Acquisitions Of Non-Controlling Minority Shareholdings: Assessment From A Competition Policy Perspective

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Abstract

In order for a merger or an acquisition transaction to fall within the scope of Communiqué No. 2010/4, a permanent change in control is required. However, acquisition of non-controlling minority shareholdings could raise certain competition law concerns especially in cases where there is a horizontal or vertical overlap among the activities of the parties. To illustrate, an acquisition of non-controlling minority shareholding from a competitor could create an incentive for the acquirer to unilaterally increase its price since such acquisition will allow the acquirer to recapture some of its lost profits through the minority shareholding and thus will be able to gain more profit from a potential price increase. Similarly, an acquisition of non-controlling minority shareholding from a competitor could reduce the incentive of the acquirer to deviate from the cartel and thus enable the cartel to be more sustainable. Intuitively, the acquirer will have to bear some of the loss made by the other cartel participant in which it has minority shareholding.

Keyword: *Merger and Acquisitions, Acquisition of Minority Shareholdings, Unilateral Price Increase, Cartel, Economic Evidence*

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Kontrol Sağlamayan Azınlık Payı Devralmaları: Rekabet Politikası Açısından Değerlendirme

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Öz

Birleşme veya devralma işlemlerinin 2010/4 Sayılı Tebliğ kapsamında Rekabet Kurulu'nun iznine tabi olabilmesi için, işlem neticesinde kontrolde kalıcı bir değişiklik yaratmış olması aranmaktadır. Fakat, kontrolde kalıcı değişiklik sonucunu doğurmayan ve özellikle faaliyet gösterdikleri pazarlar arasında yatay ya da dikey örtüşme bulunan teşebbüsler arasında gerçekleşen azınlık pay devirleri, iktisadi teorinin de ortaya koyduğu üzere, ciddi rekabet hukuku endişeleri doğurabilecektir. Örnek kabilinden olmak üzere, rakip teşebbüsten alınan ve kontrol sağlamayan azınlık payları, devralan teşebbüste tek taraflı olarak fiyat artırma motivasyonu yaratabilecektir. Nitekim devralan teşebbüs fiyat artırma sonucu kaybedeceği muhtemel talebin bir kısmını, rakibinden devralmış olduğu azınlık payı dolayısıyla geri kazanabilecek ve bu sayede potansiyel bir fiyat artışı neticesinde toplam net kârını artırabilecektir. Bununla birlikte, rakip teşebbüsten alınan kontrol sağlamayan azınlık payı, devralan teşebbüsün kartelden sapma motivasyonunu düşürecek ve karteli daha sürdürülebilir kılacaktır. Nitekim devralan teşebbüs kartelden sapması durumunda azınlık payı sahibi olduğu rakip teşebbüsün göreceği zararın bir kısmına kendisi katlanmak durumunda kalacaktır.

Anahtar Kelimeler: *Birleşme ve Devralmalar, Azınlık Payı Devralınması, Tek Taraflı Fiyat Artışı, Kartel, İktisadi Delil*

INTRODUCTION

Acquisition of non-controlling minority shareholding is subject to antitrust scrutiny of the regulatory agencies in numerous jurisdictions including US, Germany, UK, Austria, Brazil, Canada and Japan. Yet, under Turkish merger control regime, such acquisitions do not fall within the scope of the merger control regulation and thus does not trigger notification requirement before the Turkish Competition Authority (Authority). Still, acquisitions of non-controlling minority shareholdings could be problematic from a competition policy perspective.

The aim of this paper is to evaluate the acquisition of non-controlling minority shareholdings from a competition policy perspective. Following this introduction, we will briefly provide the general framework of the mergers and acquisitions under Turkish merger control regime. In this regard, we will give a specific emphasize on the concept of control. Under section two, we will evaluate the Turkish Competition Board's (Board) approach to the concept of control. In this regard, we will focus on the Board's negative control precedents in an attempt to reveal the Board's approach to the concept of negative control. Under third section, we will assess the potential anti-competitive concerns arising from the acquisition of minority shareholdings. In this regard, we will place specific emphasize on the unilateral price increase by using economic models and examples. We will also examine whether acquisition of non-controlling shareholding facilitate collusion. While doing so, the other potential anti-competitive concerns such as increasing competitors' price, increasing transparency and input and customer foreclosure will be examined as well. In the fourth section, we will go over the situation around the world. In this regard, we will mention the approaches of certain jurisdictions to the acquisitions of non-controlling minority shareholdings and also make a specific emphasise the thresholds used by different jurisdictions to capture the acquisition of minority shareholdings. Under section five, we will evaluate the adequacy of the Article 4 and 6 of Law No. 4054 in terms of dealing with the acquisition of minority shareholding.

We will also evaluate the approach of the Authority to the existing shareholdings while assessing the mergers and acquisitions. In this regard, we will make specific references to case law of the Board. Under last section, we will provide our concluding remarks as regards to the acquisition of non-controlling shareholdings under Turkish merger control regime.

1. GENERAL FRAMEWORK OF THE MERGERS AND ACQUISITIONS UNDER TURKISH MERGER CONTROL REGIME

Under Turkish competition law regime, the relevant legislations regulating the mergers and acquisitions, are the Law No. 4054 on the Protection of Competition (Law No. 4054) and the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4).

Article 7 of the Law No. 4054 reads as follows:

> *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.*

As it can be inferred from the wording of the Article 7 of Law No. 4054, Authority adopted the dominance test where the main focus is whether a transaction creates or strengthens a dominant position and significantly lessens the competition in the market. Communiqué No. 2010/4 is published by the Board based on the Article 7 of Law No. 4054[1].

