THE REPUBLIC OF TURKEY

BAHÇEŞEHİR UNIVERSITY

THE CONCEPT OF CONTROL IN CONCENTRATIONS AND A CASE STUDY

Master's Thesis

HANDE KISTAK

İSTANBUL, 2010

THE REPUBLIC OF TURKEY

BAHÇEŞEHİR UNIVERSITY

INSTITUTE OF SOCIAL SCIENCES

EUROPEAN UNION PUBLIC LAW AND INTEGRATION PROGRAMME

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Thesis Advisor: PROF. DR. ESER KARAKAŞ

İSTANBUL, 2010

T.C.

BAHÇEŞEHİR ÜNİVERSİTESİ

SOSYAL BİLİMLER ENSTİTÜSÜ

AVRUPA BİRLİĞİ KAMU HUKUKU VE ENTEGRASYONU

Tezin Adı: Konsatrasyonlarda Kontrol Unsuru ve Olay İncelemesi
Öğrencinin Adı Soyadı: Hande Kıstak
Tez Savunma Tarihi: 09.08.2010

Bu tezin Yüksek Lisans tezi olarak gerekli şartları yerine getirmiş olduğu Enstitümüz tarafından onaylanmıştır.

Prof. Dr. Selime Sezgin
Enstitü Müdürü

Bu tezin Yüksek Lisans tezi olarak gerekli şartları yerine getirmiş olduğunu onaylarım.

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T.C

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THE INSTITUTE OF SOCIAL SICENCES

EUROPEAN UNION PUBLIC LAW AND INTEGRATION

Name of the thesis: The Concept of Control in Concentrations and a Case Study

Name/Last Name of the Student: Hande Kıstak

Date of Thesis Defense: August 9, 2010

The thesis has been approved by the Institute of Social Sciences.

Prof. Selime SEZGİN

Director

I certify that this thesis meets all the requirements as a thesis for the degree of Master of Arts.

Prof. Ayşe NUHOĞLU

Program Coordinator

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Examining Committee Members	Signature
Title, Name and Surname	
Prof. Dr. Eser KARAKAŞ	……
Yrd. Doç.Dr. Selcen ÖNER	……
Yrd. Doç.Dr.Emin KÖKSAL	……

ACKNOWLEDGEMENTS

First of all I would like to thank and express my deepest gratitude to my advisor Prof. Dr. Eser Karakaş for his tolerance and guidance. I would like to thank to my dear friend Asst. Ayşegül Özbebek who has provided me a huge opportunity for my research and moral support during the preparation of this thesis, and given me a wide perspective regarding my academic career; my colleague Att. Begüm Meram for her great contribution in English terminology and full of energy; Dominik Jozic for his patience, encouragement and crucial role in my life. Finally I would like to thank my dear parents Diclehan Kıstak and Mustafa Kıstak and my whole family for their endless support and trust.

Hande KISTAK

ABSTRACT

THE CONCEPT OF CONTROL IN CONCENTRATIONS AND A CASE STUDY

Kıstak, Hande

European Public Law and Integration

Thesis Supervisor: Prof. Dr. Eser Karakaş

September 2010, 82 pages

Article 7 of The Act on the Protection of Competition which came into effect 13 December 1994 subsequently its publication in Official Gazette contains a formulation that aims to control market structure in general terms, and mentions acquisition of one undertaking's assets or its partnership shares, or of means which confer thereon the power to hold a managerial right in order to be deemed as a concentration by acquisition. However, in addition to Article 7, Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, which was published on 12 July 1997 by Turkish Competition Board and contains parallel articles with the European Community Merger Regulation on the Control of Concentrations Between Undertakings, regulates controlling of aforementioned and also joint ventures. As a matter of fact, a structural change in the control of an undertaking is the determining factor in terms of realization of a concentration.

By taking into consideration of the development of Competition Law in Turkey, the definition of the term "concentration", types of concentrations and changes in the control of undertakings and differences between European Union and Turkish law are taken up in detail, a decision of Turkish Competition Board is analyzed as to current execution in Turkey.

Keywords: Concentration, Control, Merger, Change of Control, Acquisition.

ÖZET

KONSANTRASYONLARDA KONTROL KAVRAMI VE BİR ÖRNEK İNCELEMESİ

Kıstak, Hande

Avrupa Kamu Hukuku ve Entegrasyonu

Tez Danışmanı: Prof. Dr. Eser Karakaş

Eylül 2010, 82 sayfa

13 Aralık 1994 tarihinde Resmi Gazete yayımlanarak yürürlüğe giren Rekabetin Korunması Hakkında Kanun'un "Birleşme ve Devralmalar" başlıklı 7. maddesi genel anlamıyla piyasa yapısını kontrol etmeyi amaçlayan bir düzenleme içermekte olup, hüküm devralma yoluyla konsantrasyonun gerçekleşebilmesi bakımından malvarlığının, ortaklık payının ve yönetimde hak sahibi olma yetkisi veren araçların devralınmasından bahsetmiştir. Buna rağmen, 12.7.1997 tarihinde Rekabet Kurumu tarafından yayımlanan ve Avrupa Birliği mevzuatındaki Teşebbüsler Arası Yoğunlaşma İşlemlerinin Denetlenmesine İlişkin Konsey Tüzüğü'ne paralel hükümler içeren Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkındaki Tebliğ' de ise 7. maddeye ek olarak bu sayılanların kontrol edilmesini ve ayrıca ortak girişimlere yer vermiştir. Nitekim konsantrasyonun gerçekleşmesi bakımından belirleyici olan, teşebbüslerin kontrolünde meydana gelen yapısal değişikliklerdir.

Türkiye'de Rekabet Hukuku'nun gelişimi de göz önünde bulundurularak, konsantrasyon kavramının tanımı, çeşitleri, teşebbüslerin kontrolünde meydana gelen değişiklikler ve Avrupa birliği mevzuatı ile Türk hukuku arasındaki farklılıklar ele alınmış olup, Türkiye'deki mevcut uygulama konusunda ise Rekabet Kurumu tarafından verilen bir karar incelenmiştir.

Anahtar Kelimeler: Konsantrasyon, Kontrol, Birleşme, Kontrolün El Değiştirmesi, Devralma.

TABLE OF CONTENTS

ABBREVIATIONS

European Community	: EC
European Union	: EU
Liquefied Petroleum Gas	: LPG
The Court of Justice of the European Communities	: ECJ
The European Coal and Steel community	: ECSC
The European Economic Community	: EEC

1. INTRODUCTION

Since the beginning of 1950s, competition is a concept that has been developing and growing in importance. On the other hand, globalization has also gained speed and became widespread as well. With the effect of globalization, most of companies tend to engage with other companies as a strategy in order to practice easily in international areas. Companies prefer to engage in mergers and acquisitions with different reasons such as economic, financial or necessity for research. In some cases, hard competition environment, variable economic and social conditions force companies to engage with each other. After mergers and acquisitions companies can easily get more investment and research opportunities which are also important for consumer satisfaction. For example, there was a high degree of merger activity in the second half of the 1980s, and again in the mid-1990s. From 1998 to 2000 there was a period of frenetic merger activity. In the European Commission's 1999 Report on Competition Policy it reported that 292 mergers had been notified to it that year, an increase of 24 percent from the previous year and of 70 percent since 1997 (Whish 2003).

Even though competition law has been applied in most of the countries, especially those who adopt free market economy, the application of Competition law in Turkey is quite new. For the first time, Turkey was acquainted with European Competition law by signature of the Ankara Agreement on September 12, 1963 and Additional Protocol on January 1, 1973. On 6 March 1995 Turkey-European Union Association Council adopted a decision 1/95 on the completion of the Customs Union between Turkey and the European Union (EU) in industrial and processed agricultural goods by December 31, 1995. Article 37 of this decision put Turkey under an obligation to make a competition law, put into effect in one year and adopt EU legislation into its current legislation, establish a Competition Authority.

After adoption of the Act on the Protection of Competition numbered 4054 on 7 December 1994 by Grand National Assembly of Turkey, the Competition Board, consisting of 11 members, was assigned on February 27, 1997 and took office on March

5, 1997. Since its establishment, Competition Board ensures the formation and development of markets for goods and services in a free and sound competitive environment, observes the implementation of the Act on the Protection of Competition and fulfills the duties assigned to it by the act.

Undertakings' complex structures, mergers of international companies, ascending number of competitors in the market make things difficult for Competition Authorities. A notable feature of mergers in recent years has been their increasing complexity, size and geographical reach (Whish, 2003). Concentrations between undertakings are one of the complex fields for Competition Authorities, because it is difficult to determine whether a concentration exists. In accordance with the law, Competition Authorities mostly analyze structural changes in control of undertakings as well as other conditions set out by law. According to the annual report of the year 2009, Turkish Competition Board announced that 144 application regarding mergers, acquisitions and joint ventures were made to the Competition Board, 109 of those allowed, 4 of those are allowed with condition while 31 of those are out of scope (Turkish Competition Board Official Website, 2010).

Since mergers and acquisitions are important in competition law, this thesis is written to give you precise information regarding concentration, which is an upper-concept of mergers and acquisitions. This study sets out the main perspective of "control" that is one of the main situations in which a concentration is deemed to arise. Several selected cases of European Commission and Turkish Competition Board will be examined so as to answer the question in which situations a concentration is deemed to arise.

In the first chapter, historical background of Turkish competition legislation regarding concentrations will be emphasized and compared with EU legislation. In the second chapter the definition of concentration will be given, types of concentrations will be analyzed with past cases; basic outlines of concentrations will be explained in detail.

Third chapter will deal with regulations concerning "control" element in concentrations by comparison of Turkish and EU legislation. Certain situations in which concentration is not deemed to arise will be handled in fourth chapter. In the fifth chapter, Turkish

Competition Board's first decision in Turkish Competition Case Law regarding strategic cooperation between undertakings will be analyzed.

Consequently, this thesis aims to set forth differences between EU's and Turkish legal arrangements on concentrations or in narrow sense mergers and acquisitions. At this point, Turkey's legislation will be analyzed to determine if there are some parallel arrangements with EU and some proposals will be given to fill legal loopholes in Turkish legislation. Since Turkey's competition law has been newly developing, the control of mergers and acquisitions are quite important to maintain free market and working competition.

2. THE CONCEPTUAL FRAMEWORK OF CONCENTRATIONS

The Treaty establishing the European Coal and Steel Community (ECSC Treaty) prevents mergers in coal and steel industries under Article 66. Despite this restrictive clause, latter treaty named the Treaty establishing the European Economic Community (EEC Treaty) does not comprehend any provision concerning mergers, acquisitions and control of concentrations. One of the reasons of this deficiency was the strong resistance of the Member States against to European Community's competent to control mergers on Community dimension. The Member States was defending that mergers should be controlled by Member States' national authorities in conformity with each Member States' national legislation. In the meantime, The European Commission (The Commission) relied on Articles 85 and 86 of the Treaty Establishing European Community (EC Treaty), the two traditional instruments of merger control (Philippe De Smedt and Georges VanderSanden 1989-1990). Aslan (1992, 271) explains the Commission's approach to application of Articles 85 and 86 on merger controls as follows:

> *The Commission states that Article 85/1 is not applicable to mergers. According to the Commission, mergers have the characteristics of a concentration instead of cohesion. Certain types of concentrations, especially those realized by acquiring shares in the open market, do not fall within the concept of the term, agreement among corporations. Applying the invalidity clause of Article 85/2 to all of the unlawful concentrations will be a serious sanction. Moreover, the application of Article 85/3 may cause some disadvantages with respect to both its criteria and revocability of immunity. Also, due to the abovementioned reasons, Article 85/1 cannot be applied to mergers; however, Article 86 can be applied to concentrations*[1]*. This article does not enclose all kinds of mergers and acquisitions.*[2]

The need of a detailed regulation on mergers was revealed in the Continental Can Case (Judgement of the Court 21 February 1973, Case 6-72) before the Court of Justice of the European Communities (ECJ). The ECJ laid out that Article 86 shall be applicable to the mergers which are in accordance with the conditions set out in the case. The ECJ was underlined that a merger shall have an effect to eliminate competition in order to be considered as an abuse of a dominant position. The ECJ, for the first time, referred to

[1] For contrary opinions Aslan (1992, p.272)

[2] For discussions regarding the Commission's approach see Cannellos, Silber s. 149. in Aslan (1992)

Article 85 in the Philip Morris Case (Joint cases 142,156/84. British American Tobacco Company Limited and R.J Industries Inc/Commission, ECR [1987] 4487) stating that controlling an undertaking's management by share transfer or any other way fall within the concept of Article 85/1. Moreover, Zigaretten Case in 1987 has strengthened the idea of the need of a detailed regulation and European Community's competence in this field.

