likely to be affected by the merger.[204]

There are two dimensions: the relevant product market and the relevant geographic market.

**1) The Relevant Product Market.** It is imperative because an incorrect analysis of the market may be too narrow or too broad leads to incorrect assessment of the market power.

In the *Hoffmann-La Roche v Commission*[205] "The concept of the relevant market is fact implies that there can be effective competition between the products which form part of it and this presupposes that there is sufficient degree of interchange ability between all the products forming part of the same market in so far as the specific use of such products is concerned." A relevant 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."[206]

Moreover, it provides the scope for the merger control and determines the actual competitors and the competition level. To reach the right market definition the Commission uses, price elasticity, cross-price elasticity and price correlation studies. [207] The characteristics and specificity of the industry, product and services are examined.

The demand and supply side substitution are the main constraints in competition because they provide effective and immediate evidence for the market analysis. For the competitive

[202] Monti, p 134
[203] Commission Notice on the definition of the relevant market for the purposes of Community competition law. Official Journal: OJ C 372 on 9/12/1997 and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertaking para 10
[204] FO Form Section 6
[205] Case 85/76 Hoffmann-La Roche v Commission[1979] ECR 461 at paragraph 28
[206] Relevant Market Notice paragraph 7 and FO Form Section 6- The notice on relevant market as other notice is not legally binding document and it shows the interpretation of Commission. As stated in the notice the Commission and the Community courts may interpreted differently. (paragraph 5)
[207] Monti p 133

assessment, alternatives available to suppliers and users, their access to suppliers or market, the legal barriers to entry are taken into account.[208]

**a) The demand- side substitution:**

It "entails a determination of the range of products which are viewed as substitutes by the consumer and is the one of ways the SSNIP[209]test is used. The test is based on small, permanent price changes (from %5-10) to assess whether the consumer can switch easily and willingly to a similar products or alternative location/s.

The SSNIP test is not the only way to determine the relevant product market or geographic market. It "…can perhaps best be regarded as a conceptual foundation for market definition. Product characteristic, prices and intended use may serve as a practical proxy in defining the product market…"[210] The aim is to obtain the best evidence available to get the right market definition. The advantage of using this method in a merger case is "… less prone to the "Cellophane fallacy"[211] where the monopolist is already put the price at maximum and consumer are just on the switching to the products and it seems consumer has many substitutes. The test is applicable where is price is competitive not at monopolist price where the customers are ready to change and the price increase would be profitable. The test is applied until the price change is unprofitable.

Demand is a most important element because it is the immediate and effective constraint especially on the price.[212] Consequently, sets of products which are the consumers` second choice and substituted each other will be assessed to belong to the same market

[208] Art 2/1(b) &FO Form section 8-to identify the five largest suppliers and consumers in the affected market and the market structure, market entry, the nature of research and development, also the cooperation agreements and trade association relationship are being required.

[209] Small but significant non-transitory increase in price or hypothetical monopolist test
[210] Bellamy&Child (2008) p 250
[211] Dabbah M M , Lasok, K.P.E (2005) *Merger Control Worldwide* ,UK: Cambridge University Press p 409 & the famous case Du Pont where the cellophane market was near to monopoly. Geroski P.A & R.Griffith R `*Identifing Anti Trust Markets*` January 2003
Available at http://www.ifs.org.uk/wps/wp0301.pdf downloaded on 24.3.2007
[212] Relevant market notice, para 13

The products` functionality is also important. In *Nestle/ Perrier*[213], the bottled water and soft drinks were demanded to fulfil largely different needs and soft drinks do not constitute a sufficient substitution alternative for bottled water.

In *Boeing/Macdonnell Douglas* [214], the market was large commercial jet aircraft. There was not substitutability with the regional jet market or non-Western aircraft or used aircraft with regard to result of technical facts or after sale service. Used aircraft can be implemented but not be a substitute for a new aircraft.

In *Airtours v Commission*[215], there was no demand-side substitutability between the long and the short haul package holiday with regard to the product characteristic, prices and customer preferences. These markets are different in ideas, the time of the holiday, transfer time and they are not substituting each other. In addition, there is a significant price difference and very limited overlap between those markets.

The stability of demand is also considered by the Commission.[216]

**b) The supply side -substitution**: "This requires that suppliers be able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices". [217]

The two conditions must be met: It must be for a short time and it must not entail significant adjustment of tangible and intangible assets, additional investment, strategic decisions or time delay. [218] In *Nestle/San Pellegrino*[219], the substitutability of flat water and mineral water can

[213] Case No m.190 Neste/Perrier Official Journal L 356, 05.12.1992 and also case Procter&Gamble/Schickendanz & In Irish Sugar, the industrial and retail sugar were two separate markets in terms of use, the volume of sales, type of customer, distribution and packaging. IV/34.621,35.059/F-3-Irish Sugar plc Official Journal L 258.22/9/1997 para 90 (the case was infringing Art 86 (now 82) )
[214] Case no IV/M.877 Boeing/Mcdonnells Douglas para 14-19
[215] Airtours v Commission, para 22-34
[216] In*Tetra Pak v Commission* The ECJ held, "between 1976 and 1991, packaging materials other than cartons were able to gain only a marginal share of the UHT-milk packaging market….such stability in demand is a relevant criterion for determining whether cartons are interchangeable with the other materials." Case C-333/94 ECJ Tetra Pak International SA v Commission 14.11.1996
[217] Relevant Market Notice para 20
[218] Ibid, para 23
[219] Case No IV/M.1065-Nestle/San Pellegrino available at http://ec.europa.eu/comm/competiton/mergers/cases/decisions/m1065_en.pdf on 25.3.2008 and also in Case IV / M.166-Torras/Sarrio –dispute of limited demand side substitutability, on the demand side producer it is easy to switch one type of paper to another in old and new type of the machines. & In Kali and Salz/MDK/Treuhand,

be done by changing the bottling of the products by suppliers and its cost do not amount a significant barrier.

If two products substitute each other, they are the same market otherwise, they constitute separate markets. To make the correct market analysis, the Commission takes into account ,the substitution in the past (such as launching new product[220]) other quantitative tests( price elasticity and cross price elasticity ), views of customer and competitors, consumer preferences, barriers and costs associated with switching demand to potential substitutes, distinct group of customers and price discrimination.[221] The Commission emphasis is on the consumer reactions not the competitors and puts weight on the demand side substitutability.[222] The relevant market definition is varied in every case.[223]

**2) The relevant geographic market:** It is a "…territory in which all traders operate under the same conditions of competition so far concerns specially the relevant product."[224]"The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[225]

The importance is the undertakings wish to have a wider geographical market because the parties can diminish their market shares.[226] The geographic area can be national, local, EU, EEA or worldwide.

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Suppliers can change the output of the two products with regard to the sales by an additional progressing step. There was high level of supply side substitutability between standard and granulated potash. Case no IV/M.308-Kali-Salz/MdK?Treuhand , Official Journal L 186, 21.07.1994 P.0038-0056 available at http://eu.eur-lex.europa.eu/LexUriServ.do?uri=CELEX:31994D0449:EN:HTML on 27.3.2008

**220** Case M.430 Procter&Gamble/Schickendanz – the launch of new sanitary brand had not affected the tampons price and it leads two separate markets where these products were not sufficiently substitutes each other. Para 64-65 Official Journal L 354, 31/12/1994 http://eur-le.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994d0893:EN:HTML on 27.03.2008

221 Relevant Market Notice para 36-43

222 Bellamy&Child(2008) *European Community Law of Competition*, in P.Roth QC and Rose V (eds) 6th ed, New York: Oxford University Press , p 744

223 In DG Competition website the relevant market definitions is under NACE code.

224 CFI, Case T-139/98 AMMS v Commission[2001]ECR II-3413,[2002]4 CMLR para 39 & Jones,Sufrin p 1015

225 Relevant Market Notice para 8

226 Jones&Sufrin, p 1016

As the relevant market product market analysis, the area of the demand and supply substitution plays distinctive roles. Whether or not the consumers and the suppliers would move to another area without any barrier to buy or sell the products when there is a small change in the prices.

**a)The demand substitution:** "It is necessary to consider purchasers` willingness to acquire products from other areas,"[227] In *Guinness/Grand Metropolitan*[228], essentially the variety of the consumption patterns, major taxation and regulation differences between the EU countries leads the geographic markets as national.