[1] For further information concerning the mergers and acquisition from a Turkish competition law perspective, please see; SANLI, K. C. (2000), *Rekabetin Korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği* (Prohibitive Provisions of Law on Protection of Competition and Invalidity of the Agreements and Decisions of Association of

Article 5 of the Communiqué No. 2010/4 sheds light to the transactions which are considered as merger or acquisition [2]. According to the aforementioned article, acquisition of direct or indirect control over an undertaking shall be considered as a merger or acquisition transaction, provided that there is a permanent change in control. Therefore, in cases where there is no change of control arising from a transaction, review and approval of the Board is not required to consummate a merger or an acquisition transaction. In this regard, since the concept of control plays a crucial role in terms of the notifiability of a transaction, a special emphasize needs to put on the concept of control.

Undertakings Contrary to These Prohibitive Provisions), Competition Authority Publication, Ankara, p. 314-384; BERFIN AKYUZ, H. (2007) *Türk Rekabet Hukuku Kapsamında Şirketlerde Birleşme ve Devralmalar* (Mergers and Acquisitions under Turkish Competition Law Regime), Adalet Yayınevi, Ankara, p. 69 et seq; ERDEM, E. (2007) *Türk-İsviçre Rekabet Hukuklarında Birleşme ve Devralmalar* (Mergers and Acquisitions under Turkish-Swiss Competition Law), Rekabet Hukuku ile İlgili Makaleler, Beta Yayınevi, İstanbul, p.1 et seq.; ERDEM, E. (2003) *Türk ve AT Rekabet Hukukunda Birleşme ve Devralmalar*,(Mergers and Acquisitions under Turkish and EU Competition Law) Beta Yayınevi, İstanbul, p. 113 et seq.; GUVEN, P. (2003), *Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme ve Devralmaların Denetlenmesi* (The control of Mergers and Acquisitions under Turkish and EU Law), Yetkin Yayınevi, Ankara, p. 79 et seq.; ESIN, I. and T. LOKMANHEKIM (2003), *Uygulamada Birleşme ve Devralmalar* (Mergers and Acquisitions in Practice), Beta Yayınevi, İstanbul, p. 114-118; ASLAN, Y. (2007), *Rekabet Hukuku* (Competition Law), Ekin Yayınevi, Bursa, p. 533 et seq.; GUVEN, P. (2008), *Rekabet Hukuku* (Competition Law), Yetkin Kitabevi Ankara p. 363 et seq; KESICI, B. (2017), *Rekabet Hukukunun Ihlalinden Kaynaklanan Haksız Fiil Sorumlulugu* (Tort Liability Arising from the Competition Law Infringement), On Iki Levha Yayınevi, Istanbul, p. 84-93. For information concerning the liability arising from the infringement of Law No. 4054 see DOGAN, C. (2017) "Private Enforcement of Turkish Competition Law: A Brief Overview", Global Competition Litigation Review, 10(2), p. 62-71.

[2] For further information concerning the cases considered as merger or acquisition under Turkish merger control regime, please see Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control; GÜNGÖRDÜ, A. (2003), *AT ve Türk Rekabet Hukukunda Yoğunlaşmalarda Kontrol Unsuru* (The Control of Concentrations under Turkish and EU Competition Law), Rekabet Kurumu Yayınları, Ankara p. 1 et seq.; ALTAY, S.A. (2009) *Anonim Ortaklıklar Hukuku'nda Sermayeye Katılmalı Ortak Girişimler (Equity Joint Ventures)*, Vedat Kitapçılık, İstanbul, p. 402-417.

2. THE CONCEPT OF CONTROL UNDER TURKISH MERGER CONTROL REGIME

2.1. Relevant Legislation

The concept of control under Turkish competition law regime has a wider scope than control within the meaning of Turkish Commercial Code[3-4]. According to Article 5 of the Communiqué No. 2010/4, control over an undertaking may be acquired through rights, contracts or other instruments, which, separately or together, allow de facto or de jure exercise of decisive influence over an undertaking. In particular, these instruments consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking. Article 5 of Communiqué No. 2010/4 further states that control may be acquired by right holders, or by those persons or undertakings who have been empowered to exercise such

[3] Since the aim of this paper is to provide an assessment from a competition law point of view, we will not make a specific emphasize on the Turkish Commercial Code. For further information on the concept of control under Turkish Commercial law please see; TEKINALP, U. (2009) *Türk Ticaret Kanunu Tasarısının Şirketler Topluluğuna İlişkin Düzenlemesinde Kontrol İlkesi* (The Concept of Control Under the Draft Turkish Commercial Code's Provisions Concerning the Corporate Group Law), Prof. Dr. Hüseyin Hatemi'ye Armağan, C. II, Vedat Kitapçılık, Istanbul p. 1543 - 1557; ALTAY, S. (2009); OKUTAN NILSSON, G. (2009), *Türk Ticaret Kanunu Tasarısı'na Göre Şirketler Topluluğu Hukuku* (Corporate Group Law under the Draft Turkish Commercial Law), On İki Levha Yayınevi, İstanbul; PASLI, A. (2009), *Anonim Ortaklığın Devralınması* (Acquisition of Joint Stock Company), Vedat Kitapçılık, İstanbul.

[4] The concept of merger under competition policy includes wider range of corporate transactions than full mergers of this kind. In cases where an undertaking acquires all, or a majority of, the shares in another undertaking would be considered as a merger if it results in the acquirer being able to control the strategic business decisions of the target. Therefore, even the acquisition of a minority shareholding may be sufficient to qualify as a merger under competition policy. Under EU Merger Regulation, the question is whether the acquirer will acquire '*the possibility of exercising decisive influence*' over the target; under the UK Enterprise Act, the question is whether the acquirer would at least have '*material influence*' over the target. Moreover, the acquisition of assets including a well-known brand name could also be considered as merger as well as two undertakings' merging part of their business into a new undertaking. WHISH, R. and D. BAILEY (2012), *Competition Law,* Oxford University Press, Seventh Edition, p. 809-810.

rights in accordance with a contract, or who, while lacking such rights and powers, have de facto strength to exercise such rights.