Admission of the fact that the articles 81 and 82 were inadequate as a tool for merger control in EU (Whish 2005, p.793), the Commission brought up an initial proposal (Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentrations Between Undertakings 1973 OJ C92/1) for a regulation on the control of concentrations to the Council on 1973, this proposal was amended on 1982 and 1984, and on 21 December 1989 (The regulation came into affect on 21 September 1990) the Council of Ministers adopted The European Community Merger Regulation on the Control of Concentrations Between Undertakings[3] (the Merger Regulation). The Merger Regulation was amended[4] significantly by another regulation numbered 1310/97 which came into effect 1 March 1998 [(OJ (1997) L (180/1), corrigendum OJ (1998) L (40/17)]. It is important to note that Article 81 (Ex. Article 85) and 82 (Ex. Article 86) are still applicable to mergers in conjunction with The Merger Regulation.

The Commission has published several relevant Notices, which are not legally binding, to guide concerning the interpretation and application of the Merger Regulation (see other relevant notices in Wish 2005, p. 798). The Notice on the Concept of a Concentration, one of the most important notices, was published in 1998 to provide a guideline regarding the interpretation of the term "concentration" [OJ (1998) C 66/5, (1998) CMLR 586]. It is important and essential to determine if a transaction can be considered as a concentration in order to control mergers. The European Commission is the sole competent authority to control mergers within EU, controlling process of centralization is executed by a special group named Merger Task Force in the Commissions IV. Directorate General.

[3] Council Regulation 4069/89, OJ (1989) L (395/1)
[4] In 1990 the Merger Regulation was also amended in some aspects. OJ (1990) L (257/13)

Turkish legislations deals with two different aspects of mergers; economic and anticompetitive. Turkish Commercial Code numbered 6762 regulates the legal concept and conditions of mergers, while The Act on the Protection of Competition numbered 4054 regulates the economic aspects and effects of mergers on competition. The Act on the Protection of Competition numbered 4054 was adopted 7 December 1994 by Grand National Assembly of Turkey and it came into effect 13 December 1994 subsequently its publication in Official Gazette. The main scope of The Act on the Protection of Competition is economic integration or concentrations between undertakings irrespective of legal issues.

As per the Article 20 of The Act on the Protection of Competition, The Competition Authority was established in 1997 in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment, to observe the implementation of this Act, and to fulfill the duties assigned to it by the Act. Within its framework, The Competition Authority published a Communiqué[5] which determines and announces the mergers and acquisitions calling for authorization by notifying to the Competition Board, in order to be legally valid, pursuant to the Act on the Protection of Competition.

[5] Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, Amended by the Competition Board Communiqués No. 1998/2, 1998/6 and 2000/2. (OG – 12.08.1997, 23078)

2.1 DEFINITION OF A CONCENTRATION

The Merger Regulation does not contain any definition of the term "concentration" under Article 3, but this article lays down basic outlook and components of a concentration as well as situations which shall be deemed as a concentration. According to Article 3 (1) a concentration shall be deemed to arise where:

a) Two or more previously independent undertakings merge,
b) - one or more persons already controlling at least one undertaking, or
   -one or more undertakings,

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole parts of one or more undertakings. In this case, a change of control which constitutes a lasting change in the structure of undertakings are result from mergers and acquisitions.

The term covers the case where two seperate undertakings merge into a single body, and also the more common situation where one person or undertaking requires "direct or indirect control" of the whole part of another (Goyder 2003, p. 346).

Right along with mergers and acquisitions, the Merger Regulation includes the joint ventures in the scope of concentrations by stating that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b) [Council Regulation (EC) No 139/2004, Article 4].

In the notice on the concept of a concentration, Article 3 (1) emphasizes that a concentration mentioned in the Merger Regulation covers only operations which bring about a lasting change in the structure of the undertakings concerned. Such a lasting change in the structure come into existence in two circumstances; either by a merger between two previously independent undertakings or by the acquisition of control over the whole or part of another undertaking.

Since there is no single, exact definition for this term in written legislations, authorities and courts by their case law, doctrine with their academic studies have tried to define this term as below.

According to Jones/Sufrin (2001), "concentrations is generally defined as merger of the labour of two or more independent undertakings or control change of the undertaking, in other words the turnover of separate or mutual control of an undertaking to another undertaking or several undertakings".

Concentration can be defined as the alliance of two or more undertakings under a mutual control in a way causing them to lose their (economical) independences (Cook and Kerse 2000, p.13).

Bellamy and Child (2001) adopt the concept of concentration which is defined in the recital 23 to Regulation (EEC) No 4064/89 as covering only operations which bring about a lasting change in the structure of the undertakings concerned.

In Turkish legislation, Article 7 of the Act on the Protection of Competition regulates the control of mergers and acquisitions:

> *Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.*
>
> *The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.*

Even though the Article 7 does not give an exact definition of concentrations, it aims to prevent and control main structure of a market in general terms. The main idea that lies behind this article is to preclude accumulation of economic power around certain centers and prevent economic concentrations which will cause structural changes in the market. Theoretically, every kind of lasting concentration which will cause reduction of competition in a certain market, notwithstanding to its legal perspective, fall within the

scope of Article 7. When we examine closely the content of Article 7, it is seen that there are two different formation of an economic concentration: two or more undertakings merge and acqusition of one undertaking by another independent undertaking by means of direct control.

Under the Article 2 of Communiqué on the Mergers and Acquisitions, cases considered as mergers and acquisitions are regulated as follows:

> *As the following points are deemed as mergers and acquisitions between undertakings under Article 7 of the Act, and considered to come under this Communiqué, the authorization of the Competition Board should be taken depending on the conditions in Article 4 of the Communiqué.*
>
> *a) Merger of two or more independent undertakings.*
>
> *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.*
>
> *For the purposes of this Communiqué, control may be brought about by rights, contracts or any other means which, either separately or in combination, de facto or by law, grant the opportunity of exercising decisive influence on an undertaking, and in particular by an ownership right or an operative right to use on all or part of the assets of an undertaking, or by rights or contracts which ensure decisive influence on the composition or decisions of the bodies of an undertaking.*
>
> *Control shall be deemed to have been acquired by the holders of rights, or persons 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.*

Consequently joint ventures are covered in the scope of concentration by Competition Board's Communiqué. It can be said that the most important tool for formation of a concentration is lasting and constant changes in controlling undertakings.

The term "merger" is mostly used instead of "concentration" in consideration of great majority of concentrations are consist of mergers. The term concentration with its extensive meaning, which is also preferred by EU Legislation and Competition authorities, will be used henceforwards in this thesis.

In addition to abovementioned definitions, there are some other different interpretations of the term "concentration" in Turkish doctine. According to Tekinalp (2000, p. 463) "mergers, acquisition of shares, turnover of enterprises and assets and concentrations of undertakings within or around an undertaking in accordance with contracts of code of obligation are defined as concentration, in other words aggregation or centralization in western languages".

Sanlı (2000) defines concentration as "concentration of economical decision making power, in other words the economic control, in certain centers by relaying among undertakings and thus causing structural changes by decreasing the competition subjects in the relevant markets".

Aslan (1992) defines concentration as "re-sharing of economic potential and decision making power among a descending number of enterprises".

According to Erdem's opinion (2003, p.188), "in the most general sense, concentration is defined as the aggregation of economic power, within a certain geographical region and a specific product or service market, by one or more undertaking or a person as a consequence of structural change".

It is important to define the term "concentration" in order to determine and control economic concentration as a main component in mergers and acquisitions.

2.2 TYPES OF CONCENTRATIONS

Concentrations are categorized in three types according to their effects on competition, economic process and market structure: horizontal concentrations, vertical concentrations and conglomerate concentrations.

2.2.1 Horizontal Concentrations

Horizontal concentrations are those between companies which make the same products and operate at the same level of the market (Craig and De Burca 2003, p.1035). Horizontal effects occur where a merger takes place between competitors in the same product and geographic markets and at the same level of the production or distribution cycle (Whish 2003, p.780). This kind of concentration brings about descending number of competitors in the market or fixed prices by the new entity just as in the case of a single firm has the monopoly power in the market. When horizontal concentrations are compared with vertical and conglomerate concentrations, it is seen that horizontal concentrations are the most damaging to the competitive process and treated more strictly than others. This is because the danger arises when the new entity uses its power to fall off in quality or increase prices which will cause negative impacts on consumer welfare. Beside these negative effects of horizontal concentrations, there also some positive impacts of them such as merge of small undertakings in order to compete effectively with a leading company in the market and foster competition.

2.2.2 Vertical Concentrations

Vertical concentrations are those between companies which operate at different distributive levels of the same product market (Craig and De Burca 2003, p.1035). Vertical effects may be experienced where a merger occurs between firms that operate at different levels of the market: a firm may acquire control of another firm further up or further down the distribution chain; the former known as “backward integration” and the latter as “forward integration” (Whish 2003, p.780). For example when a producer undertaking with a distributive undertaking, or acquires an undertaking that provides raw material, this concentration is considered as vertical. Despite American

Competition Authorities, The Commission has a propensity not to forbid vertical concentrations in the EU unless they lead to a result for other competitors being excluded from the market. Vertical concentrations do not have a direct effect on the structure of a certain market, as well as they contribute to strengthen competition between competitors, to build a more convenient distribution network, to enter new geographical markets to promote inter-brand competition and to provide cost efficiency. On the other hand, vertical concentrations carry a risk for the market to become foreclosed to third parties and destroyed competition. Where a firm downstream in the market acquires an upstream undertaking that has monopoly power in relation to an important raw material or input, competitors in the downstream market may be unable to obtain supplies of the raw material or input, or they may be able to do so only on discriminatory terms, with the result that they will be unable to compete effectively (Wish 2003, p. 780).

2.2.3 Conglomerate[6] Concentrations

Conglomerate concentrations are those between firms which have no connection with each other in any product market (Craig and De Burca 2003, p.1035). A conglomerate merger is one that brings together firms which do not compete with each other in any product market and which does not entail vertical integration (Whish 2003, p.780). There are still some discussions about the impacts of conglomerate concentrations on competition. Some think that conglomerate concentrations have neutral effects on competition while some think that these concentrations will be dangerous when a firm blocks the entrance of a product to a market by cross-subsidize. Consequently, even if conglomerate concentrations have a slight negative impact on competition, in general these concentrations are not forbidden directly. Conglomerate concentrations are separated into three types:

[6] Also referred to as "Conglomeral"

2.2.3.1 Product Extension Concentrations[7]

Product extension concentrations are those between firms which operate in similar and linked product markets. Thus, an undertaking, by acquiring another, adds related products to its existing products. A merge between an undertaking operating in a written media market and an undertaking operating in a visual media market can be a sample of this kind of concentrations. As a result of this concentrations both of undertakings' product markets will be broadened.

2.2.3.2 Market Extension Concentrations

Market extension concentrations are those between firms which sell the same products but in different geographical markets. As a result of this concentration both of undertakings' related geographical markets will be broadened.

2.2.3.3 Pure Conglomerate Concentration

Pure conglomerate concentrations are those between firms where there is no functional link between merged firms, their product and geographical markets.