In *Nestle/Perrier*[229], Nestle argued that the relevant market must include Belgium and Germany to consider the level of export of source bottled water and if the excessive price were applied in France, parallel import would develop. However, the argument was rejected because of the impossibility of parallel import and the existing strong barriers and absence of competitors' entry into the French market.

In *Blacktone/Acetex*[230]case the market was worldwide for the chemicals because the transport, storage cost, duties were similar and there was not a barrier to trade among the world regions.

In *Cargill/Degussa*,[231]the relevant geographic market was the EEA for non-GM lecithin. Not only the transport cost, time delivery but also support in terms of product and production know-how was crucial for the customer in the EEA. In addition, the EU regulation was considered on the GM food also the total worldwide consumes of the non-GM in the EEA.(45%).

**b) The supply substitution:** The supplier must be able to get to the market easily and quickly. "…attention focuses on the willingness of suppliers in other areas to commence supply in (into) the area in question."[232]

[227] Bellamy &Child(2008) p 283
[228]Case IV/M.938-Guinness/Grand Metropolitan Official Journal L 288,27.10.1998 P.0024-0054 date 27/3/2008
[229] Case IV/M.190-Nestle/Perrier
[230] Case 3625-Blackstone/Acetex available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m3625_20050713_20682_en.pdf on 26.3.2008
[231] Case COM/M.3975-Cargill/Degusa
[232] Bellamy& Child (2008) p 283

There are legal requirements or other barriers that would delineate the geographical market where the alternative supplier cannot trade. In *Volvo/Scania*,[233] the geographic markets for heavy trucks were concluded national because the purchase of heavy trucks is done on a national, distribution and service networks constitute a barrier to import penetration by manufacturers who do not have a well developed local network; also existing are the legal and the technical barriers in some countries.

**B) Competitive Assessment**

The ECMR Art 2/3 states "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

These factors are considered:

a) the need to maintain and develop effective competition within the common market; the structure of all the markets and the actual or potential competition from undertakings located either within or without the Community;

b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interest of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers` advantage and does not form an obstacle to competition.

[233] Case no COMP/M.1672-Volvo/Scania available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1672_en.pdf on 26/3/2008 and also the case no IV/M/755 Creditanstalt/Koramic/Wienerberger , the geographic market for clay facing brick and hollow brick were national or (cross-border regional) or local respectively. The reason is to be able to deliver the bricks at the lowest transportation cost. Available at http://ec.europa.eu/comm/competition/mergers/cases/m755_en.pdf & Similarly, in AAMS v Commission the CFI upheld the Commission` assessment "Italy" is the relevant geographic market. The Italian legislation required that the manufactured tobacco product must be kept in separate premises from other goods which mean that significantly investment would be needed for other distributors to enter the market. AAMS v EC Commission para 12

The foreseeable effect of the merger on the affected markets will be based on the overall factors within the competitive analysis.[234] The Commission assesses the effect of the concentration in the relevant market by a prospective analysis.

**1) The New Test:** The ECMR 139/2004 has not only changed the word order of the old Regulation but has also introduced the new test "significantly impede effective competition." (Hereafter it will refer to SIEC)

The new regulation preserves the concept of dominance but not as predominantly as before. As regarding to dominant position, the Community courts and past Commission decisions are still applicable. [235]

The rationale was, the merged companies exercise their market power unilaterally without a single firm dominance and without filling the requirements for collective dominance.[236] The new test can fill these foreseeable "gaps" with SIEC rather than the dominance test.

The test was described as a" hybrid of the dominance test and substantial lessening of competition test (SLC)."[237]It covers, coordinated (single-collective dominance) and non-coordinated (unilateral) effects. It seeks the effects of merger on the competition parameters such as economic power on the price, quality of production, innovation so on. Unlike dominance test, the SIEC "… focuses on changes to competition rather than changes to market structure"[238]

The rational is, not only dominance can impede effective competition as happens in the monopolist market, eliminating or reducing the competitive constraint or pressure would significantly impede the effective competition in the market. "The notion of `significant

[234] Horizontal Merger Guidelines para 13 and The ECMR Preamble para 28 states the Commission should provide a sound economic framework in its guidance for assessment of the concentration.
[235] The ECMR Preamble Art 26
[236] Bellamy&Child (2008) p 746
[237] Kokkoris I (2006)` *Do Merger simulation and critical analysis differ under the SLC and dominance test?* `ECLR 2006, 27(5) p 2
[238] Horner N (2006) `*Unilateral Effects and the EC Merger Regulation-How The Commission Had Its Cake and Ate it Too*` European Law/Europarecht, p 33 available at www.hanselawreview.org/pdf3/Vol2No1Art03.pdf downloaded on 12.12.2007

impediment to effective competition` in Art 2(2) and (3) should be interpreted as extending beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned."[239]

It encompasses the concept dominance and the non-coordinated effects of the merger in oligopolistic markets. As a result of this change, the dominance is one of essential impediments to the effective competition however it places emphasis on the SIEC.

**2) Market Share:** The first analysis is calculation of the parties' market shares and concentration level. "Market shares are a proxy for market power, not a precise measure."[240]

The parties` individually and total, the present and the future market shares are calculated. Their competitor's market shares are also calculated in the relevant market.[241]The Commission emphasis on the market share and the HHI[242] level is an indicator of a dominant position but it is not exact evidence in a merger investigation. [243] The market share that exceeds 50 % is evidence of a dominant position.[244]

"… although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position."[245]

Mergers can be categorised as horizontal, vertical and conglomerate. "Horizontal merges are potentially the most damaging to the competitive process."[246]

[239] The ECMR Preamble Art 25
[240] Monti ,p 143

[242] The HHI (Herdindahl-Hirschman Index) shows the concentration level and works by summing the squares of the individual market shares of all the firms in the market(Horizontal Merger Guidelines point 16) below 1.000 the market is not concentrated, and between 1000-1800 the market is moderately concentrated over 1800 is highly concentrated ( Jones&Sufrin p 1019)
[243] Horizontal Merger Guidelines para 21
[244] Horizontal Merger Guidelines para 17
[245]ECJ (Case T-102/96)Gencor Limited v E.C. Commission (Germany intervening)25 March 1999 [1999] 4 C.M.L.R. 971 para 205 with reference to case Akzo v Commission para 60 and Holfman-La Roche& Co AG v E.C. Commission para 41
[246] Craig P, p 1043

**3) Horizontal Mergers**: When the parties are engaged in business activities in the same product market and they are actual or potential competitors of each other.

Once the relevant market is identified, the market share and concentration level is considered "as rule of thumb to identify problematic mergers"[247]Possible anti-competitive effects are examined in the absence of countervailing factors. Countervailing factors taken into account to balance the possible harmful effects of the merger.(buyer power, new entry, efficiencies and failing firm defence). [248]

**a) Non Coordinated Effects (Unilateral Effects):** The parties in a horizontal merger are actual or potential competitors naturally the parties` market power will be increased and foremost the previous competitive constrain will be lost after post-merger and there will be no more competition. They would now be in a dominant position. The Horizontal Guidelines states the number of factors to be taken into account for assessing the unilateral effects.[249]

1. The market shares are important and they usually equal the market power and give them the opportunity to raise the price which creates dominance. However, in *Alcatel/Telettra,*[250] the Commission cleared the concentration with high market shares of 83% because the main buyer Telefonica would increase it purchases from other suppliers. Besides having a high market share, the entry barriers or temporary holding of the dominant position is also taken into account. [251]In brief, the high market shares are indicative but not conclusive evidence for market power.

2. When the parties produce the consumer first and second alternatives they are likely to increase the price and impede effective competition. The existing rivals' (supply substitution)

[247]Jones&Sufrin p 1019
[248] Horizontal Notice part II-VIII
[249] Horizontal Guidelines 28-38
[250] Case M.42 Alcatel/Telettra available http://ec.europa.eu/comm/competition/mergers/cases/m42_en.pdf downloaded on 4.4.2008
[251] Case no IV/M053 Aerospatiale-Alenia/de Havilland. The merger was not permitted. The dominance of the parties would not be temporary because of the high cost and long time needed for entry into market and in the foreseeable future there would not be realistic, potential entry to the market. The past volatile of the market structure also was not accepted. The Commission considered the potential entry to the world market from Czechoslovak, Indonesian, the USSR, the USA companies such as in Boeing and McDonnell Douglass case available at http://ec.europa.eu/comm/competition/mergers/cases/m53_en.pdf downloaded on 4.2.2008

is a crucial point. In *Volvo/Scania*[252], both companies were close competitors pursuing similar market strategies and two big manufacturers in heavy truck industry. The proposed transaction would result the loss of competition and increased power over its competitors.