The control over an undertaking can be exercised either solely or jointly. Whereas joint control arises in cases where more than one undertaking or persons have decisive influence over the strategic decisions of another undertaking, sole control arises in cases where only one undertaking has decisive influence over the strategic decisions of another undertaking. The right to determine the strategic commercial decisions of the other undertaking generally achieved through the acquisition of majority of voting rights in an undertaking. However, sole control could also arise in cases where only one shareholder has the right to veto strategic decisions in an undertaking. In the latter case, which is also known as negative sole control, the shareholder does not have power to take any strategic decisions but rather has a right to solely veto such decisions[5]. The Board through its precedents and guidelines makes it clear that in the presence of negative control, if the thresholds are met, the transaction will be subject to the Board's scrutiny.

2.2. Board's Significant Precedents on the Concept of Control

The Board's approach to the acquisition of rights, contracts or other instruments, which, separately or together, allow *de jure* exercise of control is trivial. However, the concept of negative control is determined based on the case-specific conditions and thus require a special emphasis in an attempt to set the framework of the control within the meaning of Turkish merger control regime. One of the landmark precedents of the Board concerning the negative control is the *Cicek Sepeti* decision[6], which concerns the acquisition of 10% of the shares of Cicek Sepeti by Hummingbird Ventures. In this decision, the Board evaluated the post-transaction control structure of the Cicek Sepeti and concluded that even though the shares of Hummingbird will not suffice to exercise control over Cicek Sepeti and there will not be any majority in the board in favor of Hummingbird, the fact that the board

[5] Turkish Competition Authority, *Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control*, para. 40-48.

[6] The Board's Cicek Sepeti decision dated 16.12.2010 and numbered 10-78/1623-623.

and the general assembly of Cicek Sepeti will not be able to exert some of their power without the positive vote of the Hummingbird, creates a negative control over Cicek Sepeti and considered the transaction as acquisition.

Another landmark precedent of the Board is the *Medikal Park* [7]decision, which concerns the acquisition of 40% shares of Medikal Park by Carlyle. The Board evaluated the fact that the parties need to make decisions jointly on the (i) appointment of CEO and Board members, (ii) determination of the budget and (iii) strategic commercial investment decisions, and found these conditions sufficient to conclude that the parties have joint control over the Medikal Park. A veto power granted to one of the parent companies on the abovementioned decisions seems to be interpreted as a change in control.

The Board, in *Kale Power*[8] decision, evaluated the establishment of a joint venture called Kale Power between Kale Group and GE. According to the agreement between the JV parents, Kale group will hold 85% of the shares of Kale Power and appoint 4 board members while GE will hold 15% of the shares and will have right to appoint only a member to the Board of the Kale Power. The agreement between the JV parents further indicates that, while making decision concerning (i) the subsidiaries of the Kale Group, (ii) getting a loan more than a certain amount and/or (iii) making sales more than a certain amount, a positive vote of the Board member of Kale Power which is appointed by GE will be required. Therefore, the Board concluded that GE will also have control over Kale Power since GE will be able to veto strategic decisions of the Kale Power although it is not empowered to get a decision solely through the board member that GE appointed.

With the same token, the Board in *Hedef Medya*[9] decision which concerns the acquisition of 40% of the shares of Hedef Medya by Dogus Group, analyzed the shareholding structure and the board member dispersion and concluded that although Dogus Group will not be able to take any strategic decision by itself, it will be able to veto any strategic

[7] The Board's *Medikal Park* decision dated 25.11.2009 and numbered 09-57/1392-361.
[8] The Board's *Kale Power* decision dated 04.01.2001 and numbered 01-02/3-1.
[9] The Board's *Hedef Medya* decision dated 29.03.2012 and numbered 12-14/445-127.

decision which in turn will lead to a change in the control structure of the Hedef Medya. Therefore, the Board considered the transaction as an acquisition within the meaning of Article 7 of Law No. 4054 and Article 5 of the Communiqué on Mergers and Acquisitions.

In *International Restaurants - Doors*[10] decision which concerns the acquisition of 38.5% of shares of Doors by International Restaurants, the Board concluded that the positive vote of the International Restaurants required for the strategic decisions of the Doors will in fact grant negative control to International Restaurants over Doors.

Abovementioned case law of the Board, together with the relevant legislation, clearly puts forward that the Board considers the acquisition of any right, which gives the acquirer the possibility to veto the strategic decisions of an undertaking, as a mean of control. Moreover, a shareholder who has negative sole control over the undertaking does not necessarily have to cooperate with other shareholders for the purpose of determining the strategic behaviour of the undertaking and so long as this shareholder have rights cause a deadlock situation, the Board considers this shareholder to have decisive influence over the undertaking[11]. Therefore, regardless of the amount of the share acquired, any acquisition, which grants the acquirer, such power is considered as acquisition of control within the meaning of Article 5 of Communiqué No. 2010/4. In this regard, technically speaking, whereas acquisition of 60% or 70% non-controlling capital shares of a target[12] will not be notifiable before the Board, the acquisition of 5% or 10% shares of a target which gives the acquirer a veto power

[10] The Board's *International Restaurants* decision dated 11.09.2008 and numbered 08-52/795-324.