2.3 BASIC OUTLOOK OF CONCENTRATIONS

Both in EU Law and Turkish legislation, mergers, acquisitions[8] and joint ventures are considered to bring about a concentration. The similarity of these situations sometimes causes problems while differing and examining the relation between undertakings. Especially, in consideration of a merger is a special form of acquisition, it doesn't seem

[7] Also known as "Product line extension"

[8] In the Merger Regulation, the term "acquisition of the control" is preferred instead of the common usage of "acquisition". But in Turkish law the term "acquisition" has been used for all kind of acquisitions. Despite this difference, the term "acquisition" will be used in this thesis hereafter.

easy to draw certain borders of Article 1 (a) and (b). Every merger is also an acquisition, but every acquisition does not constitute a merger.

In this thesis, conceptual definitions will be made and concepts of these terms will be handled go as follows.

2.3.1 Merger[9]

A true merger involves two separate undertakings merging entirely into a new entity (Whish 2003, p.779). Although the Merger Regulation does not define the term merger, it implies the formation of one enterprise from undertakings that were previously distinct and separate (Craig and De Burca 2003, p.1039). In general, merger is a legal notion and does not comprehend the wide meaning which economic science attributes to it (Erdem 2003, p.191). However, competition law is interested in the economic aspect of concentrations, and aims to protect competition. For competition law, the legal character or the legal form of a merger is not the main subject; it only deals with the economic character and economic results of a merger. However in the EU Law, according to Cook and Kerse (1991, p.15-16) Article 4 (a) in the Merger Regulation comprehends only legal mergers, not economic mergers.

Mergers are composed of two elements: Economic and legal element. While Turkish Commercial Code regulates legal elements of mergers, The Act on Protection of the Competition regulates the economic elements. When definitions given by both acts are compared, approaches of these two Acts towards the notion "merger" will be understood more clearly.

The Article 146 section 1 of The Turkish Commercial Code defines mergers as "*the union of two or more trading companies to establish a new trading company, or the adherence of one or more than one trading company of another existing company*." More than giving a conceptual meaning, this clause's definition takes into account the two types of merger which are the combination[10] and the absorption[11]. According to this

[9] The other name is "fusion".
[10] A good example of two undertakings merging into a single entity can be found in the Ciba-Geigy/Sandoz decision [Case No IV/M 737 OJ (1997) L201/1], where tho entities merged to establish Novartis (Whish 2003,p. 804)
[11] Also known as annexion.

definition there are two types of mergers: forming a new partnership (combination) and merger by acquisition (absorption). As stated above, The Turkish Commercial code gives only a juridical definition to mergers. An act is considered as a merger if at the beginning there are two separate companies and if one of them loses its legal entity at the end. While, In the case of a new partnership, the two existing companies are dissolving the form a new company, in the case of absorption, the acquired company should dissolve and its assets are taken by the acquiring company in the way of universal succession. Therefore, according to The Article 147 of The Turkish Commercial code, mergers can only occur between similar companies[12]. Thus, company mergers have a limited definition bind by strict formal conditions in The Turkish Commercial code.

The Act on the Protection of Competition and Communiqué number 1997/I contain no specific definition of mergers giving only a vague statement of "combination of two or more independent enterprises". As mentioned before, Competition Law deals only with the economical side of mergers. The juridical ways, juridical entities and legal entities have no significant importance[13]. What matters is the combination of an economical power with another one to form a more powerful economical entity (Aslan 1992, p.538). The Competition Law definition of merger is more comprehensive than the definition given by the Turkish Commercial Code[14].

Considering mergers, the most important aspect in Competition Law is the attribute of independence of the merging companies. In this manner, to form a merger two or more independent enterprises are required. The merger of dependent companies is not under the supervision of Competition Law (Erdem 2003, p.47).

In the case of EU Law, the definition of merger has no specific scope. However, this concept is evaluated in terms of its economical definition where the juridical shape is not taken into account. In an economical sense all combination between corporate

[12] According to Türk (1986, p. 290 et seq.) open companies and commandit companies, incorporated companies and joint stock companies are considered as equal.
[13] The reason that may be important is acquisition by heritance in Article 7 of The Act on Protection of Competition.
[14] For example mergers and acquisitions which are regulated in Privatization Law number 4046, Banking Law number 4389 are in this scope

entities acting to form a single entity are included in the definition of mergers (Sanlı 2000).

In the proper sense a complete merger is regulated in the Article 3 (1) (a) of the Merger Regulation. But also the Commission has expanded the application area of mergers by Commission Notices. In the notice on the concept of concentration under The Merger Regulation No 4064/89 on the control of concentrations between undertakings, Commission declares that;

> *A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.*

In addition to these two types of mergers conducted on a legal basis, a merger may also occur on a *de facto* basis (The Notice on The Concept of Concentration under Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings, paragraph 7):

> *A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management. If this leads to a de facto amalgamation of the undertakings concerned into a genuine common economic unit, the operation is considered to be a merger. A prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation as between the various undertakings within the group, and their joint liability externally. The de facto amalgamation may be reinforced by cross-shareholdings between the undertakings forming the economic unit.*

The precondition of determining the economic unit is the existence of a continuous and independent economic management (Erdem 2003, p.192).

2.3.2 Joint Ventures

Joint venture is a kind of partnership which has been increasingly taking part and getting common in commercial life. Especially flexibility of relationships between companies that choose to be in joint venture and easy settlement promote its currency among companies. Compared with a merger, a joint venture is easier and less costly to arrange. Furthermore, a joint venture can be ended much more easily than a merged entity. These and other aspects of joint ventures are appreciated by the business community and strengthened an increase in the number of these types of collaboration agreements over the years (Toksoy 2007, p. 120).

There is not a term and definition unanimity in doctrine and it is difficult to define what joint venture really means. Some definitions of joint venture are given below:

According to Kaplan (1973, p.6); a joint venture is an association, either having a legal entity or not, formed between two or more legally and economically independent real individuals or a legal entities to perform a specific goal and make profit together and to be administered mutually by them.

Joint venture agreement is an agreement which is not subject to any kind of form and signed between two or more individuals or enterprises to establish a new enterprise controlled mutually by them, with an independent entity and organisation, to achieve a specific economic goal (Aslan 1992).

Akyol (1997, p.59) describes joint venture as an agreement executed between at least two companies, one of which is a foreign company and the other is a local company, under which a contracting business, an enterprise is established for a common cause and cooperation by undertaking an occupational hazard to accomplish a common purpose. Consequently, joint venture can be described as a partnership relation between legally and economically independent undertakings, to achieve a specific economic goal.

There is not any restriction regarding nature and field of activity. Unless it is not contradiction to law, parties can have operations in any kind of field such as distribution, marketing, production or subject such as finance, research and development, construction etc. Also joint venture is not obliged to have operations in order to have a profit and executed operation does not need to be perdurable. But in Turkey Competition Board sometimes seeks the continuity element of joint venture in some decisions.

Joint venture must be based on an agreement. Undertakings that will establish and be a part a joint venture shall make a joint venture agreement regarding baselines of partnership, rights and obligations of each part, resolution of disputes and termination of the agreement.

There are two types of joint venture whether shares are based on capital or not:

2.3.2.1 Contractual Joint Venture

Without a legal personality parties determine their partnership shares, obligations and other issues within the terms of joint venture agreement. Contractual joint ventures are mostly preferred for several or short-term and uncomplicated businesses due to the absence of a legal personality and capital in this type of joint venture. In Turkish doctrine, it is accepted that contractual joint venture is based on ordinary partnership.

2.3.2.2 Equity Joint Venture

In equity joint venture, relationship between parties is more complicated than contractual one. Together with a joint venture agreement, parties achieve their joint venture aim by a separate partnership, mostly a legal entity. In general, parties incorporate a company in order to achieve their aims.

In this kind of joint ventures, partnership relation who is based on the joint venture agreement acquires a shape by articles of association of the legal entity and as a result two different and also dependent partnerships arise. First one is joint venture agreement,

the other one is a subsidiary which is a based on the joint venture agreement and aims to achieve common aim. Joint venture agreement only regulates relations between parties and between parties and subsidiary, and the relation of joint venture with outside and commercial life is executed by the subsidiary. Field of activity of this joint venture is mostly more complicated than the previous one and related with technology transfer, providing goods, loan and labor force etc.

Equity Joint Ventures are divided into three groups within itself;

2.3.2.2.1 Horizontal Joint Ventures

Joint venture and parties that form joint venture operate at the same level of production or distribution chain.

2.3.2.2.2 Vertical Joint Venture

Joint venture and parties that form joint venture operate at different productive or distributive levels of the same product market. Joint venture is established to provide raw material for parties, to do research and development activities, to do marketing or to distribute, to transport goods that are produced by parties.

2.3.2.3 Conglomerate Joint Venture

Parent company and subsidiary have no connection with each other in any product market. Joint ventures might have important pro-competitive benefits both for the collaborating firms and consumers. On the other hand, anti-competitive concerns may arise through the formation of joint ventures. Collaborating parties can use a joint venture as a platform to make collusion easier. A joint venture would be suitable for this purpose because it helps the parties to easily discover and punish deviations that would undermine the collusion (Toksoy 2007, p. 121)

The Act on the Protection of Competition does not regulate joint ventures, but the Communiqué on the Mergers and Acquisitions mentions about joint ventures a kind of concentration and gives various criteria in which situations a joint venture agreement can be lead to a concentration. According to Article 2 (c) of the Communiqué on the Mergers and Acquisitions, 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 are deemed as mergers and acquisitions between undertakings under Article 7 of the Act on the Protection of Competition.

In conformity with the old regulation in EU this article in the Communiqué contains a positive and a negative condition for a joint venture in order to be deemed as a concentration. In this context as a positive condition, joint venture shall join into the economic life as an independent economic entity; have labour force, capital, technology and capacity for this purpose. As a negative condition, this joint venture shall not effect on the competition between parties. Right along with these conditions, this joint venture shall be jointly controlled by parties.

The Merger Regulation and Communiqué number 1997/I regulate joint venture separately in an article. Before the amendment in 1998, the Merger Regulation separated joint ventures into two kinds whether a joint venture leads to a concentration or not. If a joint venture does not lead to a concentration, it is deemed to be an acquisition under the paragraph (b). Because theoretically, a joint venture which leads to a concentration is not an independent concentration, it is a concentration which achieved by acquisition, in other means jointly acquisition of control.

It has not been easy to define a joint venture as concentrative or cooperative at first look. Generally, a joint venture which will be able to perform the functions of an independent economic unit in the long term was thought to be concentrative. Similarly, if the formation objective or the evident influence of the establishment of a joint venture is to coordinate the competition policies of the independent parent companies in the market, this joint venture was considered as cooperative joint venture (Toksoy 2007, p.122). In the *Varta/Bosch* (Case no IV/M.12, Varta/Bosch, EC Commission Decision of 12 April 1991, OJ [1991] L 320/26) and *Ericsson/Kolbe* (Case No IV/M.133,

Ericsson/Kolbe, EC Commission Decision of 22 January 1992, OJ [1992] C 27) cases, the Commission listed the conditions needed for a joint venture to meet to qualify as independent. According to these conditions, it is required that the joint venture;

(i) must take its place in the market as an independent seller or buyer,
(ii) have the material and human resources needed to guarantee it a long-term existence and independence and
(iii) put into practice its own commercial policy.

The Commission also took into consideration (i) whether two or more of the parent companies keep their activities in the same or a similar market at a significant level, (ii) whether or not the cooperation between the parent companies coming from the establishment of the joint venture allows these companies to remove competition in this market in determining whether a joint venture is a cooperative joint venture or not (Toksoy 2007, p.123).

As a result of this, The Merger Regulation number 4069/89 regulated abovementioned positive condition as a special condition of concentration that is achieved by acquisition of control. With the Regulation number 1310/97, which amended The Merger Regulation number 4064/89, the term concentration had widened including cooperation and every kind of independent and lasting structuring.

As mentioned above, Article 3(2) of the Merger Regulation was substantially amended by Regulation 1310/97, with effect from 1 March 1998 as follows:

"The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."
So, the creation of a joint venture company may qualify as a concentration and be subject to the Merger Regulation if it is a full-function joint venture; if not, it may be subject to the Article 81. In parlance of European Community competition law, an operation that satisfies this test is known as a "full function joint venture" (Whish 2003,

p.807). The only question to be determined in deciding whether a joint venture is a concentration is whether it will be full function. A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to research and development or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture (Notice on the Concept of Full-Function Joint Venture, paragraph 13). Restrictions accepted by the parent companies of the joint venture that are directly related and necessary for the implementation of the concentration ('ancillary restrictions'), will be assessed together with the concentration itself (Ibid, paragraph 16).