3. Real possibility of switch suppliers. In *Agfa-Gevaert/Dupont*,[253] the existing package sold to the consumer set conditions which would penalised the consumer if they switch suppliers. Therefore it created a barrier for the consumer's options.

4. Whether the competitor likely to increase supply if the prices increase. The rivals must be able to increase the output and find it profitable rather than increase its prices. The merger firm may also have the ability to make the competition difficult for its competitors. For example, control or influence over the supply of inputs or distribution possibilities.[254] In *Vodafone Airtouch/ Mannesmann*[255], it was assessed that, by merging, the parties would be the only mobile operator across Europe and they would have the power to eliminate actual or potential rivals. The Commission serious doubts eliminated where Vodafone accepted the third parties access to merged parties integrated network

5. Elimination of important competitive force. Some firms have more influence on the competitive process than their market shares for instance; a firm may be a recent entrant and expected to put competitive pressure in the future on other firms. In *Boeing/MCD*[256] case, the MCD market presence had an influence on the airlines negotiations in terms of a better price and better purchasing conditions.

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[252] Case no COMP/M.1672 Volvo/Scania available at http://ec.europa.eu/comm/competition/mergers/cases/m1672_en.pdf. downloaed on 4.4.2008

[253] Case no IV/M.986-Agfa-Gevaert/DuPont available at http://ec.europa.eu/comm/competition/mergers/cases/m986_19980211_600.en.pdf downloaded on 4.4.2008

[254] Horizontal Merger Guidelines para 32-36

[255] Case no COMP/M.1795-Vodafone Airtouch/Mannessman available at http://ec.europa.eu/comm/competition/mergers/cases/m1795_en.pdf. downloaded on 4/4/2008 and also MCI Worldcom/Sprint case the merger prohibited because of the merger entity would be unrivalled and competitors and consumer would be dependent on their internet connectivity and the merger entity would be able to control over price and technological developments.

[256] Case no IV/M.877 Boing/McDonnell Douglass case, para 58 The study on aircraft supply competition between 1994-96 showed that the presence of the MCD in the market has led to the reduction of over 7% in the realised price as compared with the list price as far as orders placed with Airbus was concerned.

**b) The Coordinated effects (Collective Dominance)**

To determine collective dominance, to analyse oligopolistic market structure is necessary. By merging in highly concentrated market, firms may able to coordinate their anticompetitive behaviour without entering into any agreement by raising the prices or other competitive harm. [257]Therefore, considering this possibility "The Commission will examine the structure of the market and past behaviour of the firm on the market."[258]

The "dominant position" is not defined in the EC Treaty but the ECJ states "a dominant position relates 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 extend independently of its competitors, customers and ultimately of its consumers."[259]

"In the beginning, the focus of merger control was largely on single dominance: would the merger create a single player with a dominant position"[260] "…Through the doctrine of *collective dominance*, the Commission was able to prohibit mergers leading to coordinated effects using the dominance test, even if they did not result in particularly high market shares."[261]

The first time, the collective dominance was recognised was in the *Nestle Perrier.*[262] Case was the merger of two of three major suppliers of bottled mineral water in the French market. After the merger there were two remaining major suppliers with total market shares for bottled water and still water would be 82% and 95% respectively and foremost the competition would be impeded by duopoly. The Commission held that, the Regulation was covered single and oligopolistic dominance in order to ensure the competition is not distorted which is the one of the EC Treaty objectives.

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[257] Horizontal Merger Guidelines para 39,43
[258] Bellamy&Child (2008) p 753
[259] Case 85/76Hoffman La Roche v Commission ECJ[1979] ECR 461, 520 & Gencor v Commission para 200
[260] Amato &Ehlermann, p 438
[261] Horner N(2006) *"Unilateral Effects and the EC Merger Regulation-How The Commission Had Its Cake and Ate it Too"* p, 25
[262] Case No IV/M.190-Nestle/Perrier**,** Official Journal L 356, 05.12.1992 para 11-115 available at http://eur-lex.europa.eu/LexriServ/LexUriServ.do?uri=CELEX:31992D0553:EN:HTML downloaded on 18.4.2008

In *Gencor v Commission*, the Commission blocked the merger because of the merging parties (Implats/LPD ) and Amplat would have held 60-70% of worldwide market shares and 89% of the world reserves of platinum. The parties argument the regulation did not cover collective dominance was rejected because it does neither exclude it. The Commission` findings the prospect of collective dominance was upheld by the Court. Implats/LPD and Amplat have a similar cost structure, shares and shares of world reserves. Platinum is a homogeneous product and the market has a transparent price-setting mechanism and price transparency is a fundamental factor where there is an oligopoly. In addition the parties have a high degree of interest. The alignment of interest would have increased the likelihood of anti-competitive parallel behaviour. The Court stated that collective dominance may also arise from the existing economic conditions in the market which leads to tacit collusion[263] the Commission was able to block the merger when tacit collusion caused by the common interest arising from the characteristic of the market even though there was an absence of dominance. [264]

However, in *Airtours v Commission*[265] the CFI annulled the Commission decision and the ruled out the conditions which must be filled for the establishing of collective dominance:

1) There must be a sufficiently transparent market, the member of oligopoly is able to know the others behaviour and whether or not they are adopting a common policy

2) The tacit coordination must be sustainable over time and there must be an incentive to follow a common policy, also there must be a deterrent mechanism

3) The Commission must prove that the foreseeable reaction of the competitors or the consumer would not create a risk for common policy.

Those conditions must be fulfilled and the Commission had not supported its prospective analysis with the cogent evidence. The CFI showed that "collective dominance is not at all easy to prove."[266]

The effects resulting from a merger where effective competition is significantly impeded by the creation or strengthening of a collective dominant position increases the risk for tacit

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[263] Gencor v Commission, para 277 "That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice."

[264] Amato& Ehlermann p 442

[265] Case T-342/99, Airtours plc v Commission[2002]ECR II-2585 [2002] 5 CMLR 317 para 62

[266] Amato & Ehlermann p 445

collusion. The coordination can be in different forms such as, keeping prices above the competition level, limiting production, dividing markets.

In *Impala v Commission*,[267] the CFI annulled the Commission's decision on merging Sony and BMG which are two of the five major music companies the CFI reaffirmed the previous judgments and underlined that the Commission's prospective analyses must be proved by solid evidence.

**4) Vertical Mergers:** In this type, the companies operate a different level of supply chain when the upstream firm merges with the downstream firm. Competition concerns arise non-coordinated effects arises from foreclosure or coordinated effect. It may be result in actual or potential competitors' access to downstream or upstream markets is impeded or eliminated. This is called the foreclosure effect. "…as for horizontal mergers, the increase of market power is the essential criterion for the assessment of vertical mergers"[268]

The parties` individual or combined market shares must be 25% or more in downstream or upstream market. [269]

**a) Non-Coordinated Effects (Foreclosure)** The actual or potential rivals` ability to access suppliers or market is hampered or eliminated. Consequently, the rivals` competition ability is lessened and merging parties would be able to profitable increase the price.

Foreclosure can be in two forms. Firstly, the downstream rivals` access to an important input; secondly, the upstream rivals `s access to a sufficient customer base is restricted.

The Commission must prove that the merged entity ability to substantially foreclose access to input or customer base and also have an incentive to foreclosure which can significantly impede effective competition.[270] Also, the countervailing factors are considered such as

[267] Independent Music Publishers and Label Association (Impala) v Commission [2006]ECR II-2289,[2006] 5 CMLR 19 para 245-248
[268] Amato &Ehlerman, p 476
[269] FO Form section 6 /III &The Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the Control of concentration between undertakings, para 25 states that the safe harbour where the post merger market shares are below 30%.
[270] Case no COMP/ M.2803-Telia/Sonera para 91 available at http://ec.europa.ec/comm/competition/mergers/cases/decisions/m2803_en.pdf on 14.4.2008

strong competitors, buyer power, market entry[271] which the entity would not be determinative on market conditions.