[11] Authority, *Guidelines on the Concept of Control* para. 40. This is also in line with the Commission's approach. Minority shareholding acquisitions are not caught by Regulation 139/2004 unless they have decisive influence attached to them that goes beyond what would normally be expected to protect an investment of that proportion. In order for a transaction to be caught by Regulation 139/2004, the minority shareholder acquired has to be able to determine the strategic commercial behaviour of the target. RUSU, C. S. (2014), "EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings - The State of Play", CLaSF WP Series No. 10. p. 5.

[12] This could be possible in case 70 or 80% of capital rights do no confer 70 or 80% of the voting rights. Therefore, an acquisition which does not include a majority of the

on the strategic decisions of the target will be notifiable (assuming the jurisdictional turnover thresholds are met)[13].

3. ACQUISITION OF MINORITY SHAREHOLDINGS

3.1. Introduction

Minority shareholding could be defined, in economic terms, as an interest in the performance of a firm which does not grant its holder with the ability to have decisive influence over the behaviour of the firm[14]. However, acquisition of minority interest does not imply that the shareholder does not exercises any control over the target undertaking at all, but rather that the shareholding is not sufficient to allow exercising decisive influence over the target[15]. To get a better understanding of the potential anti-competitive concerns that could arise from the acquisition of non-controlling minority shareholding, it would be prudent to draw a clear line among the concepts of financial interest (minority shareholding) and corporate control. Whereas minority shareholding refers to the acquirer undertaking's profit share in the ratio of its share in the acquired undertaking, corporate control refers to the acquirer's ability to control or influence the acquired firm's competitive decision making, including pricing strategies[16].

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voting rights may not confer control even majority of the company capital is acquired. Authority, *Guidelines on the Concept of Control,* para. 42.

[13] This could be partly explained by the corporate rights granted to the holder of the veto power as in such case the holder of veto power will be able to shape the strategic decision of the undertaking but there are question marks whether an undertaking needs to control the target in order to restrict the competition in the market.

[14] In an effort to get a better understanding of the firms' motivation for minority acquisition please see, OUIMET, P. (2012) "What Motivates Minority Acquisitions? The Trade-Offs between a Partial Equity Stake and Complete Integration", EFA 2007 Ljubljana Meetings Paper, available at SSRN: https://ssrn.com/abstract=966700 accessed on January 16, 2017.

[15] OFFICE OF FAIR TRADING (2010), *Minority Interests in Competitors, A Research Report Prepared by DotEcon Ltd*, p. 15. Within the scope of Turkish Commercial Code, certain rights are granted to the shareholders with more than 10% shareholding over the firm even though such shareholding is not sufficient to exercise decisive influence over the firm.

[16] SALOP, S. C. and D. P. O'BRIEN (2000), "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*"*, 67 Antitrust Law Journal. p. 568.

These factors have different impacts on the competitive incentives of undertakings in the sense that minority shareholding affects incentives of the acquiring undertaking on the other hand, corporate control affects the incentives of the acquired undertaking[17].

Acquisition of minority shareholding of an undertaking which does not confer neither sole nor joint control (including negative control) over the target undertaking (i.e. acquisition of financial interest), does not fall within the scope of Communiqué No. 2010/4 and thus the clearance decision of the Board within the meaning of Communiqué No. 2010/4 is not required for such transaction to be legally valid. However, even in the absence of change in control, such transactions are prone to raise certain competition law concerns.

3.2. Potential Competition Concerns

As it is widely accepted among different jurisdictions, acquisition of a non-controlling minority shareholding indeed can still raise certain competition law concerns similar to those caused by a full merger or an acquisition transaction[18]. However, these competition law concerns heavily depends on several transaction specific factors such as the acquirer's market share, the target undertaking's market share and the percentage of the shares acquired by the acquirer[19]. The potential anti-

[17] Salop et al. 2000, p. 568.

[18] EZRACHI, A. and D. GILO (2006), "EC Competition Law and the Regulation of Passive Investments Among Competitors" Oxford Journal of Legal Studies, Vol. 26, No. 2, p. 345; EUROPEAN COMMISSION (2013), *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")*, ANNEX to the COMMISSION STAFF WORKING DOCUMENT Towards more effective EU merger control available at <http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex1_en.pdf> accessed on October 21, 2016.

[19] The empirical test of Nain and Wang demonstrates that the expected increase in the prices and the profit margins following the acquisition of a minority shareholdings directly associated with the acquirer's size, the target undertaking's size and the percentage of the shares acquired. According to Nain and Wang's econometric analysis, the size of the acquirer and the market share dummy variable have positive and significant coefficients meaning that the larger the acquirer, the greater the increase in price and margin following the acquisition of minority shareholdings. Furthermore, if such acquisition grants corporate rights that can be used as a tool of influence, the related concerns could become more visible. NAIN, A. and Y. WANG (2012), "The Anti-Competitive Effects of Minority Stake Acquisitions", <https://www.mcgill.ca/desautels/files/desautels/channels/

competitive concerns arising from the acquisition of non-controlling minority shareholding will be examined under three different section.

3.2.1 Unilateral Price Increase

The key purpose of the competition policy is to increase the total welfare of the society which is the sum of consumer surplus and producer surplus. The surplus of an individual consumer is the difference between the consumer's willingness to pay for a product and the price which such consumer pays for it. Whereas consumer surplus is the sum of the surplus of all consumers, producer surplus is the sum of all profits made by producers of that certain product[20]. Hence, an increase of a price reduces the consumer surplus and increases the producer surplus but as the price of a given product increases, the increase in the producer surplus does not compensate all the reduction in the consumer surplus. Thereby, welfare is lowest when market price is equal to monopoly price and highest when the market price equals to marginal cost[21].