Also, Notice on the concept of full-function joint venture provides guidelines regarding this issue. According to the paragraph 12 of this Notice;

> *...a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement...*

Joint venture must be under the joint control and be intended to operate on a lasting basis.

2.3.3 Acquisitions

Under the Article 7, The Act on the Protection of Competition regulates acquisitions of one undertaking's assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right by any undertaking or person. Despite this article, the "control" of these abovementioned elements is also included in Communiqué numbered 1997/I which comprises parallel articles with the Merger Regulation. The Competition Authority has tried to fill this legal loophole concerning the absence of "control of these elements" in the Act on the Protection of Competition by a latter Communiqué. Actually, it is still a divisive issue whether the Competition Authority has exceeded its power by establishing a Communiqué which contains contrary articles to the Act on the Protection of Competition (Erdem 2003, p.48).

Regardless the conflict between the Act and the Communiqué, in practice as well as mergers, a change of control in the undertakings management is also considered a situation which will be deemed a reason to abuse the competition in the market. Even some [e.g Sanlı (2000, p. 324)] in doctrine think that the term "acquisition" in Article 7 of the Act also comprehends mergers, turnover of a part of an undertaking and turnover of the managerial right.

Article 3 (b) of the Merger Regulation only covers the cases of change of control and sets forth in which situations a change in the control may occur. The differentiation as control and acquisition has not been mentioned in the Article, "acquisition of the control" is used as a general term. According to this, direct or indirect control of the whole parts of one or more undertakings may exist whether by purchase of securities or assets, by contract or by any other means. The essence of this article, however, is conveyed as follows by Craig and De Burca (2003, p.1039):

A change of control can result in the acquisition of sole control[15] by a person or an undertaking. This is exemplified by Arjomari-Prioux/Wiggins Teape[16], where the Commission held that that acquisition of a 39 per cent shareholding in a company was sufficient to give a buyer control, given that the remaining share were widely dispersed. It is also possible for two or more undertakings to acquire joint control over another. All the circumstances will be taken into account in deciding whether joint control exists in any particular case. Thus, in Northern Telecom/Matra Telecommunications[17] both companies were held to have acquired joint control over Matra Sa on the ground that the consent of both parents was necessary for all important business decisions and financial plans.

Consequently, the most important thing in a concentration is a lasting change in the structure of undertakings, and it is not important which tools are used in order to cause this lasting change. Article 3(3) has clearly conceived the structure how the control can be applied as follows:

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

As stated in the Merger Regulation, an acquisition of control may be obtained by a person or two or more persons already controlling at least one undertaking; or by one undertaking acting alone or two or more undertakings acting jointly.

In the light of the foregoing, it can be said that the determining criteria of an acquisition and also a concentration in the Competition law sense is the "control". A number of cases have been brought before the Community Courts on the meaning of control in Article 3(3). The Commission has, moreover, made it clear that the determination of whether or not a concentration exists will be based on qualitative rather than quantitative criteria, focusing on the notion of control (Craig and De Burca 2003, 1039).

[15] See Part 3.2.2.1
[16] Case IV/M25, [1991] 4 CMLR 854
[17] Case IV/M 249.

3. CONTROL

3.1 THE CONCEPT OF CONTROL

Under the Article 3 (2) of the Merger Regulation, control is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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

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

According to this article, "decisive influence" has been used as a criteria in determination of control. It can be said that the "decisive influence" arises when an undertaking has the advantage to direct the establishment of the commercial policies of another undertaking for its own benefit. The notion "decisive influence" has also mentioned in Article 3 and 4 of the ECSC Treaty, but The Merger Regulation regulates it widely and gives detailed examples of the tools used while obtaining the control.

The acquisition of control may be in the form of sole or joint control. In both cases, control is defined as the possibility of exercising decisive influence on an undertaking on the basis of rights, contracts or any other means (Notice on Concentrations under Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings).

In Turkish law, even though the Act on the Protection of Competition does not explicitly consist any article regarding the control, in the Communiqué number 1997/I it is stated that control may be brought about by rights, contracts or any other means which, either separately or in combination, de facto or by law, grant the opportunity of exercising decisive influence on an undertaking, and in particular by an ownership right or an operative right to use on all or part of the assets of an undertaking, or by rights or

contracts which ensure decisive influence on the composition or decisions of the bodies of an undertaking. Regardless of by which ways this control has been obtained, any kind of legal or factual tools or ways can be used while obtaining the control in order to ensure decisive influence on the target undertaking. The Communiqué hasn't put any restrictions concerning tools or ways used while obtaining the control. Not limited to these, there are some examples such as management contract, usufructuary lease contract, and share transfer agreements etc. that lead to a decisive influence by acquisition of control. But it is necessary to note that this decisive influence shall be lasting and constant. While determining the existence of a control, ways or tools ensuring decisive influence don't have to be used at that moment, but as declared in the Merger Regulation these tools or ways shall be ready for use at any time.

There are two different approaches in the doctrine regarding the determination of decisive influence: economic approach and legal approach[18]. Economic approach asserts that only economic facts are determinative in decisive influence and this influence may arise in the event that an undertaking's economic power affects other undertaking's decision maker power and process. The disadvantage of this approach is that it is sometimes difficult to determine "decisive influence" in cases due to different parameters used in each case. On the other hand, legal approach has the opinion that those who wield the control have the ability to perform decisive influence. To ignore the economic realities while determining decisive influence can be considered a disadvantage of this approach (Erdem 2003, p.193-195). In doctrine, general opinion is that within the scope of Article 3/3 legislators adopt the economic approach concerning decisive influence contrary to the legal structure of Article 5/4 which gives explicitly some examples of legal ways and tools thereto. This opinion has been criticised time to time with the reason that Article 3/3 has adopted both economic and legal approach together.

Factual elements are also important as well as legal elements while determining whether an operation is deemed as an acquisition of control or not. According to the notice on the concept of a concentration, the acquisition of property rights and shareholders' agreements are important, but are not the only elements involved: purely economic

[18] Other name is Anglo-Saxons approach.

relationships may also play a decisive role. Therefore, in exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence (Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/02), paragraph 9/1).

Apart from above mentioned there are some presumptions in EU case law and doctrine regarding the determination of acquisition of control. In the event of acquisition of minority shares of an independent undertaking, if the rest of shares of the undertaking belongs to different share groups or general assembly is not able to become together due to power gap in practice, it can be said that these tools are adequate for acquisition of the control solely or jointly. It should be noted that these presumptions may differ state to state in consideration of different company law applications in Member States. Goyder gives Eridania/ISI [Case No IV/M.062, OJ C 204 (03/08/1991)] case as a sample how an acquisition of minority shareholdings has leaded to a decisive influence. In this case, Eridania increased its shareholding in ISI to 65 per cent by purchasing 15 per cent from another shareholder, a sugar beet growers' cooperative, Finbieticola, which retained 35 per cent (Goyder 2003, p.347). The Commission decided that Eridania has exercised joint control with Finbieticola regarding the appointment of a managing director and decisions on the sale of plants and on plant closures before the acquisition. But after that, Finbieticola has lost a great majority of its power and rights, especially the right to veto major changes in the structure of the company. As a consequence, it can be said that Eridania gained the sole control with a 15 per cent transfer of shares. Also abovementined Arjomari/Wiggins Teapse case is a good example of acquiring the sole control of a company by an inconsiderable share transfer. In this case, Arjomari obtained 39 per cent of shares of Wiggins Tape, and after the transfer Group Saint Louis shares retained 45.19 percent and each shares of rest of shareholders were less than 4 per cent which is not sufficient to affect decision making power. Thus, Arjomari's 39 per cent shares were evaluated as more than sufficient by the Commission in order to have sole control in Wirgin Tapes.

3.2 TYPES OF CONTROL

3.2.1 Direct and Indirect Control

In The Merger Regulation and in Communiqué, "indirect control" is mentioned in the content as well as direct control. According to the Article 3(2) of the Merger Regulation, Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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

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

In accordance with Article 3(3) of the Merger Regulation, 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.

In general, the undertaking that performs the acquisitions should be the same with the controlling undertaking. This is based the principle that whoever performs the acquisition has the right and ability to control it. However, this situation has faded away on the basis of economic relations and dependence between companies in real economic life such as holding companies, multinational companies etc. Consequently, the undertaking that performs the acquisition in appearance and the controlling undertaking that is subject to acquisition can be different in reality. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights [Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between

undertakings (98/C 66/02), paragraph 10]. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking [Article 3(4)(b) of the Merger Regulation].

Indirect control is also mentioned in the Communiqué numbered 1997/1 as such: *"Control shall be deemed to have been acquired by the holders of rights, or persons 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."* Even though both in the Merger Regulation and the Communiqué number 1997/I there is an impression that natural persons do not fall within the scope of articles, in the Notice on the concept of concentration it is explicitly mentioned that natural persons will be considered as undertakings in legal sense.

In Medeol/Elosua case, Medeol acquired the indirect control of 20 percent shares of Elosua's shares by Bessoll. This situation led to a sole control right to Medeol with 37 percent of shares that indirectly acquired previously (Ibid).

An undertaking, which acquired shares and assets of the other, may be controlled by one or more undertakings and in this situation these undertakings acquire the indirect control on the target undertaking (Cook and Kerse 2000, p.34).

It is not very complicated to determine who holds the control. Having a majority in the capital or in board of directors will be deemed as a means of evidence of control. On the other hand, it is also important to analyze how commercial and manufacturing decisions are taken (İnan 2000, p.20).

Where one undertaking acquires more than 50 percent of the voting capital of another this would normally give rise to sole control, unless for example, a shareholders' agreement gave the minority shareholder(s) joint control with the majority shareholder, for example through rights of veto. Control can be found to exist even where there is a shareholding of less than 25 percent; for example in CCIE/GTE (Case No: IV/ M.258 CCIE/GTE), CCIE acquired 19 percent of the voting rights in EDIL and was found to have acquired control, the remaining shares being held by an independent investment bank whose approval was not needed for important decisions (Peker 2007).

It is possible that an undertaking that acquires shares in another, but which does not acquire control in the sense of Article 3(3) of the ECMR, may nevertheless be party to an agreement that is restrictive of competition under Article 81 (Whish 1994, p.746-747).

3.2.2 Sole And Joint Control

3.2.2.1 Acquisition Of Sole Control

3.2.2.1.1 *Majority of the Voting Right*

As it is mentioned above, when one undertaking has the power to execute decisive influence over another undertaking, it is mostly accepted that this undertaking has the sole control over the other. Generally decisive influence can be gained in the situations where assets, shares or majority votes of the decision making authorities are acquired by another undertaking in consideration of legal and factual elements and circumstances of each case. Because it is not in itself significant that the acquired shareholding is 50 percent of the share capital plus one share as in the Crédit Lyonnais/BFG Bank case (Case IV/M.296-Crédit Lyonnais/BFG Bank, of 11 January 1993) or that it is 100 percent of the share capital as in the Sara Lee/BP case (Case IV/M.299-Sara Lee/BP Food Division, of 8 February 1993). In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital (Ibid, paragaraph 13). In the event of sole acquisition of majority of the capital, voting system in general shareholder's meeting, formation of the board of directors, voting system regarding the assignment of authorized people of the company etc. should be taken into consideration while determining of the existence of sole control. Because neither Article 3 (3) nor 3(4) give a presumption that acquisition of the capital is sufficient tool to maintain the control. According to the Commission, where having the right to appoint more than half of the members of the supervisory board or the administrative board or having the majority votes in supervisory board or the administrative board or to having the right to control the undertaking by its own, it is accepted that sole control of the undertaking has been maintained (Erdem 2003, p.196).