In *Tetra Laval Sidel*[272], Tetra was dominant in the liquid food carton and plastic packaging and Sidel was SBM machines which were used in production of PET bottles. The Commission held that, vertically integrated entity would use its dominant position as a supplier of the machines and could foreclosure on small independent packaging companies – which was converting pre-forms-into the PET bottles- by raising the machines costs or to reinforce its position. Tetra committed to divest its interest in PET business to eliminate the Commission concerns. The CFI held that, there was not cogent evidence and the Commission had not been showed that a modified merger would result in sizeable or at least significant vertical effect on the relevant PET packaging market. The CFI annulled the Commission assessment on vertical effects.

**5) Conglomerate Mergers**: The parties are engaged in unrelated types of business activities. The parties are in closely related the supplier of complementary products or partially substantial products. It is important when one of the parties is dominant. The CFI held in Tetra Laval case the proof of conglomerate effects need precise examination, supported by convincing evidence.[273]

The competitive concerns arise when a merging entity has ability and incentive to leverage a strong market position from one market to another by bundling, trying or in other ways.
The bundling or trying practices are compensated by efficiency defence. Nonetheless, it may lead to a reduction of competition and opportunity to raise the price for the merging entity. [274]

[271] Non-Horizontal Guidelines para 48-50 & Case no IV/M.0023-ICI/Tioxide In *ICI/Tioxide*, ICI is the second largest suppliers of paint and Tioxide is the world's largest supplier of titanium dioxide (TD) this material is the most important raw material for making paint. It was assessed that there was no evidence of foreclosure because both firms were not dominant on the downstream paint and upstream TD market. By merging ICI would not have big cost advantages over the competitors because TD`s cost was low in the paint. In addition there was alternative supplier for ICI`s competitors.
[272] CFI, T-5/02 Tetra Laval BV v European Commission. [2002] ECR II-4381 & Case no COMP/M.2416-Tetra Laval/Sidel
[273] Ibid , para 155
[274] Non Horizontal Merger Guidelines para 93

**C) Countervailing Factors**:

**1)Market Entry: "**In the context of merger, the question is whether, if the merger creates a dominant position, the firm can exploit this or whether entry barriers are so low that other can enter and prevent high prices."[275] To define entry is sufficiently constraint; it must be likely, timely and sufficient to deter anti-competitive effect of the merger.[276]To assess the market entry, the entry barriers are important which specific features of the market in question. The barrier may arise from legal, technical or other factors.

**2) Buyer Powers:** The merging entity could be seller or buyer. By merging the parties can have buyer power which provides them more favourable terms. Also, the supplier may have maintained their sales through the merged entity and merger provides the ability to obtain lower prices where the rivals cannot compete. The buying power would allow action independently from its competitors.[277] However, the merged entity on the seller side with high market share will not significantly impede effective competition it has countervailing buyer power in respect of their bargaining power, its significance to the seller and switch to alternative suppliers. It must be exist at the time and after the merger.[278]

**3)Efficiencies:** When a merged entity is significantly impeding effective competition, it may balance it with efficiency claims. These conditions must be met. It must benefit consumers; it must be merger specific; it must be verifiable.[279]The essence is consumer welfare not the total market or merged entities. [280]"Traditionally, the Commission has shown itself reluctant to accept the efficiencies resulting from a merger as a consideration in support of a clearance decision."[281]The parties must prove that efficiencies are substantial, timely and could only be provided by merger.

[275] Monti, p 146
[276] The Horizontal Merger Guidelines para 68-75
[277]Case no IV/M.784. Kesko/Tuco. It was merging of two supermarket chain in Finland, the majority of producer's sales 50-70% was depended on Kesko/Tuco purchase. Para 134-135, 150 available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m784_19961120_610_en.pdf on 24.4.2008
[278] The Horizontal Merger Guidelines para 64, 67
[279] The Horizontal Merger Guidelines para 76-88
[280] Korah, p 415
[281] Dabbah & Lasok, p 415

**2) UNDER TURKISH LAW:**

The LPC aims to prevent restrictive competition for goods and services or an abuse of a dominant position in the market and to ensure the protection of competition in Turkey.

**A) Market definition:** First of all, in order to establish the Board jurisdiction and substantial assessment of merger is based on a market definition in terms of product and geographic area. The Board has just established Guidelines on the relevant market.[282] To define the market in product and geographic term"…enables the determination of suppliers and buyers/consumers active in that market"[283] and from this point calculation of market share is also based on the market definition. Consequently, "for determining the relevant product market for goods or services, a detailed economic analysis is necessary."[284]

**1) Relevant product market:** The relevant market is "the goods or services which are deemed identical in the eye of consumers in terms of their prices, intended use and characteristics… "[285] In *Aygaz* case[286], the Board underlined the substitutability and stated that the definition of the relevant product market covers the demand and supply side substitutability. Particularly, when in the view of consumer the characteristic of product, price and functionality are similar; the product would be in the same market. On the other hand, in respect of supply side; the products would be in the same market when the suppliers are able to produce similar products by a small change in their production structure.

**a) Demand side-substitution:** In *Aygaz* case, LPG was a multifunctional product and its use in industry or for lighting and heating was substitutable with other products. However, in domestic use (for oven/ kitchen) was not substitutable with electricity and natural gas because electricity was more expensive and there was no natural gas resource.

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[282] TCB Guidelines on the Definition of Relevant Market Art 41, the Guidelines has been adopted by the TCB decision no 08-04/56-M on 10/01/2008 available at http://www.rekabet.gov.tr/ekilavuz/html
[283] TCB Guidelines on the Relevant Market para 41
[284] Guven, p 154
[285] The TMR Art 4/ last paragraph &Similar definition takes place in the Block Exemption Communiqué on Vertical Agreements, Amended by the Competition Board Communiqué No.2003/3, Communiqué no 2002/2 Art 3(d)
[286] TCB case no E2-D1-97/2 Aygaz Anonim Sirketi Decision no 93/750-159 decision no 26.11.1998 available at http://www.rekabet.gov.tr/pdf/93-750-159.pdf downloaded on 16/4/2008

Although having almost the same production process, the characteristic of the products, by different consumer group shows no substitutability between products. [287]

**b) Supply side-substitution:** The Board decided that, in terms of production, having know-how for two products and reasonable cost to switch shows supply side substitutability.[288] There was not supply substitution because necessity of an essential change in production technology required new investment. [289]

However, to determine the relevant market not only from the point of view of consumer preference but other factors are also taken into account. In the *Pfizer*[290] case "medicine" market, the view of end users was not the main consideration. The product preference was made by the medical profession with consideration of "its scientific intended use and aim".

In one of the privatization cases[291], the Board took the economic and legal factors to determine the relevant markets. The fact that only ships registered in Turkey have the right of coastal trading was a determining factor of the coastal trade market. Transatlantic transport was a separate market because it needed more investment, agency network and a good reputation.

The past samples of substitutability between the products, quantitative tests, opinion of consumers and competitors, consumer choices, cost and barriers to switch, different customer categories and price discrimination.[292]

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[287] TCB case 2007-3-3 Bal Uretim ve Ihtiyac Maddeleri A.S/ Turk Henkel Kimya San.ve Tic.A.S decision no 07-11/65-20 decision no 1.2.2007 available at http://www.rekabet.gov.tr/pdf/07-11-65-20.pdf downloaded on 6/2/2008

[288] Case Bal Uretim/Henkel case & case no D1/1/C.D.-01/3 (Acquisition) SmithKline Beecham plc/Block Drug Company Inc decision no 01-06/53-16 decision no 30.01.2001 available at http://www.rekabet.gov.tr/pdf/01-06-53-16.pdf downloaded on 15.4.2008. also decision no 99-12/93-35 decision date 03.03.1999 Erbak Uludag Mesrubat ve Gida A.S . available at http://www.rekabet.gov.tr/pdf/99-12-93-35.pdf downloaded on 14/4/2008

[289] TCB case no 2008-3-3 decision no 08-19/194-65 decision date 28.02.2008 available at http://www.rekabet.gov.tr/pdf/08-19-194-65.pdf downloaded on 17.4.2008

[290] TCB case no D1/1/E.C.G.-00/2(Acquisition) Decision no 00-19/189-101 decision date 23.05.2000 available at http://www.rekabet.gov.tr/pdf/00-19-189-101.pdf downloaded on 16/4/2008

[291] TCB case no D4/1/M.A.-00/1 The Presidency of Privatization Administration /Deniz Nakliyati A.S decision no 00-6/61-28 decision date 10.2.2000 available at http://www.rekabet.gov.tr/pdf/00-6-61-28.pdf downloaded on 16.04.2008

[292] TCB The Market Guidelines Art 24-30

However, there are some cases where the relevant market was not defined[293] or the relevant market was defined without analysis. [294]

**2)Relevant geographic market:** The TMR defines "…areas in which undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighbouring areas, as the conditions of competition are appreciably different from these areas."[295] The barriers and switching cost of suppliers, conditions of access to distribution systems are taken into account by the Board.[296] Also, the nature of the product can be determinative factor.[297]There are many cases where the geographic market has been assessed as whole or part of the country.