Industrial organization literature simply acknowledges that each undertaking sets its own price in an attempt to maximize its own profit. Even though such profit maximization leads to a price equal to marginal cost in a perfectly competitive market where the total welfare is at its maximum, this would not be the case in an imperfectly competitive market where the number of competitors or differentiated products is limited. In such cases, the undertakings (with market power) have, to some extent, control over their pricing strategies[22]. An undertaking active in such imperfectly competitive market needs to balance the benefits and costs of a price increase in order to maximize its profit.

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attach/wang_yan_-_the_anti-competitive_effects_of_minority_stake_acquisitions.pdf> accessed on 08.11.2016, p. 26-27; WILKINSON, L. A. and J. F. WHITE (2007), "Private equity: antitrust concerns with partial acquisitions", Antitrust 21 (2), p. 29.

[20] MOTTA, M. (2009), *Competition Policy, Theory and Practice,* Cambridge University Press, 12th printing, p. 18.

[21] Motta 2009, p. 18.

[22] Undertakings can charge higher price with less output or lower price with high output. REED, B. J. (2010), "Private Equity Partial Acquisitions: Towards a New Antitrust Paradigm", 5 Virginia Law & Business Review, p. 311-312.

While the cost of a potential price increase will be the profit loss (caused by the decrease in the amount of sales)[23], the benefit of a price increase will be higher profit margins. The net effect of a potential price increase would be the sum of the cost and the benefit of the potential price increase and the firm's profit maximizing price would be in a level where further price increases reducing the profits due to higher costs[24]. However, the incentive of the undertaking would change if it acquires full ownership of one of its competitors (target) since a part of its lost sales (due to price increase) will be diverted to the target undertaking[25]. Such acquisition will allow the acquiring firm to recapture some of its lost profits through a merger and thus will be able to gain more profit from a potential price increase[26]. This also constitutes the basic intuition behind the most acquisitions of minority shareholding[27] since

[23] Depending on the demand function, a price increase could also lead to a deadweight loss which refers to the sacrifice in total surplus due to price being elevated above marginal cost. In such case, the costumers which would have been purchased in the absence of price increase, will not purchase due to the price increase since the increased price is higher than the maximum price that the given individual customers are willing to pay. This will be a cost to the society. The lost consumer surplus is the sum of deadweight loss and the amount transferred from consumers to producers but the latter is not part of deadweight loss (the reduction in total welfare) precisely since it is a transfer from consumers to producers. KAPLOW, L. (2012), "On the choice of welfare standards in competition law", in Daniel Zimmer (ed.), The Goals of Competition Law, Edgar Elgar Publishing, pp. 3-26.

[24] Salop et al. 2000, p. 571-572; Ezrachi and Gilo 2006, p. 327–349.

[25] Needless to say, this will also be the case for the minority shareholding acquisitions. For detailed information on the unilateral effects arising from the mergers see BISHOP, S. and M. WALKER (2010), *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, London, p. 366-390.

[26] Salop et al. 2000, p. 573; KOPPENFELS, U. V. (2015), "A Fresh Look at the EU Merger Regulation? The European Commission's White Paper 'Towards More Effective EU Merger Control'", Liverpool Law Review, Volume:36, Issue:1, p. 12-13; Wilkinson and White 2007, p. 29; REED, B. J. (2010), p. 311-312; LEVY, N. (2013), "EU Merger Control and Non-Controlling Minority Shareholdings: The Case Against Change", European Competition Journal Vol. 9, Issue 3, p. 729-734.

[27] 27 It should be emphasized that the acquisition of 100% financial interest in a competitor may not be the optimal strategy for the acquirer. The joint profit of the acquiring firm and the acquired firm can be higher in case the acquirer purchases less than 100% of the shares of the competitor. For more information, please see, FOROS, Ø., H. J. KIND and G. SHAFFER (2010), "Mergers and Partial Ownership", CESifo Working Paper Series No. 2912; Simon School Working Paper No. FR 10-11. For similar results showing that acquisition of minority shareholding have several advantages over full mergers as a

the acquirer will be able to capture some of its lost sales through the acquisition of minority share from a competitor where some of the lost sales of the acquirer will likely to be diverted[28]. However, in such case the recapturing of the lost sales will be limited to the shares acquired from the target regardless of whether such shares grants control or not.

Acquisition of non-controlling minority shareholding from a competitor may raise certain competition concerns since competitors will be able to internalize the negative externality they impose to each other while they were aggressive in a market[29]. *Bresnahan and Salop* (1986)[30], and *Reynolds and Snapp* (1986)[31] have reached this result in

tool for increasing market power that are not captured in simple oligopoly models (for example, multiproduct firms that overlap in some but not all of their various markets), please see, REITMAN, D. (1994), "Partial Ownership Arrangements and the Potential for Collusion", The Journal of Industrial Economics, Vol. 42, No. 3, pp. 313-322; For results suggesting that a full merger induces higher unilateral anti-competitive effects than partial controlling acquisition please see BRITO, D., A. OSÓRIO, R. RIBEIRO and H. VASCONCELOS (2015), "Unilateral Effects Screens for Partial Horizontal Acquisitions: The Generalized HHI and GUPPI", available at SSRN: https://ssrn.com/abstract=2627103 accessed on 05.12.2016; In a Salop setup with more than three firms, firms would opt for a merger than a minority acquisition since both neighbours to the entity respond differently to such transaction. However, in an alternative product differentiation model, firms would choose a merger in case the product differentiation is high. In cases where there is limited product differentiation (i.e the products are close substitutes), they would prefer a minority acquisition. For more information, please see, STUHMEIER, T. (2016), "Competition and Corporate Control in Partial Ownership Acquisitions", Journal of Industry, Competition and Trade, Volume 16, Issue 3, p. 298.