3.2.2.1.2 *Qualified Minority*

Pursuant to the Notice on the concept of concentration, sole control may also be acquired in the case of a 'qualified minority` which can be established on a legal and/or de facto basis (Ibid, paragraph 14). Qualified minority rights are taken into consideration to the extent how much they enable to maintain decisive influence. Because the Merger Regulation does not comprehend any minimum share or vote ratio regarding the acquisition of the control (Erdem 2003, p.196). Sole control can be maintained by qualified majority in two circumstances (Notice on the concept of the concentration, paragraph 14):

i. When specific rights are attached to the minority shareholding. These may be preferential shares leading to a majority of the voting rights or other rights enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.

The Commission has accepted that the person whose approval is required for important decisions regarding to development of new products, designation of the scope of research and development activities, designation of distribution, advertisement and marketing strategies has the decisive influence over the undertaking (Karakeçili 1997, p.11).

ii. On a de facto basis, for example, where the shareholder is highly likely to achieve a majority at the shareholders' meeting, given that the remaining shares are widely dispersed. In such a situation it is unlikely that all the smaller shareholders will be present or represented at the shareholders' meeting. Where, on the basis of the number of shareholders attending the shareholders' meeting, a minority shareholder has a stable majority of the votes at this meeting, and then the large minority shareholder is taken to have sole control. The Commission will look at the evidence of what has actually

happened in the recent shareholders' meeting[19]. For example, in the Société Généralé de Belgique case (Case No IV/M 343), the Commission has considered the attendance of shareholders to the shareholdings' meetings in previous years. In this case, the Commission decided that Société Généralé de Belgique has maintained the decisive influence even though Société Généralé de Belgique's total shares in Générale de Banque were increased from 20.94 percent to 25.96 percent by this way. Because, 55 percent shares of Générale de Banque were shared by a great number of shareholders and each of the shareholders had less than 0.5 percent shares at most. In previous shareholdings meetings before the transaction, Société Généralé has a vote ratio between 43 percent and 47 percent, but afterwards its ratio increased to approximately 55 percent which confer a sole control to Société Généralé (Erdem 2003, p. 196-197)

In Arjormari/Wiggins Teape Appleton case, Arjormari acquired the control of the undertaking and hold the decisive influence by acquisition of 39 percent shares of Wiggins Teape where the remaining shares were widely dispersed.

According to Ülgen (1998, p.26), where shares are dispersed between a large number of shareholders, it is sometimes difficult to determine whether sole control has been provided.

In Renault/Volvo case (Case No COMP/M.1980), the Commission decided that contracts and any other means of tools between Renault and Volvo should be examined in order to determine whether these tools, either separately or in combination, bring about a decisive influence. Qualified minority rights can be used on the basis of a legal transaction or de facto (Erdem 2003, 196-197). The main samples of minority rights based on a legal transaction are multiple vote securities or other rights which provides to manage the activities of the company and to determine its business policy. A shareholder can capture the control and a stable majority de facto at shareholdings meeting in the absence of other shareholders.

[19] For Commission's similar judgements: Crown&Seal/Carnaud Metalbox [Case No IV/M 603, OJ (1996) L 75/38], Skanska/Scancem [Case No IV/M 1157, OJ (1999) L 183/1, (1999) 4 CMLR 16], Anglo American/Lonhro [Case No IV/M]

In CCIE/GTE case, EDIL acquired the right to appoint the chairman of board of directors and Chief Executive Officer and a membership in board of directors in addition to 19 percent of shares. And also the manager who will be appointed by CCIE had the right to veto EDIL's important decisions (Cook and Kerse 2000, p. 37).

On the other hand, in a latter judgement[20] the Commission declared that an option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements.

It is possible that an undertaking that acquires share in another, but which does not acquire control in the sense of Article 3 (3) of the Merger Regulation, may nevertheless be party to an agreement that is restrictive of competition under Article 81 (Whish 2003, p. 806-807).

3.2.2.1.3 *Transition From Joint to Sole Control*

According to the Commission, a transition from joint to sole control would qualify as a concentration in conformity with the Merger Regulation, by reason of that joint and sole control are qualitatively different from one another. For the same reason, an operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation (Notice on the concept of concentration, paragraph 16). In ICI/Tioxide Case [Case No IV/M 23, (1991) 4 CMLR 792], ICI acquired 50 percent interest of Cookson's in Tioxide, while ICI had already 50 percent shares in Tioxide. Thus, this acquisition has qualified as a concentration due to transition from joint to sole control of ICI in Tioxide.

In ABB/BREL (Case No IV/M 221) case, ABB and Trafalgar House each had 40 percent holdings in BREL, thereby giving them joint control; when Trafalgar cold its 40 percent holdings to ABB this gave ABB sole as opposed to joint control and qualified as a concentration (Whish 2003, p.806).

[20] Judgment in Case T 2/93, Air France v. Commission [1994] ECR II-323. 754, OJ (1998) L 149/21]

In Turkish case law, by acquisition of 1 percent share of *Marsa KJS* (Competition Board Decision, number 24283, date 10.01.2001) by Hacı Ömer Sabancı Holding A.Ş. the sole control of joint venture transferred to the Sabancı Group. In another case (Competition Board Decision, number 24440,date 22.06.2001) , Türkiye Şişe ve Cam Fabrikaları A.Ş. acquired Schott Zwiesel Gkasswerke A.G's substantial 50 percent shares in Paşabahçe Schott Cam San. ve Tic., which is a joint venture company and is governed by joint control, after the transaction Türkiye Şişe ve Cam Fabrikaları A.Ş obtained the sole control of the Paşabahçe Schott Cam San. ve Tic.

3.2.2.1.4 *Division of a Business*

A division of an undertaking can involves one or more concentrations. In the Commission's Solvay-Laporte/Interox decision (Case No IV/M 197), Solvay and Laporte proposed to dissolve Interox, a joint venture company established in 1970; Solvay would take Interox's bulk chemical business and Laporte the speciality chemical business. As Solvay and Laporte would each acquire sole control of business in respects of which they had had joint control before, this entailed two concentrations (Whish 2003, p.826).

3.2.2.2 Acquisition of Joint[21] Control

In competition law, not only acquisition of sole control, but also acquisition of joint control by more than one undertaking brings about a concentration. Under the Commission Notice on the concept of concentrations, joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. If the influence of one undertaking over the other is not sufficient to maintain sole control, and the decisive influence can be used with other undertakings, it can be talked about the existence of a joint control. In other words, if undertakings are obliged to take a common decision regarding to commercial policies due to economic interest and this common behaviour is not temporary, it is accepted that joint control is

[21] Also known as "Common Control"

achieved over that undertaking. Joint control is mostly seen in joint ventures as well as acquisitions, partial acquisitions that not enable to control on its own, company rescues the buying of interests reciprocally, and even in mergers (Sanlı 2000, p.330). According to Bellamy and Child (1993, p.319) joint control can be seen in those below:

a) Joint ventures
b) Joint acquisitions (acquisition of third undertakings shares of assets by two or more undertakings together)
c) To invest to another undertaking's existing
d) Mergers or reciprocal share transfer
e) Bailout

The Commission Notice states that there is joint control if the parent companies must reach agreement on major decisions concerning the joint venture. In a case of sole control, one undertaking is able to determine the strategic decisions of another; a case of joint control will exist where two or more undertakings must reach agreement in determining the commercial policy of the entity in question. A change in control by three firms to two would also qualify as a concentration (Whish 2003, p. 806).

Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behavior of an undertaking. Unlike sole control, which confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions (Notice on the concept of concentration, paragraph 19). These can be arising from necessity of legal and commercial contractual relations between undertakings or being shareholdings. A large percentage of cases involve the acquisition of joint control. A change from joint control by three firms to two would also qualify as a concentration (Whish 2003, p.806).

The Merger Regulation does not regulate the situations in which the joint control can occur. In spite of this, presumptions regarding the existence of joint control are specified in the Notice on the concept of the concentration.

In the Act on the Protection of Competition, it is accepted that not only the achievement of control on its own, but also "joint control" by more than one undertaking result in concentration. In one of the cases (Competition Board Decision Date: 01.07.2000 Number: 24096) the Competition Board described joint control as follows:

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

According to Fine (1996, p.152), a joint control is constituted from four elements:

i. Property in assets of joint venture
ii. Having the right to appoint members of executive and supervisory board
iii. Being effective on decisions that are taken by abovementioned boards
iv. Other rights that are provided by business contracts of joint control

Joint control is deemed to exist where one or more minority shareholders act jointly in voting and have the majority of votes together despite absence of veto rights. This can be provided by either an agreement or de facto in the event of a common interest of minority shareholders (Aslan 2001, p. 298-299).

The existence of decisive influence in respect of acquisition of joint control is predicated on taking decisions regarding the basic commercial policy of the undertaking such as approval of long-termed budget, research and development projects, new investment plans, appointment and release board of directors and senior management, decisions concerning distribution of profits etc. (Bellamy and Child 1993, p. 319-320).
The Commission Notice sets out a series of examples of situations in which there could be a joint venture:

3.2.2.2.1 *Equality in voting rights or appointment to decision-making bodies*

This type of joint control exists where there are only two parent companies which share equally the voting rights and do not have a formal agreement in between. In such a situation, the sides will have to act together as a result of their positions in the undertaking, and joint control will be performed per se. The Commission point of view is that common shares which are owned by more than one shareholder will cause the application of joint control. But, if there is a formal agreement between them, it must be consistent with the principle of equality between the parent companies, for example, that each has the right to appoint an equal number of members to the decision-making bodies of the undertaking and none of the members has a casting vote. Equality in voting rights in decision-making bodies mostly depends on shares in capital, contract or other preferential terms. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture. The conditions that are required to be represented in decision making bodies do not have be proportional with share holders of the same level or with the values of property ownership (Cook and Kerse 1991, p. 27).

In the decision of *Borusan Mannesmann Endüstri ve Yatırım A.*S., a joint venture called Borusan Mannesmann Endüstri ve Yatırım A.S is incorporated by Borusan Birlesik Boru Fabrikaları A.S, Kartal Boru A.S, Mannesmann Sümerbank Boru Endüstrisi T.A.S. with the capital ratio of 77 percent Borusan Group, 23 percent Mannesmann AG. In this decision although the owner interests are not equal; there has been no mutual control contest. Because the process in question is taken as joint venture, it is understood that the existence of mutual control is acquiesced (Güngördü 2003, p.34).

3.2.2.2.2 *Veto Rights*

Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic

commercial behaviour of the joint venture (Notice on the concept of concentration). These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. Veto rights becomes more of an issue where there is no equality between the two parent companies in proportion of shares or representation in the bodies and one of them is in a state of minority. In such a situation, these two parent companies should have common decisions regarding the undertaking's functioning due to the pressure of the veto right. For example, in Thomas Cook/LTU/West LB case (Case 4.M/229, OJ (1992) C.154/29), the Commission founded 10 percent shares sufficient for existence of a joint control along with veto rights and other tools. But, it should be noted that veto rights which are not related with commercial strategy of joint venture are not taken into consideration in terms of control. For instance, in Eridania/ISI case, the Commission decided that veto rights on the decisions regarding to amendment of articles of association, partnering with another entity or the change of registered office of the undertaking do not give minority shareholders the possibility to maintain a decisive influence over commercial decisions of the related undertaking. Also in Mediobanco/Generali case (Case No. IV/M.159) the Commission decided that 12, 84 percent shares that Mediobanco had in Generali do not constitute a de facto majority in annual general assembly. Because the average of rates represented in annual general assembly by Mediobanco has been changing between 33, 24 - 41, 24 percent, and there is no agreement between parties that decisions will be taken jointly.

When there are more than one veto right, each one should be analyzed individually in order to determine their scope, however in determination whether or not joint control exists, these veto rights should be considered together as a whole. A veto right which does not relate either to commercial policy and strategy or to the budget or business plan cannot be regarded as giving joint control to its owner (Notice on the concept of concentrations, paragraph 29). In other words, veto rights simply to protect the financial interests of minority shareholders would not confer joint control. A mutual veto right which will be used in taking a strategic decision is a mandatory element of joint control in an undertaking (Cook and Kerse 2000, p. 44). So, according to the Commission veto

rights which are related with the following can be regarded as giving joint control to its owner:

i) Approval of the budget and business plan
ii) Development of new products and making investments
iii) Appointment and deprive of members of the boards of directors and senior management
iv) Execution of important financial contracts.