**B) Competitive Assessment:**

There is no specific provision for foreign investments or particular sector under the TMR. The LPC Art 7 states that "*mergers of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition significantly decreased in any market for goods or services within the whole or a part of a country…is illegal and prohibited."*

The TMR 6/2 states" mergers and acquisitions which do not create a dominant position or strengthening a dominant position as a result of which effective competition shall significantly impeded in the country or in a part of if, shall be authorized."

[293] TCB decision no 52/377-41 decision date 12.2.1998 available at www.rekabet.gov.tr/pdf/52-377-41.pdf & TCB decision no 99-3/24-6 decision date 28.01.1999 available at www.rekabet.gov.tr/pdf.99-3-24-6.pdf & TCB decision no 64/483-75 decision date 07.05.1998 available at http://www.rekabet.gov.tr/pdf/64-483-75.pdf & TCB decision no 59/439-60 decision date 26.03.1998 available at http://www.rekabet.gov.tr/pdf/59-439-60.pdf downloaded on 17/4/2008

[294] TCB decision no 2006-3-165 decision no 07-01/9-4 decision date 11.1.2007 available at www.rekabet.gov.tr/07-01-9-4.pdf & TCB decision no 99-12/95-37 decision date 03.03.1999 available at www.rekabet.gov.tr/pdf/99-12-95-37.pdf & TCB case no 2008-4-33 decision no 08-22/222-72 date 06.3.2008 available at http://www.rekabet.gov.tr/pdf/08-22-222-72.pdf downloaded on 17.4.2008

[295] TMR Art 4/5

[296] TCB The Market Guidelines Art 38 & TCB case no 2003-3-84 decision no 04-42/519-126 decision date 17.06.2004 available at http://www.rekabet.gov.tr/pdf/04-42-519-126.pdf on 17.4.2008 in the case the geographic market was a "Sultandagi" district because the highest level of production in the district and storage conditions, limited distribution facilities in terms of producers.

[297] TCB decision no D3/1/H.S.-00/3 decision no 00-29/314-181 decision no 03.08.2000 available at http://www.rekabet.gov.tr/pdf/00-29-314-181.pdf downloaded on 18/4/2008 in the case relevant product market was "bread market". Bread was easy to get stale which makes its distribution in limited area.

Art 6 (a) and (b) [298]shows the factors that should be taken into account by the Board. The factors are as same as the ECMR Art 2/1 (a) and (b). The approval can be in the form of final decision or by implied acceptance in which case, the Board does not respond or take any action for the merger and acquisition within 30 days from the notification, the transaction become legally valid.[299]

**1) Dominance Test:**

The TMR applies dominance test. The dominant position is "The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers."[300]

Art 7 of LPC prohibits creating or strengthening dominance position by mergers as a result the competition being significantly impeded. A dominance position is not enough to block the merger; it must significantly impede effective competition. According to some academics, the existence of dominant position and strengthening of dominant position is enough to prohibit the merger within the meaning of Art 7 of the LPC without further analyses.[301]

The High Court of State decided that "the examination of market structure with respect of amount of credits which were given by the banks in the relevant market, the largest10 banks and 11 medium and remaining 54 banks provided credit of 72 %; 12% and 16% respectively. This structure did not fit with narrow oligopoly definition because none of the banks had power to determine economic parameters independently from its rivals. Therefore there was no dominant position in the market; consequently there would not be abuse of dominance."[302]

[298] The Board takes into account, structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country; the market position the undertaking concerned; their economic and financial powers; their alternatives for finding suppliers or users; their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for relevant goods or services; interests of intermediaries and end consumers; developments in the technical and economic process which are not in the form a barrier to competition and ensure advantages to a consumer; and the other factors shall be taken into account.

[299] The LPC Art 10/2
[300] The LPC Art 3
[301] Arslan p 540
[302] The High State Court , 10 Chamber Case no:[ Esas no] 2002/871 Decision no:[Karar no] 2004/5103

Since 1999 the Board has rejected three and conditionally approved forty one transactions.[303]

**2) Market Share:** Market share is not entirely enough for dominance but the most important indication of dominant position. Therefore it is the preferential factor [304]and it should be taken into account with rivals` market share.

Neither the LPC nor TMR or the Notification Form state presumed market share which indicates dominance.

Also, the Board decisions do not set such a limit. For example, The Board has cleared the merger with 60% of market share.[305] Also, 70% market share was not assessed creation or strengthening a dominant position.[306]

In other decision the Board assessed that, Sisecam was already in a dominant position and after merger it market share would increase 1% which was not a strengthening of dominant position. [307] The market shares are not exact evidence for assessing the dominance and the Board has determined every case in its own merit.

Not only market share but also concentration level is also taken into account. For example, *Glaxo/Smithkline* [308]cases where the parties activities overlapped in two medicine markets; the Board applied CRn and HHI test. It was concluded that before and after merger, the concentration level would high. The Board established a dominant position. The merger was approved with condition that the parties had to transfer some medicine licences to third parties.

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[303] According to TCB statistics available at http://www.rekabet.gov.tr/eistatistik/index.htm on 19/4/2008
[304] TCB Case no D4/1/L.K.-01/2(joint venture) decision no 01-44/433-311 decision date 18.09.2001 available at http://www.rekabet.gov.tr/pdf/01-44-433-311.pdf downloaded on 19/4/2008
[305]TCB case no D3/1/Y.K.-99/11(Acquisition) decision no :99-33/313-193 decision date 06.07.1999 available at http://www.rekabet.gov.tr/pdf/99-33-313-193.pdf downloaded on 19/4/2008
[306] TCB case no D1/1/A.O.-00/2 decision no 00-49/518-283 (Acquisition) decision date 12.12.2000 available at http://www.rekabet.gov.tr/pdf/0049-518-283 .pdf downloaded on 19/4/2008
[307] TCB decision no D1/1/H.H.U.-00/1(Acquisition) decision no 00-14/134-66 decision date 18.04.2000 available http://www.rekabet.gov.tr/pdf/00-14-143-66.pdf downloaded on 19/4/2008
[308] TCB case no D1/1/M.M.O.-00/2(merger) Glaxo Welcome plc/Smithkline Beecham plc decision no 00-29/308-175 decision date 03.08.2000 available at http://www.rekabet.gov.tr/pdf/00-29-308-175.pdf on 19/4/2008 also in case D1/2/E.C.G.-00/4 (privatization) decision no 00-43/464-254 . HHI test was applied.

With regard to market share, if it was stable for a long time it shows the firms market power therefore to maintain the high market shares indicate dominance position. However, its duration change from one market to another. In one of its decision 3 years was enough.[309]At this point, the barriers to entry into market play an important role. When it is the beginning of market formation and the barriers are low, high market shares will not be convincing evidence of existing of dominance. In addition, comparison with the rivals market share may also be determinative for dominance when there is big a discrepancy.[310]

Existence of rivals and market entry, the Board decided that[311], in the gypsum market which was within the plaster market; even though being the only producer, the entry to the market was easy because the investment cost was low and the technology was widely known. In a different case,[312] it was stated that the market share was the most important indication to determine dominance. However, the undertaking market share was 22% and the Board expressed other criteria for analysis dominance. Firstly, vertical integration which was the undertaking itself takes place from production to marketing in the market. The second criterion was to provide all demands and in respect of long term it means monopoly. Moreover, the loyalty scheme or barrier to entry also had to be taken into account. It was decided that, absence of the above conditions indicates that there was no dominant position.