[28] For similar results please see Brito et al. 2015, p. 38-39; OFFICE OF FAIR TRADING (2010), *Minority Interests in Competitors, A Research Report Prepared by DotEcon Ltd*, p. 9-12; GONZALEZ-DIAZ, F. E. (2012), "Minority Shareholdings and Interlocking Directorships: The European Union Approach", CPI Antitrust Chronicle, vol. 1, January 2012, p. 2-3; Ezrachi and Gilo 2006, p. 330; Levy 2013, p. 730.

[29] Wilkinson and White 2007, p. 29; MOAVERO MILANESI, E. and A. WINTERSTEIN (2012), "Minority shareholdings, interlocking directorships and the EC Competition Rules - Recent Commission practice", EC Competition Policy Newsletter, No. 1, p.15; Ezrachi and Gilo 2006, p. 331-333.

[30] BRESNAHAN, T. and S. SALOP (1986), "Quantifying the competitive effects of production joint ventures", International Journal of Industrial Organization, 4, p. 155-175.

[31] REYNOLDS, R.J. and B. SNAPP (1986), "The Competitive Effects of Partial Equity Interests and Joint Ventures", International Journal of Industrial Organization Vol. 4, issue 2, p. 141-153.

the case of joint-ventures. *Flath* (1991)[32] shows that a non-controlling minority shareholding has typically two effects. The first effect is that the acquirer may have incentive to sacrifice some of its own revenue to have better gain from its non-controlling minority shares. The second effect is the competitor's response to the unilateral price increase of the acquirer. Whereas first effect is always negative, the effect of the second one heavily depends on the type of competition in the market[33].

Before showing the incentive of the acquirer to increase its price, it would be useful to touch upon the general approach to the types of competition in an oligopolistic market place. When the type of competition is "*Cournot*[34]" (or quantity), firms choose output as the strategic variable. The most crucial feature of the Cournot model is that undertakings chose the quantity to supply and once each undertaking has decided the amount of product to supply, the market will find a price that ensures that the aggregate quantity produced by the undertakings will be sold[35]. In such competition, quantities are strategic substitutes, which indicates that in case a competitor increases its output, the firm's best response to such increase is to reduce its own output. Under Cournot equilibrium, undertakings with the lowest marginal costs have the highest market shares, the largest profits and are thus are the most profitable undertakings. On the other hand, undertakings with higher marginal costs will have smaller profit margins and thus will have smaller market shares[36]. The most important outcome is that any Cournot equilibrium will generate prices higher than marginal cost since all positive levels of market concentration will mean that margins must be positive and that consequently prices must be greater than

[32] FLATH, D. (1991), "When is it rational for firms to acquire silent interests in rivals?" International Journal of Industrial Organization, 9, pp. 573-583.

[33] CHARLETY, P., M. C. FAGART and S. SOUAM (2009), "Incentives for Partial Acquisitions and Real Market Concentration", Journal of Institutional and Theoretical Economics (JITE), Mohr Siebeck, Tübingen, vol. 165(3), p. 510.

[34] For further information on *Cournot* please see COURNOT, A. (1938), *Researches into the Mathematical Principles of Theory of Wealth* (Homewood, RD Irwin, 1986).

[35] NERA (1999), Merger Appraisal in Oligopolistic Markets, Prepared for the Office of Fair Trading by National Economic Research Associates, November 1999, Research Paper 19 p. 22.

[36] Nera 1999, p. 22.

costs[37]. Moreover, the higher the market elasticity of demand, the lower the profit margin of the undertaking will be.

In case the firms do not have any capacity constraints, the type of competition is "*Bertrand*" (or price) where the price is the strategic variable. In Bertrand competition, in case a competitor reduces its price, the best response of the firm will also be decreasing its own price as a response to price decrease of its competitor[38]. This is basically because at all prices above marginal cost, each undertaking will always gain by slightly undercutting the last period price of its competitor and supplying the whole market. This leads to an equilibrium where the price equal to marginal cost. However, in cases where the undertakings have different marginal costs, the entire market will be provided by the most efficient firm at a price which is just below the marginal cost of the less efficient firm[39]. It is clear that when the firms competing *a la Bertrand*[40] which is considered as a tougher competition than *Cournot*, acquisition of minority shareholding (either one way or reciprocal) will lead to a price increase in the market since it will be profitable for the acquirer to increase its price and such increase will be responded by another increase by the competitor[41].

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[37] Under Cournot, the price-cost mark-up of any undertaking *i*, is given by: where the market price, p, is given by, p=p(Q), where Q is the aggregate output of all firms in the industry, ci is the marginal cost of firm i, si is its market share and || is the market elasticity of demand. Nera 1999, p.23.

[38] GABRIELSEN, T. S., E. HJELMENG and L. SORGARD (2011), "Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention", European Law Review 36(6) p. 838.

[39] Nera 1999, p. 24. According to Shelegia and Spiegel, in cases where firms with minority shareholdings, have different levels of marginal costs, the equilibrium price may be as high as the monopoly price of the most efficient firm in the market. SHELEGIA, S. and Y. SPIEGEL (2012), "Bertrand competition when firms hold passive ownership stakes in one another", Economics Letters, 114(1), pp. 136–138.

[40] Once we assume that prices rather than quantities are the strategic variables in the market by assuming that the products of the two firms are perfect substitutes, it is clear that only the firm setting the lowest price will make sales. Therefore, both firms will have incentive to set prices equal to marginal cost regardless of the partial cross-shareholding. However, only in cases where the products of firms are imperfect substitutes, cross-shareholding may raise competition law concerns. Flath 1991, p. 579-580.

[41] Gabrielsen et al. 2011, p. 838-839.