For instance, in Varta/Bosch case (IV/M.0012 12.04.1991, OJ 1991, L 320/26) Varta had 65 percent of the joint venture while Bosch had 35 percent. In articles of the association of the joint venture, it is stated that the majority in decisions related to approval of annual budget and appointment of managers should be 75 percent, so the Commission decided that these two companies had joint control in this joint venture (Güngördü 2003, p.35).

These veto rights of minority shareholders are related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned (Notice on the concept of concentrations, paragraph 22).

It is not necessary to hold all veto rights and use decisive influence de facto, the possibility of exercising decisive influence is sufficient for the existence of joint control. In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture (Notice on the concept of concentrations, paragraph 24).

In Conagra/IDEA case (IV/M.010, 30.05.1991, OJ 1991, L 175) Con Agra, an American company, acquired 26 percent shares of a French company called Idea. In addition to its shares, Con Agra gained veto rights by partnership agreement which was signed between Con Agra and other partners. With this agreement Con Agra had veto right on decisions concerning approval of annual budget, strategic plans and their amendments; inception of new projects that don't take place in approved budget and strategic plans, and have an advertisement and development cost more than 1.5 million Frank; appointment of experienced managers and determination of their wage. The Commission decided that by this agreement and veto rights Con Agra obtained decisive influence as well as joint control over Idea with other partners.

In Thomas Cook/LTU/West LB case [IV/M.229, OJ.(1992), C.154/29] Commission decided that even 10 percent minority share in conjunction with a veto right that measures up to obstruct taking decisions is sufficient to achieve joint control.

In Turkish law, parallel articles with EU are set out in the Act on the Protection of Competition. In this respect, all sides will have to exhibit common behaviour concerning the continuance of the functioning of the undertaking because of the pressure created by the veto right. In LPG case (Competition Board Decision Date: 27.05.1999 Number: 99-26/230-138) , parties applied to Turkish Competition Board in order to obtain permission for the joint venture that aims to supply liquefied petroleum gas (LPG). 39 companies that operate in LPG market merged and made a shareholders contract, and in accordance with this contract a joint venture named "LPG Temin Dağıtım ve Sanayi ve Ticaret A.Ş would be established. Parties do not have equal shares in joint venture, because shareholding structure of the joint venture is constituted according to the partner companies' gas purchase rates in 1997. And board of directors is consist of 11 members; 4 members from Aygaz Group, 3 members from Ipragaz Group, 2 members from Demirören Group and 2 members from other partners. In consideration that8 members of board of directors should cast affirmative votes in strategic decisions, it is understood that none of the companies or group of companies has power to take decisions on its own. In this regard, if Aygaz Group votes in the negative, some important decisions where 8/11 vote quorum required cannot be taken,

so it is decided that Aygaz Group has an important role in decision making procedure and it is qualified to veto decisions on its own differently from other companies. In ordinary decisions, when Aygaz Group votes in the same way with any other group, quorum (6 votes) can be achieved, but if Aygaz Group is absent from the meeting, other groups should vote in the same way in order to take a decision. Beside those, Primagaz and Demirören Groups' financial structure was taken into consideration. Incase Primagaz, Demirören and Aygaz vote in the same way, aforementioned quorum can be achieved where the rest of company has been represented just by 2 board of directors. It means that in such strategic decisions, small companies do not have any right to effect decisions. Consequently, Competition Board did not permit this joint venture due to absence of joint control.

3.2.2.2.3 *Joint Exercise of Voting Rights*

Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control by a legally binding agreement to this effect or *de facto.* In practice, if there is not any formal agreement between undertakings regarding the management procedure, these undertakings have a tendency not to act together taking into account their common commercial interest concerning the commercial policies of the undertaking. In addition to this, having a sole or joint control over an undertaking will be more difficult when the number of partner undertakings is getting increase. As a solution to this reluctant behaviour of undertakings, they can obtain the control by signing a contract regarding the joint exercise of voting rights, and secure their power to influence decision-making procedure. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights (Notice on the concept of concentration, paragraph 30). So, they achieve control by securing the common decisions and behaviours legally. But in EU, there are some examples to the joint control which is exercised by partner undertakings that have very strong bounds instead of a binding contract between them. Such as in Elf/BC/CEPSA case [4/M.098, OJ.(1991), C.132/12, 4 CMLR.580)], when shares of Elf in Cepsa increased from 20,5 percent to 34 percent and became equal to Banco Central's shares in Cepsa, it is

decided that joint control exists even though there isn't any agreement between Elf and Banco Central. Each of them had a veto right and this provided them joint control.

In Bonesto/Totta case [IV/M.192, OJ.(1992), C.73/18, 4 CMLR 542], a group of minority holders who hold 46,5 percent of shares achieved joint control acting jointly as a result of contractual relationship between themselves and having 60 percent equivalent power in management. Also in Air France/Sabena case [IV/M.157, OJ.(1992), C.235/15], Air France acquired 38 percent of Sabena'a shares through its subsidiary Finacta and even though rest of shares were belong to Belgium State it was decided that they had joint control by reason of the fact that 75 percent quorum is required for strategic decisions and approval (Sanlı 2000, p.363).

Obtaining the control by an agreement over an undertaking can be appeared by a voting agreement which is acted between partner undertakings. By this agreement, voting right can be used by a determined representative or situations whether a voting right will be used wholly or partly can be fixed. In another words, by this agreement minority groups that do not have any effect on management of the target undertaking will be able to obtain control and management (Poroy *et al*. 1997, p. 522 *et.seq*.) For example in Dresdner Bank/Banque National de Paris case [Case 4/M.21, OJ.(1991), C.5/7], each of Dresdner Bank and National Paris Bank had 37 percent shares in a joint venture which had founded to operate in finance sector in East Europe, and in joint venture agreement it was stated that both of them had the right to appoint governing organ and were responsible from the management of the joint venture. Even though third partner had 26 percent shares, it is decided that Dresdner Bank and National Paris Bank had a joint control (Cook and Kerse 2000, p.24) Also in Thomson/Banco Zaragozano/Caja Madrid/Indra case (Case No IV/M. 1479) the Commission found that a group with less than 25 percent of the shares, but with an agreement to coordinate their voting behavior at the shareholders' meeting, was in joint control. The Commission decided that there was neither joint nor sole control where there was no agreement between shareholders on voting rights in Paribas/CDC/Beaufour case (Case No IV/M.1366, Whish 2003, p. 806).

In some cases, each parent company provides a contribution to the joint venture which is vital for its operation for example specific technologies, local know-how or supply agreements. So, the parent companies may be able to operate the joint venture with full cooperation only with each other's agreement on the most important strategic decisions even if there is no express provision for any veto rights (Notice on the Concept of Concentrations).

On the other hand, if there isn't any common and important interest between parties, an agreement which provides equal rights and authorization will not be sufficient for joint control, because parties tend to have variable coalitions between each other pursuant to their individual interest (Erdem 2003, p.202). Also the Commission only accepts the existence of joint control where there is no likelihood that "shifting alliances" may change the identity of those who jointly control the target (Goyder 2003, p.348). But in the shareholders agreement veto rights are provided in strategic decisions, joint control is deemed to exist. For instance, in Paribas/MTH/MBU case ([1991] OJ C277/18, Case IV/M50) both Paribas and MTH acquired 40 percent interest in MBU, a newly-created joint venture. Both Paritas and MTH had a veto right over decisions made in shareholders' meeting in spite of the fact that each held only a minority interest in the company. Although the theoretical possibility of changing alliances existed, the veto rights were held sufficient by the Commission to establish joint control (Goyder 2003, p.348). Also in Volvo/Renault case (Case IV/M4 [1991] 4 CMLR 297) which is the first decision of the Commission within the frame of The Merger Regulation, the Commission decided that a strong situation of common interest which together other factors led to a de facto permanent common control situation existed, although both parties each held 45 percent holding in each other. Renault and Volvo made an agreement consisting of a strong cooperation and structural articles. According to this agreement they accepted and undertook to transfer one another 25 percent shares of their affiliated enterprises concerning automobile engine and 45 percent shares of their truck and bus enterprises. In addition to these share transfers, they established three committees concerning general commercial policy, car enterprise and heavy vehicle enterprise. The Commission analysed if these transactions provided joint control to parties in two field of activity. The Commission decided that 45 percent share transfer

one another formed a concentration only in bus and truck branches, and by this way parties would take decisions jointly due to common interest arising from the equal profit and loss. In addition, the Commission thought that the articles of the agreement between parties help to integrate research and development, production and purchasing activities of parties and strengthen the dependence in between. According to the Commission, parties could not terminate this merger easily because of its heavy cost, thus parties would have joint control to maintain their economic interests stable.

Where an operation leads to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders, the whole operation will normally be considered to be an acquisition of sole control (Notice on the Concept of Concentration). This situation especially appears in the establishment process. In British Telecom/Banco Santander (Case IV/M.425) case, the Commission decided that establishment period should not exceed 3 years. However, in accordance with legally binding agreements if it is understood that joint control will be used solely by one of the undertakings which have the joint control at that moment, it will be established sole control.

3.2.3 Control by a Single Shareholder on The Basis of Veto Rights

In accordance with a merger or an exceptional situation exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions. This situation occurs either where one shareholder holds 50 percent in an undertaking whilst the remaining 50 percent is held by two or more minority shareholders, or where there is a quorum required for strategic decisions which in fact confers a veto right upon only one minority shareholder (Notice on the concept of concentration, paragraph 39). In these circumstances, a single shareholder possesses the same level of influence as that normally enjoyed by several jointly-controlling shareholders, for instance the power to block the adoption of strategic decisions. However, this shareholder does not enjoy the powers which are normally conferred on an undertaking with sole control, for example the power to impose strategic decisions. Since this shareholder can produce a deadlock

situation comparable to that in normal cases of joint control, he acquires decisive influence and therefore control within the meaning of the Merger Regulation (Ibid, paragraph 39).

3.2.4 Changes in the structure of control

A change in the structure of control is accepted as a concentration[22] in pursuant of Article 3 (1) of the Merger Regulation. A change in the structure can arise from those below:

a. Change from sole control to joint control:
b. An increase in the number of shareholders exercising joint control.

The principles for determining the existence of a concentration in these circumstances are set out in detail in the Notice on the concept of undertakings concerned (Paragraphs 30 to 48).

1. Mergers
2. Acquisition of sole control
    a. Acquisition of sole control of the whole company
    b. Acquisition of sole control of part of a company
    c. Acquisition of sole control after reduction or enlargement of the target company
    d. Acquisition of sole control through a subsidiary of a group
3. Acquisition of joint control
    i. Acquisition of joint control of a newly-created company
    ii. Acquisition of joint control of a pre-existing company
    iii. Acquisition of joint control with a view to immediate partition of assets
4. Acquisition of control by a joint venture
5. Change from joint control to sole control
6. Change in the shareholding in cases of joint control of an existing joint venture

[22] The principles for determining the existence of a concentration in these circumstances are set out in detail in the Notice on the Concept of Undertakings Concerned.

a. Reduction in the number of shareholders leading to a change from joint to sole control

b.Reduction in the number of shareholders not leading to a change from joint to sole control

c. Any other changes in the composition of the shareholding

7. 'Demergers` and the break-up of companies
8. Exchange of assets
9. Acquisitions of control by individual persons
10. Management buy-outs
11. Acquisition of control by a State-owned company

In ICI/Toxide Case (Case IV/M.023 - ICI/Tioxide, of 28 November 1990), Tioxide Company was jointly controlled by ICI and Cookson; and the Commission decided that acquisition of Tioxide's whole shares by ICI, who already hold the half of the shares, should be qualified as a concentration as follows:

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

In this case, the Commission pointed out the distinction between decisive influence exercised solely and jointly. Decisive influence exercised jointly shall take into account the other undertaking's potentially different shares (Cook and Kerse 2000, p.43; Bellamy and Child 1993, p.311).