**3) Horizontal Mergers (yatay birlesme)** In *Igsas/Toros Gubre(TG*) [313]case was Igsas`s privatization. TG was offered the highest price. The case was assessment of privatization by the Board. In this case parties were producers in the same market which was "nitrous fertilizer". The Board examined a number of factors. The market had high entry barriers and during last 19 years there was no new entrants, there were few Turkish companies. Igsas made 80% of sales in that market and the last three years the parties total production volume was more than 48 %.In addition, supply of nitrous fertilizer corresponded with imports in the

[309] TCB decision no case no S.R.-01/1 decision no 01-35/347-95 date 20.07.2001 available at http://www.rekabet.gov.tr/pdf/01-35-347-95.pdf downloaded on 20.04.2008
[310] TCB case no D4/1/L.K.-01/2 (joint venture) Benkar Tuketici Finansmani AS /Fiba Bank A.S decision no 01-44/433-111 date 18.09.2001 available at http://www.rekabet.gov.tr/pdf/01-44-433-111.pdf downloaded on 19.4.2008
[311] TCB decision no D1/1/A.O.-99/4 Ata Insaat/Lafarge/Agretas/ Entegre Harc, decision no 99-21/172-91 available at http://www.rekabet.gov.tr/pdf/99-21-172-91.pdf downloaded on 18/4/2008
[312] TCB case no D3/1/H.S.-00/3 decision no 00-29/314-181 Afyon Ekmek decision no 03.08.2000 available at http://www.rekabet.gov.tr/pdf/00-29-314-181.pdf downloaded on 19/4/2008

[313] TCB case no D1/2/E.C.G.-00/4 (privatization) TC. Basbakanlik Ozellestirme Idaresi Baskanligi/Toros Gubre ve Kimya Endustrisi A.S. date 03.11.2000 available at http://www.rekabet.gov.tr/pdf/00-43-464-254.pdf downloaded on 17.4.2008

market where TG had the highest import and it had a big production capacity. With regard to competition between importer and producer there were legal barriers like subsidization of producers.

According to the HHI test the market was highly concentrated and the parties` market share would reach 46.22 % their nearest rivals` market share would be 18.84 %. Also by the merger, TG`s distributorship would be extended. The Board decided that, at present the existence of oligopoly, the high entry barriers, the fact that TG achieved one third of the total import, it sales and production, it was the leader in the market. In addition, TG would have more than half the sales especially in two types of fertilizer (urea and AN) where sale was increasing. Moreover, significantly distribution facilities would give TG serious advantage comparison its rivals and its negotiation power would increase. Overall, the Board assessed dominant position and blocked the privatization of TG.

In *Pfizer/ Warner-Lambert(WL)*[314] case, the parties were pharmaceutical companies and they were in "C10" market. Their total market share was 23%.In the market they have two big rivals. There was not a dominant position. However, only Pfizer`s market share in C2A, C8A and N7D[315] market were 95%, 80% and 56% respectively. The Board stated that, Pfizer was already dominant and there was no strengthening of its dominant position because WL had no any economic activity in those markets. The merger was approved.

**a)Collective Dominance (Birlikte hakimiyet)** The Board recognised collective dominance in its early decision.[316] The Board assumed the both group's total market share in "advertisement" was strengthening evidence for collective dominance. Nevertheless, it did not establish any further analyses and did not assess existence of abuse of dominant position.

[314] TCB case D1/1/E.C.G.-00/2 (Acquisition) decision no 00-19/189-101 date 23.05.2000 available at http://www.rekabet.gov.tr/pdf/00-19-189-101.pdf downloaded on 19/4/2008

[315]C10, C2A, C8A, N7D are names of medicine groups which were used to define the relevant markets according to the World Health Organization classification.(Anatomical Therapeutic Classification)

[316]TCB case no D2/1/B.E.-99/2 decision no 99-56/599-381 decision no 08.12.1999 It was about abuse of dominant position (Art 6(d) of LPC). Nine newspaper in the relevant market was belong to four big group companies.(Dogan, Sabah, Cukurova, Uzan) Considering the oligopolistic market structure, Dogan Group had the highest market share. Also, it always considered its big rivals Sabah Group's behaviour in the market. Both company had increased their price as respond to Uzan`s price decrease. available at http://www.rekabet.gov.tr/pdf/99-56-599-381.pdf downloaded on 24.4.2008

The Board in other decisions considered the collective dominance and set out the criteria. In the *Ingenico/Sagem* [317], the merged entity (Ingenico) and its rival (Verifone) market share would reach a high level in an already concentrated market which shows an oligopolistic structure. The Board set out three criteria with reference the Commission's notice[318]

1) In a transparent market, firms who are in tacit collusion must be able to know each others behaviour whether they follow the common policy

2) Deterrent mechanism in case of deviation and its applicability

3) Customer, actual or potential rivals must not create a risk for the coordination.

"Having common policy depends on market characteristics. In this respect, it is easy to reach a common policy where there are few firms, homogenous product, stable demand and supply in the market." In POS terminal market[319], the products were not homogenous and the firms had different financial structures, distribution channels. The market was not transparent because the price was determined by sale by sealed bids. There was no deterrent mechanism and the buyers were big Turkish banks usually work with more than one POS providers it was assessed there were not creating or strengthening a dominant position.

**4) Vertical Mergers (dikey butunlesme)** In *Dusa/Kordsa* [320], it was stated that " vertical effect does not change direct market structure. However, it may create significant entry barriers and anti-competitive effects." Dusa was acquired by Kordsa which was only producer and dominant in kord bezi [321]market. Duso was supplier of Kordsa and Dusa`s the only buyer its groups and Kordsa. Therefore, the Board decided that, merger did not increase the market share of the parties consequently did not significantly impede effective competition. The Board also stated that there were high barriers to enter into the market such as technology and need for significant investment but it cleared the merger without any further analyses.

[317] TCB case no 2007-2-213 decision no 08-08/89-23 decision no 24.1.2008 available at http://www.rekabet.gov.tr/pdf/08-8-89-23.pdf on 24.4.2008 & also TCB case no 2003-3-121 decision no 03-75/911-385 decision no 20.11.2003 available at http://www.rekabet.gov.tr/pdf/03-75-911-385.pdf downloaded 24.4.2008

[318]The Commission Horizontal Merger Guidelines

[319] POS (point of sales) used for electronic payment terminals by bank or other institutions.

[320] TCB decision no 99-12/95-37 date 03.03.1999 available at http://www.rekabet.gov.tr/pdf/99-12-95-37.pdf downloaded on 24.4.2008

[321] This material is used in production of car tyre.

However, in another case[322], the JV was the supplier and the parent companies (39) were distributors of LPG. Parent companies had 92% of market share in distribution. The Board considered that, JV would be deal with LPG import, produce, supply, stock, wholesale and marketing. This was vertical integration. LPG was compulsory product in Turkey. By merging the supply and distribution of LPG would facilitate control. The entry barrier was high and the existing actual dominance in distribution would eliminate potential competition. Therefore, the Board blocked the merger.

**5) Conglomerate Mergers ( capraz butunlesme)** In *Proctor Gamble/Gillette*[323] case, the Board mentioned the possibility of conglomerate effects whether two complementary products( toothbrushes and toothpaste) would provide a dominant position to P&G. The Board stated that, P&G was not dominant in these markets. It considered the existing of buyer power where end users of the products usually buy these products via organised retail sector in Turkey and concluded that there was no concern about conglomerate effects.

**C) Countervailing Factors:**

**1) Entry Barriers:** The dominance position may be balanced with actual or potential competition. The Board assessed in *Migros/Tansas*[324] case, that potential competition may arise, the ability of rivals to increase their capacity, import facilities from other geographic areas, supply substitution and essentially new entry into the market. Essentially, it relates to the entry barriers. The entry must be timely, likelihood and sufficient. In this case the relevant retail market was the stores above 300sq m for FMCGs[325] and the especially market share in four district was between 52%-74%. However, considering the availability of land for 300sq m stores, needed for less capital to entry into the market, the absence of legal barriers to obtain permission and the possibility of small market expansion and the strong rivals in the market did not create a dominant position.

[322] TCB case no D4/1/O.P.-98/2,(D1/2/O.P.-98/2) Decision no 99-26/230-138 date 27.05.1999 on http://www.rekabet.gov.tr/pfd/99-26-230-138.pdf downloaded on 17.4.2008
[323] TCB case no 2005-1-75 The Procter Gamble Company/Gillette .decision no 05-55/836-228 date 08.09.2005 available at http://www.rekabet.gov.tr/pdf/05-55-836-228.pdf on 24.4.2008
[324] TCB case no 2005-3-99 Migros/Tansas decision no 05-76/1030-287 date 31.10.2005 available at http://www.rekabet.gov.tr/pdf/05-76-1030-287.pdf downloaded on 25.4.2008
[325] FMCGs refer to fast moving consumer goods.