Potential anticompetitive effects of minority shareholding acquisition were studied by *Reynolds and Snapp*[42] and by Farrell and Shapiro as well[43]. The studies concluded that within a single-period Cournot oligopoly model, the total market output is declining as a result of the minority shareholdings. It is also shown that the greater the level of ownership in competitors, the greater the incentives of the firms to lower their output[44]. However, the effect of acquisition of non-controlling minority shareholding on total welfare depends on the size of the firm and the amount of share acquired[45].

Scenario I

In an attempt to demonstrate the abovementioned issue with a simple example, let us assume that there are two symmetric firms producing homogenous product with zero marginal costs ($c_A=c_B=0$) active in the same market (i.e Firm A and Firm B) and they are competing *a la Cournot*. Let us further assume that the inverse demand function is $P(Q) = 1 - Q$ and $Q=q_A+q_B$. In such case, profit function of the Firm A will be $\pi A=(1-Q)qA$. Once we derive the profit function of the Firm A, we will see the profit maximizing quantity of the Firm A which will be as follows:

$$\pi A = (1 - qA - qB)qA$$

$$\frac{\partial \pi A}{\partial qA} = 1 - 2qA - qB = 0$$

$$qA = \frac{1 - qB}{2}$$

With the same token, profit-maximizing quantity for Firm B will be as follows:

[42] Reynolds and Snapp 1986, p. 141.

[43] FARRELL, J. and C. SHAPIRO (1990a), "Horizontal Mergers: An Equilibrium Analysis", 80(1) The American Economic Review p. 107.

[44] FARRELL, J. and C. SHAPIRO (1990b), "Asset ownership and market structure in oligopoly", 21 Rand Journal of Economics, pp. 275-292.

[45] ZEVGOLIS, E.N. and P. N. FOTIS (2016), "A Rule of Reason Approach in the Assessment of Passive Minority Interests", < http://www.cresse.info/uploadfiles/2016_pa8_pa2.pdf> accessed on 10.11.2016.

$$\pi A = (1 - qA - qB)qA$$

$$\frac{\partial \pi A}{\partial qA} = 1 - 2qA - qB = 0$$

$$qA = \frac{1 - qB}{2}$$

Once we solve equations by inserting $qB = \frac{1 - qA}{2}$ into first equation $qA = \frac{1 - (\frac{1 - qA}{2})}{2}$, we will reach the following conclusion: $qA = \frac{1}{3}$, $qB = \frac{1}{3}$, $P = \frac{1}{3}$. This indicates that the profit maximizing quantity for the Firm A and Firm B will be $qA = \frac{1}{3}$, $qB = \frac{1}{3}$. It further indicates that the profit-maximizing price of the market will be $p = \frac{1}{3}$.

Scenario 2

However, once we use the facts set forth under scenario 1 and also add another condition that Firm A acquires 25% shareholding in Firm B, Firm A's profit maximizing equation will be $\pi A = (1 - Q)qA + \frac{1}{4}(1 - Q)qB$ [46]. The first part represents the profit to be gained directly from Firm A and the second part represents the profit to be gained from the 25% share in the Firm B. Once we derive the profit function to find the profit maximizing quantity of Firm A, we will see the following:

$$\pi A = (1 - qA - qB)qA + \frac{1}{4}(1 - qA - qB)qB$$

$$\frac{\partial \pi A}{\partial qA} = 1 - 2qA - qB - \frac{qB}{4} = 0$$

$$qA = \frac{4 - 5qB}{8}$$

The profit function of the Firm B Firm A has 25% shareholding, will be $\pi B = \frac{3}{4}(1 - Q)qB$. Once we take the first order condition, we will see the following:

[46] We assume that the firms are competing *Cournot* with homogenous product.

$$\pi B = \frac{3}{4}(1 - qA - qB)qB$$

$$\frac{\partial \pi B}{\partial qB} = 3 - 3qA - 6qB = 0$$

$$qB = \frac{1 - qA}{2}$$

As we see above, the profit-maximizing quantity of the Firm B (with respect to qA) where Firm A has 25% shareholding does not change compared to the case where Firm A has no shareholding in Firm B. This clearly indicates that acquisition of 25% shareholding in Firm B leads to a change in the profit maximizing quantity of the Firm A but does not lead to any change in the profit maximizing quantity of the Firm B with respect to the Firm A's best response quantity.

Once we insert $qB = \frac{1 - qA}{2}$ into $qA = \frac{4 - 5qB}{8}$, we will see that $qA = \frac{4 - 5(\frac{1 - qA}{2})}{8}$ and once we solve the equation we will see that q_A=3/11 q_B=4/11, Q=7/11 and P=4/11.

When we compare these results with the case where Firm A has no shareholding in firm B *(scenario 1)* we can conclude that (i) profit maximizing quantity of Firm A decreases[47], (ii) profit maximizing quantity of Firm B increases[48], (iii) total quantity to be supplied to the market decreases[49] and (iv) the market price increases[50]. As we see from the above results, Firm A's acquisition of 25% shareholding on Firm B will lead to higher price and lower supply in the market which could

[47] It was 1/3 but with the acquisition of 25 % minority shareholding from Firm B, it decreases to 3/11.

[48] It was 1/3 but with Firm A's acquisition of 25% minority shareholding from Frim B, Firm B's profit maximizing quantity becomes 4/11.

[49] It was 2/3 but with Firm A's acquisition of 25% minority shareholding from Firm B, it decreases to 7/11.

[50] The market price was 1/3 but with Firm A's acquisition of 25% minority shareholding from Firm B, the market price becomes 4/11.

be considered as problematic from a competition policy perspective as it will negatively affect the welfare[51].