In Eridania /ISI case, Eridania increased its shares from 50 percent to 65 percent by purchasing Finbieticola's shares in ISI. Even though Eridania was very powerful in management, it is analyzed that Eridania did not manage the company on its own. Because Finbieticola had still a voice in strategic decisions contrary to daily management. But as a result, The Commission decided that this transaction should be deemed as a concentration and by this Eridania acquired the sole control.

Another case (Competition Board Decision date: 22.06.2001 number : 24440) can also be given to transition from joint to sole control; in this case Türkiye Şişe ve Cam Fabrikaları A.Ş. acquired 50 percent shares of Zwiesel Gkasswerke A.G in Paşabahçe Schott Cam San. ve Tic. A.Ş. which was a joint venture and jointly controlled. Thus after the share transfer Türkiye Şişe ve Cam Fabrikaları A.Ş. acquired the sole control.

4. CERTAIN SITUATIONS IN WHICH CONCENTRATION IS NOT DEEMED TO ARISE

Operations, which are not a result of commercial avtivity and do not significantly effect competition in markets or effect competition in a good way, are not in the scope of concentration and this term is being limited in order to be applied in accordance with the aim of competition rules.

Article 3/5 of the Merger Regulation regulates the situations in which concentration is not deemed to arise. Pursuant to the Article 3 (5) of the Merger Regulation; a concentration shall not be deemed to arise where:

> *(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;*
>
> *(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;*
>
> *(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(6) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.*

According to Hawk and Huser (1996, p.32), if an operation does not cause a change in the control, it is not considered as a concentration pursuant to the Merger Regulation. Eryürekli (1996, p.56) indicates the situations in which concentration is not deemed to arise as follows:

a. To acquire less shares than required in order to maintain control.
b. The situation where shares of an undertaking are temporarily hold by credit institutions or other financial institutions or insurance companies

In the context of exceptions mentioned above, the question may arise whether a rescue operation constitutes a concentration under the Merger Regulation. A rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in the Merger Regulation is normally not applicable to such an operation. The reason is that the restructuring program normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, transforming a rescued company into a commercially viable entity and reselling it within the permitted one-year period is not normally realistic. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period (Notice on the concept of Concentration, paragraph 45). Thus, where such an operation results in a joint control, it will be considered as a concentration within the meaning of the Merger Regulation.

In order to apply the substantive provisions of the Merger Regulation it is necessary for the Commission to determine that the concentration has a Community dimension. Once it is established that a transaction constitutes a concentration within the meaning of the Merger Regulation, it is time for the determination of Community dimension in order to assess whether or not it falls within the jurisdiction of The Merger Regulation (Toksoy 2007).

The scope of Community dimension is basically determined with respect to thresholds. While Article 1 of the Merger Regulation sets out the thresholds to be used to determine a concentration with a "Community dimension", Article 5 explains how turnovers should be calculated (Commission Notice On Calculation Of Turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings,

paragraph 4). The fact that the thresholds mentioned in Article 1 of the Merger Regulation are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria, shows that their aim is to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable (Ibid, paragraph 5). However, despite the aim of the Merger Regulation to provide a simple jurisdictional test, the quantification of "turnover" and the identification of the "undertakings concerned" are not as simple as it might seem at first (Broberg 1998).

Pursuant to Article 1 (2) of the Merger Regulation a concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

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

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

First threshold is intended to exclude mergers between small and medium-sized companies, while the second is intended to exclude relatively minor acquisitions by large companies or acquisitions with only a minor European dimension. This so-called "two-thirds rule" is intended to exclude cases where the effects of the merger are felt primarily in a single Member State and therefore it is more appropriate for the national competition authorities to deal with it (Toksoy 2007).

However, if Article 1 (2) threshold is not triggered, the additional and more detailed threshold of Article 1 (3) comes into play. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

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

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

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

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

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

This requirement was introduced in March 1998, by way of amendment to the old Merger Regulation that has been kept in the new one, in order to bring more mergers within the scope of the Merger Regulation so eliminating the problem of multiple filings to national competition authorities. The introduction of the second threshold has increased the number of notifications to the Commission as intended (Toksoy 2007).

Once the undertakings concerned are identified, their turnover for the purposes of determining the relevant jurisdiction must be calculated according to the Article 5 of the Merger Regulation. According to Article 5(1) of the Merger Regulation, aggregate turnover comprises the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services. The basic principle is thus that for each undertaking concerned the turnover to be taken into account is the turnover of the closest financial year to the date of the transaction (Commission Notice on Calculation of Turnover under Council Regulation (EEC) No

4064/89 on the control of concentrations between undertakings, paragraph 24). This can be obtained from the profit and loss statement in the audited accounts for that financial year. Deductions may be made from this figure in respect of sales rebates, and value added tax and other taxes directly related to turnover. Sales of goods or the provision of services between companies belonging to the same group are excluded from turnover.

Where the concentration consists of the acquisition of parts of one or more undertakings, only the turnover relating to those parts that are the subject of the transaction is to be taken into account.

Commission Notice on Calculation of Turnover and Commission Notice on the Notion of Undertakings Concerned are guidelines regarding the application of thresholds.

Differently from EU, in Turkish law there are two kinds of restrictions; first one is related to economic capacity and growth of undertakings, the second is related to the quality of relation between parties. So, in order to determine whether a transaction falls in the scope of the Article 7 of the Communiqué number 1997/1, firstly the quality of the transaction must be evaluated, then economic powers of undertakings that are the parts of the transaction must be analyzed.

i. *Qualitative Restriction*:

Article 7 of the Act on the Protection of Competition prohibits merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country. But this article keeps separate acquisition by any undertaking or person from another undertaking by way of inheritance. In addition to this, Communiqué number 1997/1 has widened this scope and regulated two additional situations.

Pursuant to the Article 3(a) of the Communiqué number 1997/1; undertakings whose ordinary activities are to transact with securities for their own account or for the account of others, temporarily hold the securities acquired with a view to reselling them, provided that the voting rights arising from such securities are not exercised by them in such a way that the competition policies of the undertaking issuing the securities are affected, do not fall under the scope of Article 7 of the Act on the Protection of Competition, and it is not required to obtain the authorization of the Competition Board for such mergers and acquisitions.

Also in the Article 3(b) it is declared that acquisition, which is carried out by a public institution and an organization with the aim or reason of liquidation, winding up, insolvency, cessation of payments, composition, privatization or by a similar reason, and as required by law, is an exception and is not required to obtain the authorization of the Competition Board.

In order to that a merger or an acquisition must be considered in the scope of the article 3(b), acquiring party must be a state institution and organization and also controlling tools must be transferred legally.

ii. Quantitative Restriction:

Some transactions that are qualified as a concentration on quantitative basis can be exempted from the control of Competition Board and other authorities. This exemption aims to eliminate number of application in front of competition authorities and provide more detailed and correct decisions. And this exemption will help to encourage mergers between undertakings with small and medium scale.

In order to determine economic power of undertakings, market share or turnover criteria are mostly used. The Article 4 of the Communiqué number 1997/1 sets forth both "market share" and "turnover" criteria. Where, as a result of a merger or an acquisition mentioned in Article 2 of the Communiqué, total market share of the undertakings that carry out the merger or acquisition exceeds 25 percent of the market in the relevant product market within the whole or a part of the territory, or even though it does not

exceed this rate, their total turnover exceeds TL twenty-five trillion, it is compulsory for them to take the authorization of the Competition Board. So, Competition Board draws up two thresholds which are based on market share and turnover. If a concentration exceeds one the threshold, Competition Board stipulates a prior notification and an authorization (Sanlı 2000, p. 340)

In calculation of the market share or turnover, sum of market shares or sum of turnovers of the partner undertakings and their subsidiaries in the relevant product market is taken as the basis.

5. CASE STUDY: AKBANK & CITIBANK PARTNERSHIP

In 2006, Competition Board gave an interesting decision (Competition Board Decision Date: 06.12.2006, Number: 06-87/1120-325) regarding the partnership between Akbank T.A.Ş. and Citigroup. Akbank and Citigroup successfully completed a strategic partnership agreement according to which Citigroup acquired a 20 percent equity stake in Akbank. Parties applied to Competition Board in order to demand for exemption or obtain a negative clearance for Shareholders Agreement and strategic partnership between them.

Akbank T.A.Ş is one of the leading banks in Turkey with its branches country-wide. In addition to its core banking activities, Akbank offers a wide range of corporate, SME, consumer and private banking services as well as foreign trade financing. Meanwhile, non-banking financial services in addition to capital markets and investment services are provided by the Bank's subsidiaries (www.akbank.com 2010). Akbank is one of the group company of Hacı Ömer Sabancı Holding A.Ş. Sabancı Holding is the parent company of the Sabancı Group, Turkey's leading industrial and financial conglomerate.The Sabancı Group companies are market leaders in their respective sectors. Sabancı Holding's main business units include financial services, energy, retail, cement, automotive, tire and tire reinforcement materials (Sabancı Official Website, 2010). In 2006, Akbank had 658 braches inside and 2 branches outside the Turkey (http://www.tbb.org.tr)

Citibank A.Ş (Citibank) started doing business in Turkey in 1975 with corporate banking services and began to operate as a branch in 1981. However, even before the bank established a presence in Turkey, Citibank was involved into many development projects such as motorway financings, power plants and dams. In 1996 Citibank launched its Consumer Banking business. In 1998 Citibank began providing Commercial Banking services. Citibank provides Loans, Treasury Products, Corporate Finance, Cash Management, Foreign Trade Finance and Custody Services to its corporate and commercial customers. Citibank COIC has 99,99 percent shares of

Citibank and is also an indirect participation of Citigroup through Citibank N.A which has 100 percent shares of Citibank COIC. All shareholders of Citibank are participants of Citigroup, too. Citigroup Inc. has the world's largest financial services network, spanning 140 countries with approximately 16,000 offices worldwide. Citibank A.Ş is the only bank in Turkey which is controlled by Citigroup. Citilease Finansal Kiralama A.S. is the other subsidiary of Citigroup which indirectly has the whole shares of it. In 2006, Citibank had 23 branches in Turkey. According to the balance sheet dated 31.12.2009 the current rank of Citibank N.A is 21 in the world ranking with US$m1,161,361 (http://www.bankersalmanac.com).

When we look at ranking of banks in Turkey and compare sizes of Akbank and Citibank just before the partnership in 2005, we can see that Akbank had 48.635.663 YTL total assets while Citibank had 2.387.409 YTL.