**2) Buyer Power:** When "major buyers should be able to find new alternatives in a reasonable time in which case prices are increased by the supplier"[326] *Dystar and BASF* [327]`s market share would be 71% in the "vat paint" market. However, considering the buyers who were big companies and their "negotiation power", the effect of merger would decrease. In another case,[328] the "glaze coil wire" customers were consuming one third of production in total and able to import. They would have influence on the price and marketing strategies of the merged entity.

Also, merger may provide significant buyer power to merged entity. In *Migros/Tansas*, the merging in the retail market would cause a concentration in supply market. The increase of buyer power would bring more favourable terms to the merged entity and it would reflect its prices and their market share which would increase until creation of dominant position which is called the spiral effect. As a result of decreasing competition the advantages gained from the buyer power would not pass the consumer. Especially, frozen foods and detergent product market were chosen where the most possible effect could be seen. However, in these two markets the parties realises total sales and total sales in the organised retail chain[329] and the existence of operating firms led the Board to judge there was no dominant position. By that decision "the first time has assessed buyer power concern comprehensively in the retail market"[330]

**3) Efficiency:** There is no explicit reference in the TCMR. In *LPG*[331] case the merger was blocked and the Board did not grant any exemption to JV, the Board stated that price and quality were leading factors to access the benefit of consumers. Supply of LPG under one company may bring less risk and cost efficiencies for the firms. Also, it may bring increase of prices in a short time however in absence of competition there would be no benefit to the consumer in terms of the quality and prices. However, there has not been any case where the efficiency rules set out by the Board.

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[326] Arslan, p 574
[327] TCB case no D1/1/A.O.-00/2 decision no 00-49/518-283(Acquisition) date 12.12.2000 available at http://www.rekabet.gov.tr/pdf/00-49-518-283.pdf downloaded on 19/4/2008
[328] TCB case no 2002-1-49(JV) decision 02-43/504-209 date 11.07.2002 available at http://www.rekabet.gov.tr/pdf/02-43-504-209.pdf downloaded on 20.4.2008
[329] In detergent market realised total sales was 10.74% and 38% sales in total retail sector; frozen foods 18% and 54.4% respectively.
[330] Erdogan, T(2007) ` *Case Comment Decision of Turkish Competition Authority on Migros/Tansas acquisition*` European Competition Law Review p 3 (2007) available in English.
[331] TCB case D4/1/O.P.-98/2,(D1/2/O.P.-98/2) decision no 99-26/230-138 decision date 27.05.1999 available at http://www.rekabet.gov.tr/pdf/99-26-230-138.pdf downloaded on 17.4.2008

**4) Failing Firms:** It does not explicitly state in the TMR. The Board considered the failing firm defence even though there was no dominant position. It set out criterias:1) the failing firm would out of the market in the near future and its market share would be taken by the acquirer in absence of merger 2) There must not be available any other less anti-competitive option 3) If merger had not been occurred, failing firm's assets would exist in the market.[332]
It can be concluded that, the Board's approach is same as EU[333].

## 3) COMPARISON

There are no guidelines on assessment of merger in Turkish law. The fundamental difference is the ECMR applies the SIEC test which put weight on the significant impediment to effective competition with or without dominance. It also contents the dominance test.

However, the TMR applies dominance test as a pre-condition to significant impediment to the effective competition. As a result, without establishing dominance the merger cannot be blocked. The similarity is, the TMR also covers collective dominance as the ECMR but there has not been a case of collective dominance established by the Board.

According to well established case law large market shares 50% is evidence of existence of dominant position in the ECMR but there is no legal presumption under the LPC, the TCM or the TCB decisions. Therefore, some cases are approved with such as with 70% market shares which are obviously higher than the presumed percentage in the EU.

Nevertheless, it would be correct to say that the limit of 25% of market share for the Board's compulsory jurisdiction per se would not create a dominant position and consequently significantly impede effective competition.

To compare the assessment of conglomerate mergers, so far there is no actual case has been examined in detail by the Board.

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[332] TCB case no D4/1/C.A.-00/1 Uzel/Efe .Decision no 00-27/294-164 date 20.07.2000 available at http://www.rekabet.gov.tr/00-27-294-164.pdf downloaded on 17.04.2008
[333] Cetinkaya, M,(2003) ` *Literature Search and Sample Case Study*` The Competition Law Journal vol 13 , p 42 available at http://www.rekabet.gov.tr/pdf/13.pdf downloaded on 25/4/2008 & The Horizontal Merger Guidelines point 89-91 & case no IV/M.308 Kali+Salz/Mdk /Treuhand

## CHAPTER IV PROCEDURE

**1) UNDER THE EU:** Notification must be made prior to their implementation following the conclusion of the agreement, the announcement of public bid, acquisition of control. Also, notification can be made where the parties has demonstrated good faith and intention to conclude an agreement or make a public bid.[334]

Notification should be made jointly in true merger cases and acquisition of joint control. In other cases the acquiring is obliged to notify the Commission.[335] The notification becomes effective when the complete information is received by the Commission.[336]

Under the EU, pre-notification discussion is always possible with the Commission before prior to notification.[337]

Phase I: The Commission examines a notification as soon as possible. After examination of a concentration, if it falls under the regulation and does not arise any serious doubt compatibility with the common market, the merger would be cleared. The clearance decision could be with conditions as well. The time limit is 25 working days in certain conditions could be increased 35 working days from the following day of notification date or completion of documents.[338]

Phase II investigation starts if a concentration raises serious doubts. The time limit is 90 working days in certain conditions it could be up to 125 working days. [339]

If not notified, the Commission has power to impose a maximum 10% fine of the aggregate turnover of the undertaking concerned within the meaning of Art 5 , on the persons referred

[334] The ECMR Art 4/1
[335] ECMR Art 4/2
[336] Implementing Regulation 802/2004 Art 5/2
[337] DG Competition Best Practice on the conduct of EC merger proceedings Art 5
[338] ECMR Art 6/1(b) and Art 10/ 1
[339] ECMR Art 6(c) Art and Art 10/3

Art 3/1(b).[340] In case of misleading or incorrect or incomplete information regardless of intent or neglect within the required time or refusing to submit an inspection maximum fine will be 1% of aggregate turnover calculated in accordance with Art 5.[341]

**2) UNDER TURKISH LAW**

A notification should be made before implementation of a transaction. In some Board decisions the announcement was enough.[342]However, The Board "in principle inquires to a binding and signed agreement for the notification"[343]

Neither LPC nor the TMR do state notification time to the Board and which event the time starts. The LPC[344] regulates fines in which case the merger and acquisition are committed without the Board authorization. The Board required to be notified before implementation of mergers and acquisition in a reasonable time (preferably 30 days) until 09.03.2006.[345] However, at present there is no a specific time.

Upon notification the Board can clear the transaction within 15 days as a result of preliminary examination or duly notify the parties with objection letter of objection and proceeds to final examination. Until the Board's decision, the transaction will be suspended.[346]

During the second stage, the Board either decides to open an investigation or conduct a preliminary inquiry for gathering evidence. The preliminary inquiry is done by one of Board expert/s and the report is submitted within 30 days[347]. Upon submission of the report, the

[340] ECMR Art 14/2(a)
[341] ECMR Art 14/1
[342] TCB case no D1/1/M.M.O.-00/1(JV-Acquisition) decision no 00-29/309-176 date 03.08.2000 in the case JV and its members of Directors of Board had been fined. Available at http://www.rekabet.gov.tr/pdf/00-29-309-176.pdf downloaded on 20.4.2008 & TCB case no 2002-1-49 (JV) decision no 02-43/504-209 date 11.7.2002 the pre-protocol was enough. Available at http://www.rekabet.gov.tr/pdf/02-43-504-209.pdf on 20/4/2008
[343] TCB Discussion paper about reviewing 1997/1 Communiqué, p 20 & case TCB case no 2005-3-77 decision no 05-40/599-138 date17.06.2005 available at http://www.rekabet.gov.tr/pdf/05-40-559-138.pdf downloaded on 20.4.2008 & TCB case no 2003-2-68(Acquisition) decision no 03-69/831-361 date 23.10.2003 available at http://www.rekabet.gov.tr/pdf/03-69-831-361.pdf downloaded on 20.4.2008
[344] The LPC Art 16(c)
[345] Art 7 of the Communiqué on the Rights and Obligations of the Undertaking and Associations of Undertakings Arising From the Act no 4054 after conclusion of the Organization of the competition Authority Communiqué 1997/6 (Official Gazette 11.11.1997 no 23167) was abolished by Communiqué 2006/2 on 09.03.2006 Official Gazette no 6103
[346] The LPC Art 10
[347] The LPC Art 40

Board makes a decision whether or not to open an investigation within 10 days.[348] If the Board decides to initiate an investigation, this is concluded within six months. However, in cases where it is deemed necessary the Board grants an extra six months.[349]

**3) COMPARISON**

Under Turkish law only one party notification is deemed valid whereas in the EU, depending on the transaction, joint application may be needed. The LPC states that the notification should be made before implementation however it does not state when the parties' obligation starts but the Board requires the signed or binding agreement in practice. In EU, the conditions are set out clearly; before conclusion of agreement or public bid or good intention is enough to notify the Board.

Under Turkish law, there is no pre-notification discussion as EU. The period time is also different in EU usually 25 working days; in Turkey 15 days. Tacitly approval time under Turkish law is 30 days; in the EU 125 working days.[350] Similarly in cases, non notification, providing miss information, both competition authorities impose fines. Under the EU a fine is based on aggregate turnover. The Board imposes fines[351] on base equal to 001% of the annual gross revenue of the undertakings and association of undertakings.

The Commission imposes periodic fines on the persons in Art 3/1(b) and undertakings on a base of each working day of delay not exceeding 5% of the average daily aggregate of the undertaking concerned or its group's turnover. [352]However, the TCM periodic fines are base on 0005% of the annual gross revenue of the undertakings concerned per day.[353]

Art 8 of TMR under the heading of "transformation of notification" states, if the transaction is not a merger or acquisition, the notification will be considered an application for negative clearance within the meaning of LPC Art 8 or exemption within the meaning of Art 5. (It is

[348] The LPC Art 41
[349] The LPC Art 43
[350] The ECMR Art 10/6
[351]The LPC Art 16(amended by Act 5728 on 23.1.2008.Previous article was base on fixed amount and was redetermined every year.)
[352] The ECMR Art 15/1
[353] The LPC Art 17(amended by Act 5728 on 23.1.2008. The previous fines were base on fixed amount for per day)

parallel to Art 81/3) [354] The practical result is negative clearance decisions can always be revoked in certain conditions[355].Under both TMR and ECMR permission may be revoked when incorrect or misleading information was given or the obligation attached to the decision has not been fulfilled.[356]

The ECMR does not state the transform of notification. The ECMR 21/1 provides that the regulation alone shall apply to concentration as defined in Art 3. The Form under 4064/89 stated transfer of notification[357] but the Form under 139/2004 does not express it. However, under the EC Treaty Art 85, the Commission has duty to ensure the application of principles in Art 81 and 82 which was expressed by case law for the merger procedure.[358] Also, Art 6/1 (b) states that, a clearance decision can cover restrictions which are necessary to the implementation of the transaction. It can be concluded that, transfer of notification is also possible under the EU law.

Moreover, in Phase 1 and II, time limits can be suspended when the Commission request information that has not been given or the Commission inspection has been refused or failure to provide new information to the Commission.[359] However, the TMR or LPC have no such provision.

The similarity between the two systems is the competition authorities can both approve the transaction conditionally.[360] General rule is commitments should be proportionate and entirely eliminate the competition problem.[361] It is determined on case by case bases and could be

[354] TCM Art 8
[355] The LPC Art 13"a)change in any event constituting the basis of decision, b)failure to fulfil the terms or obligations resolved c) having taken the decision on the basis of incorrect or incomplete information concerning the agreement in question."
[356] The TMR Art 9 and the ECMR Art 8/6
[357] The Form CO( under 4064/89 Regulation) 9.6
[358]CFI ,case T-210/01, General Electric Company v Commission[2005] ECR II-5575 para 74 " Thus where the Commission, without undertaking a specific and detailed investigation into the matter, can identify the unlawful nature of the conduct in question, in the light of Article 82 EC or of other provision of Community law which it is competence to enforce, it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct." & Case T-5/02, Tetra Laval BV v. Commission[2002]ECR II-4381[2002] 5 CMLR 1182
[359] The Implementing Regulation 802/2004 OJ L 133/1 , Art 9/1
[360] The ECMR Art 6/1 (b) subparagraph , Art 8/2 ;The TMR Art 6/3
[361] The ECMR Preamble Art 30

structural or behavioural commitments.[362] There are no guidelines for remedies under the TMR unlike the EU.

In an appeal, the Commission's decisions are subject to review by the ECJ.[363] Action for the annulments goes to the CFI and from point of law to the ECJ. Appeal against the Board decision should be made to the High Court of State as a Court of First Instance.[364] However, it does not state any specific time. According to Art 7/1 of the Code of Administration,[365] the appeal time is 60 days.

[362] The Commission Notice on remedies acceptable under Council Regulation no 4064/89 and Under Commission Regulation no 447/98, OJ 2.3.2001 Art 9
[363] The ECMR Art 21/2 & The ECMR Art 16
[364] The LPC Art 55 (it has been amended by Act no 5728 Art 476 on 23.1.2008) Previous Art 55 stated "Appeal may be made to the Council of State within due period against the final decisions, fines and periodic fines of the Board, as of communication the decision to the parties."
[365] The Code of Administration (no 2577) Official Gazette, no 17580 , 20.1.1982 "The appeal time to the Council of State and the Administrative Court is 60 days where it was not stipulated with special provisions."

## V.CONCLUSION

Both systems define “undertaking” in broad terms and cover all public undertakings unless their activity in question is within the core activities of the state. In acquisitions, contrary to the ECMR, the TMR does not state “change of control”. However, it applies in practice. The difference is “any person” can be acquirer in the TMR whereas the ECMR requires the acquirer of person or undertaking to be already in control of another undertaking. Under the TMR, to determine a JV as merger and acquisition, corporative and concentrative criteria are applicable. However, under the ECMR, JV is a concentration if it has full functionality.

Under the EU, temporary holding of securities by financial institutions and acquisition by financial holding companies unless they involve determining the competition policy of the undertakings and acquisition of control by liquidator do not constitute a concentration. However, the TMR excludes the merger and acquisition by inheritance but does not exclude financial holding companies activities.

The Commission and the Board has competence over foreign transactions if it affects their territory. In the ECMR thresholds are based on worldwide and EU wide turnover whereas the TMR thresholds are based on market share and turnover in the relevant product market. Even if only one party exceeds the given thresholds, merger will be subject to the Board `s jurisdiction.

The Board has sole authority to determine the turnover and the market share in the relevant product market. Therefore, it is difficult for the parties to determine whether they exceed the thresholds. As a result, every transaction is notifiable to the Board for legal security. Therefore, in my opinion, the thresholds should be based on only turnover without reference to the relevant market.

The fundamental difference is the ECMR applies the SIEC test whereas the Commission may block the merger without establishing dominant position if there is a significant impediment to effective competition.

However, the TMR applies dominance test and it may block the merger if the dominance position significantly impedes effective competition. For example, if a concentration had notified the Commission and the Board, the transaction may be blocked by the Commission and may be approved by the Board as a result of these tests.

According to the well established case law in the EU, 50% market share may be evidence of a dominant position. However under Turkish law there is no legal presumption.

In both systems notification of the transaction is compulsory. There are many differences in the procedure in terms of time limit and determination of fines as previously noted. Contrary to the ECMR, there is no pre-notification stage and suspension of time limits under the TMR.

The ECMR has been formulated by the Commission's experience and by the Community Courts judicial review over the years. Since 1989, the merger regulation had been amended with consideration to overcome the "gaps" in regulations and maintain effective competition in the common market. The assessment of merger comprises legal and prospective economic analyses. The Chief Competition Economist in the Commission provides more detailed prospective analyses about mergers.

Overall, harmonising the law with the EU was the main reason to adopt the LPC in Turkey.
The merger control has a longer history in the EU than in Turkey. According to Decision no 1/95 of the EC-Turkey Association Council Art 39, case law developed by the EC authorities is applicable in Turkey. The EU jurisprudence provides a rich reference to the Board. However, under the TMR there are no available notices except the Relevant Market Guidance. In my opinion, to establish further notices may provide a valuable guidance for investors and legal practitioners in order to understand mergers regulations in Turkey. It can be concluded that, even though there are differences the TMR is deeply influence by the EU law.

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