Banks	Total Assets	Total Credits	Total Profit/Loss
1 Ziraat Bankası	59.893.193	12.433.206	1.265.826
2 İş Bankası	55.567.382	18.657.600	709.798
3 Akbank	**48.635.663**	**19.464.112**	**1.132.305**
4 Garanti Bankası	32.324.783	14.741.567	525.693
5 Vakıflar Bankası	28.579.537	10.001.762	370.017
6 Halk Bankası A.Ş.	26.060.704	4.839.800	390.794
7 Yapı ve Kredi Bankası	23.067.854	9.930.891	-2.501.116
8 Koçbank	14.057.547	5.622.345	178.437
9 Finans Bank	10.845.944	6.876.112	272.015
10 Denizbank	8.608.742	4.132.124	153.959
11 Oyak Bank	7.721.081	4.800.791	264.670
12 HSBC Bank A.Ş.	7.380.209	5.000.145	182.478
13 Dışbank (Fortis)	6.646.318	3.523.326	87.876
14 Türk Ekonomi Bankası	4.524.324	2.574.675	63.414
15 Türk Eximbank	3.803.687	3.050.313	273.128

16	İller Bankası	3.508.882	2.459.610	83.151
17	Şekerbank	3.184.840	1.292.467	30.675
18	TSKB	3.019.712	1.388.592	70.049
19	**Citibank A.Ş.**	**2.387.409**	**996.081**	**90.601**
20	Anadolubank	2.099.024	939.286	26.913
21	Bayındırbank	1.892.966	21.483	237.358
22	Tekstil Bankası	1.556.761	1.073.652	12.125
23	Alternatif Bank.	1.368.082	781.339	13.634
24	Deutsche Bank A.Ş.	763.990	76.683	23.032
25	Türkiye Kalkınma B.	653.845	272.522	22.348
26	ABN AMRO Bank N.V.	643.671	76.320	14.183
27	WestLB AG	628.665	8.531	4.508
28	Tekfenbank	594.729	287.708	1.508
29	BankEuropa	558.579	211.901	-6.221
30	JPMorgan Chase Bank N.A	485.490	0	9.428
31	Calyon Bank Türk A.Ş.	481.856	36.839	241
32	MNG Bank	436.691	216.558	7.139
33	TAKASBANK	400.676	16.754	34.390
34	Turkish Bank A.Ş.	366.743	94.725	4.099
35	Societe Generale (SA)	339.425	63.008	8.461
36	Arap Türk Bankası A.Ş.	334.739	82.782	4.175
37	Bank Mellat	195.034	110.580	3.288
38	C Kredi ve Kalkınma B.	191.764	84.714	12.050
39	Nurol Yatırım Bankası	100.785	36.686	250
40	GSD Yatırım Bankası	74.378	54.611	2.386
41	Çalık Yatırım Bankası	66.252	46.011	3.433
42	Diler Yatırım Bankası	58.837	0	50
43	Banca di Roma S.P.A.	55.909	35.783	490
44	Adabank	46.011	0	-13.200
45	Habib Bank Limited	29.947	5.676	-108
46	Taib Yatırım Bank	6.294	0	16

47 Tat Yatırım Bankası	3.386	316	22
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Total	364.252.340	136.419.987	4.069.768

Parties signed both a Trust Deed Agreement regarding acquisitions of 20 percent equity stake in Akbank by Citigroup and a Shareholders Agreement to cooperate a strategic partnership and set its framework. According to Shareholders Agreeement parties will have a strategic partnership in technology and know-how sharing, economic cooperation and senior management meetings.

There are some significant articles of Shareholders Agreement which is related with the topic.

1. Voting Agreement

According to the voting agreement, COIC has the right to appoint a member, who does not have executive duties, to board of directors of Akbank T.A.Ş. None of the other members of board of directors shall be appointed by a foreign bank or a foreign financial enterprise that is tied up with a foreign bank or shall not be actively related to a foreign bank or a foreign financial enterprise that is tied up with a foreign bank.

Hacı Ömer Sabancı Holding A.S. has the right to appoint a member, who does not have executive duties, to board of directors of Citibank A.Ş. None of the other members of board of directors of Citibank A.Ş shall not be appointed by a Turkish bank or financial enterprise except Citigoup Inc. or shall not be actively related to a Turkish bank or financial enterprise except Akbank T.A.Ş.

2. Share Transfers

Citibank Overseas Investment Corporation shall not sell or transfer its shares during 36 months period beginning from effective date.

3. Exclusive Strategic Relation

Citigroup and its affiliates controlled by it shall not make strategic partnership agreements, including agreements regarding distribution or sale of Citigroup's products or services, with other banks and financial enterprises except Akbank and Citibank.

Akbank and Hacı Ömer Sabancı Holding A.Ş parties shall prevent Akbank and its aff iliates controlled by it not to have a strategic partnership agreement with any other bank or financial enterprise which is not belong to Turkish partners completely or mostly.

4. Mergers and Acquisitions which will be made by Citigroup Inc. and Akbank

Except as otherwise provided, Citigroup and Citibank shall continue to practice as independent parties.

Before analyzing the decision of Competition Board, it is important to define "strategic cooperation" and its place in Competition law. Strategic cooperation is a later stage of simple trade relations and contracts and an earlier stage of a merger. In a strategic cooperation parties maintain their legal independence, identities, management abilities individually and follow their own interests. Strategic cooperation is an agreement between two or more independent companies which joint individual capabilities or/and resources to pursue joint activities with purpose to increase and maintain competitive advantages of co-operators across time (Strategic Cooperation in the Furniture Sector; European Social Fund Guidelines).

Cooperation is a formal agreement between two or more parties with purpose of attaining common goals, defining future obligations of cooperators. Normally the duration of strategic cooperation is stipulated, although there is cooperation agreement which may be initiated with the intention to last across indefinite period of time. In general most of strategic cooperation has last or been reconstructed in less than five years. Cooperative agreements cover only some part of activities of participated companies (4Strategic Cooperation in the Furniture Sector; European Social Fund

Guidelines). Companies prefer to have strategic cooperation in complicated and new developing fields. The scope of cooperation can be widened or narrowed in due course.

Competition Boards approach strategic cooperation very cautiously, because they may arise in different legal structures and complicated relations. Hence, strategic cooperations related to price fixing, restraint of supply or market sharing.

In EU, strategic co operations are tolerated unless they don't have anticompetitive effects on competition in European single market. In The Act on the Protection of Competition and secondary legislation do not contain any definition or reference of strategic cooperation. Transactions in the scope of abovementioned definition are regulated as part of joint ventures in article 2(c) of Communiqué number 1997/1.

The first strategic cooperation in banking and finance sector in EU is Banque Nationale de Paris (BNP) and Dresdner Bank (DB) cooperation (Banque Nationale De Paris-Dresdner Bank, OJ L 188, 27.07.1996) which European Commission granted an exception to. BNP and DB were planning to serve wide-ranging financial services to their customers in France and Germany and to broaden in international market. Commission decided to grant an exception to this cooperation for ten years beginning from 23.01.1995. But this cooperation has been dissolved in 2001 after five years.

In Turkey, for the first time Akbank T.A.Ş. and Citigroup applied to Competition Board for a strategic cooperation**.** So, this is the first decisions related to strategic cooperation in Turkish Competition Case Law.

Even though the importance of this case in Turkish Competition Law, the Competition Board unfortunately did not made a detailed analyze and use its judicial discretion to give an exemplary decision in order to maintain inflow of capital to Turkey from foreign investors.

The Competition Board decided that this transaction does not constitute an acquisition and fall in the scope of Article 2 of Communiqué number 1997/I. In the case, 20 percent shares of Akbank were acquired by COIC by two-stage transaction. First stage is to purchase 28.000.000.000 number of Akbank shares, second is to purchase 20.000.000.000 shares of Akbank which would be issued by capital increase.

While before the acquisition Hacı Ömer Sabancı Holding was holding the control of Akbank, after the transaction Hacı Ömer Sabancı Holding's shares in Akbank would decrease without any control change in Akbank. The Commission decided that appointment of a member of each's board of directors cannot be interpreted as a tool to maintain decisive influence and have a say in management.

Even though Competition Board granted an exception to Trust Deed Agreement, it did not grant to Shareholders Agreement due to anticompetitive articles in its content. So, acquisition of 20 shares of Akbank does not constitute an acquisition because the control of Akbank does not change after the transaction, but parties can obtain a negative clearance for Trust Deed Agreement. In this case, the Commission changed its settled opinions regarding acquisitions. Before, there are many decisions that commission considered as an acquisition even though control change does not exist.

Consequently, the Competition Board decided to give 60 days to parties to add an article to Shareholders Agreement that states each of the company will maintain their independent identities and decide individually in all decisions concerning banking and commercial issues including customers. The Commission added that if parties fulfil this condition, their application will be evaluated again in order to give an exception for five years. Finally, parties could get a conditional exception for five years.

The most interesting thing in this decision is the negative vote of a board member. In his written justification, he indicates that Citigroup Inc. and Akbank's demand is in the scope of Communiqué number 1997/I and the transaction is an acquisition under the Article 2 of the Communiqué. According to him, acquisition of a part of undertaking's partnership shares constitutes a separate acquisition in competition law sense. Both in

the Act on Protection of Competition and Communiqué number 1997/I bring out that "acquisition, by any undertaking or person, the whole or a part of its partnership shares" is deemed to as an acquisition. He thinks that acquisition of 20 shares of Akbank by COIC does not constitute a control change in Akbank and the sum of market shares (14.28 percent) of Akbank and Citibank does not maintain dominant position, therefore the Competition Board should have allowed this transaction, without any condition.

As it is followed from media, strategic cooperation between Akbank and Citigoup has been resulting good operations and products also beneficial for customers and will continue for a long time.

6. CONCLUSION

Turkish Competition Law is a newly developing, fast-growing, dynamic law. Turkey accomplished its duty arising from Ankara Agreement and Additional Protocol, enacted the Act on Protection of Competition and established a Competition Authority. Competition Authority regulated Competition Law field by issuing many Communiqué, observing the implementation of the Act on Protection of Competition and ensuring the formation and development of markets for goods and services in a free and sound competitive environment.

It is remarkable that the first Communiqué of Competition Authority is on the Mergers and Acquisitions Calling for the Authorization of the Competition Board. So, we can say that mergers and acquisitions are important for Turkey as well as other countries. Turkish legislation contains parallel articles and regulations with European legislation, even Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board is based on the Merger Regulation. But there are some differences between these legislations because even though European legislation was amended several times, Turkish legislation has not changed in accordance with these amendments.

As it is stated in previous chapters, the concept of concentration is broader in scope and involves mergers, acquisitions and joint ventures. However, neither the Merger Regulation nor the Act on Protection of Competition contains any definition of the term "concentration". Both of them regulate the situations in which concentration is deemed to arise and give some sample situations.

In EU legislation, Article 3 of the Merger Regulation deals with mergers and acquisitions. According to this Article, mergers between two or more previously independent undertakings, acquisition of control of one undertaking and establishing a

joint venture are accepted as a concentration. The situations in which concentration is not deemed to arise are counted in Article 3(5) of the Merger Regulation.

In Turkish legislation, Article 7 of the Act on the Protection of Competition and Article 2 of the Communiqué number 1997/I regulate mergers and regulations. According to these articles, mergers between at least two undertakings, control or acquisition of an undertaking's assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right and joint ventures which do not aim or have an effect to restrict competition are accepted as mergers and acquisitions. The situations which are not deemed to as mergers and acquisitions are regulated in Article 3 of the Communiqué number 1997/I. It is a defect that even though Communiqué number 1997/I regulate joint ventures, the Act on Protection of Competition does not have any article concerning joint ventures. It is somehow contradictory because Competition Authority does not have competence to make primary legislation instead of legislators.

As a conclusion, even though a great majority of Turkish legislation is similar and the same in some points to European legislation, there are still some differences and loopholes in Turkish legislation. However, Turkish Competition Authority works hard in order to fill these legal loopholes with its communiqués and case law. Since now, it is undeniable that Turkish Competition Board has formed a stable and permanent case law. But, in some points, Competition Board still does not have a definite execution regarding "change of control". Competition Board has allowed mergers and acquisitions till 2006 even though change of control does not exist; Board suddenly changed its settled decision in the case of Akbank & Citibank partnership. When considering the insufficiency of the Act on Protection of Competition and the Communiqué number 1997/I, Competition Board should act with awareness of being the only authorized entity regarding the competition law, and publish guidelines regarding the contradictions in application. In this ever-changing and developing atmosphere, it will be necessary to amend current legislations in order to adjust future needs.

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RESUME

Name and Surname	**:** Hande Kıstak
Permanent Address	**:** Kozyatağı, İstanbul
Place and Date of Birth	**:** İstanbul, 04.08.1982
Foreign Languages	**:** English, Italian
Elementary School	**:** Ataköy İlkokulu, 1993
Secondary School	**:** Adile Mermerci Anatolian High School, 1997
High School	**:** Adile Mermerci Anatolian High School, 2000
Bachelor's Degree	**:** Marmara University Faculty of Law, 2005
Master's Degree	**:** Bahçeşehir University, 2010
Name of the Institute	**:** Institute of Social Sciences
Name of the Programme	**:** European Public Law and Integration
Work Experiences	**:** 2010- … Finansbank A.Ş Head Office/Legal Department
	2009-2010 Akuğur Law Firm
	2006-2008 Ekşioğlu Law Firm