Scenario 3

We can also use different example to support our argument that acquisition of non-controlling minority shareholdings could lead to unilateral price increase even in the presence of differentiated products. To illustrate the case with a numeric example, let us assume that there are 4 firms, which have symmetric costs of c_A=c_B=c_C=c_D=90 TRY, active in the market (i.e. Firm A, Firm B, Firm C and Firm D). Firm A has a selling price of p_A=100 TRY and has a cost of c_A=90. Let us further assume that the demand for Firm A is q_A=40. Therefore, the total profit of Firm A will be as follows:

$$\pi A = (qA \; x \; pA) - (qA \; x \; cA)$$

$$\pi A = (40 \; x \; 100) - (40 \; x \; 90) = 400 \; TRY$$

Let us assume that in case Firm A increases its price by 5% (make its price p_A=105 TRY), the demand will decrease to q_A=30 unit. Hence its total profit will be equal to 450 TRY[52]. Since 5% price increase will also increase Firm A's profit by 50 TRY, Firm A will have the incentive to increase its price by 5%.

Scenario 4

However, once the price is increased by 10% (make its price p_A=110), let us assume that the demand will decrease to q_A=18 from 40 due to elastic demand. In such case, Firm A's profit will be 360 TRY[53] and thus Firm A will not have an incentive to increase its price by 10% since its profit will decrease from 400 to 360 TRY due to elastic demand[54].

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[51] For similar results please see, Flath 1991, p. 573-583; ÜNAL, S. M. (2008), *Sanayi Iktisadı ve Rekabet Hukuku Açısından Rakipler Arası Azınlık Hisse Devirleri*, Rekabet Uzmanlığı Tezi, Ankara, p. 12-14.

[52] πA=30x105-40x90=450 TRY.

[53] (110x18)-(90x18)= 360 TRY.

[54] πA=(40x100) - (40x90)=400 TRY > (110x18)-(90x18)=360 TRY.

Scenario 5

However, if we assume that the 20 of the lost 22 units demand (due to the 10% price increase demand decreased from 40 to 18) is captured by Firm B and Firm B is wholly acquired by Firm A, then the firm A will have incentive to increase its price by 10%. Intuitively, Firm A will lose TRY 40[55] profit but Firm B will increase its demand by 20 unit, (once we assume Firm B is symmetric to Firm A and Firm B also has cost of 90 and has a price of, let us assume, 102) Firm B will increase its profit by 240 TRY. Therefore, Firm A, through the acquisition of Firm B, will be able to profitably increase its price by 10% since it will increase its overall profit by TRY 200[56]. While this is, most of the time, the main motivation of the firms for mergers and acquisitions, this is the case where the highest decrease in the consumer surplus can be observed and regulatory agencies finds this kind of transactions problematic.

The above analysis would be applicable to the cases where Firm A acquires 100% of the shares of Firm B as well. Furthermore, it would also hold true where Firm A acquires less than 100% shares of Firm B. However, in such case, Firm A only takes the partial interest into the account when re-calculating its total profit even though Firm A does not acquire any control over Firm B. Hence, while a minority acquisition increases Firm A's incentive to raise its price, the incentive of Firm A to increase prices following an acquisition of minority shareholding is smaller than it would be in case of a full acquisition[57]. The absence or insignificance of cash-flow rights would lead to such outcome since the acquirer will be able to capture a smaller proportion from the profits of the target firm[58].

[55] (10x40)-(18x20) = 40 TRY.
[56] (18x20)+(20x12) – (10x40) =200 TRY.
[57] Salop et al. 2000, p. 575.
[58] Rusu 2014, p. 25.

Scenario 6

In an attempt to illustrate the impact of an acquisition of minority shareholding on the pricing behaviour of the acquirer, we can use the above example where Firm A has a selling price of p_A=100, cost of c_A=90 and demand q_A=40. In case Firm A increase its price by 10%, the p_A=110, c_A=90, the demand will decrease to 18 and Firm A's profit will decrease from 400 to 360. Thus, Firm A will not have an incentive to increase the price by 10% due to elastic demand.

However, once we assume that 20 of the lost 22 units demand is captured by Firm B where Firm A has 30% of minority shareholding which does not grant control to Firm A, then firm A will have incentive to increase price. Intuitively, Firm A will lose 40 TRY[59] profit but Firm B will increase its demand by 20 units and increase its profit by 240 TRY. Hence, Firm A, through its 30% minority shareholding over Firm B, will capture the 30% of the total profit increased by Firm B which will be equal to 72 TRY[60]. Therefore, Firm A will be able to increase its price by 10% since it will increase its overall profit by TRY 32[61].

Therefore, it can be concluded that a decrease in the incentive of the undertakings with a minority shareholding in competitor to compete effectively will not depend on whether the minority shareholding is passive (i.e. the minority shareholding does not confer any right to influence the target firm's decisions) or active (i.e. the minority shareholding confers right to influence the target firm's decisions)[62]. In other words, the incentive of the acquirer in terms of competing effectively will be independent from the type of investment. Acquisition of non-controlling minority shareholding can also lead to unilateral price increase. In order to observe whether the undertakings would have incentive to increase price following the acquisition of minority

[59] (10x40) - (20x18) = 40 TRY.
[60] (30/100x240) = 72 TRY.
[61] (18x20) + (72) – (10x40) = 32 TRY.
[62] EUROPEAN COMMISSION (2014), *White Paper, Towards more effective EU merger control*, available at <http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf> accessed on 05.11.2016, para. 23-24.

shareholding, the demand elasticity of the product, a criterion revealing the market power of the firms, diversion ratio of the products and the amount of the minority shareholding acquired play a significant role. Furthermore, in markets characterized with high entry barriers, acquisition of minority shareholdings may reduce the firms' incentive to compete by creating positive correlation among the profits of the firms which in turn leads to higher prices and lower supply. This would be the case especially when (i) the number of firms which has structural links increases, (ii) the market share of the firms with structural links increase and (iii) the diversion ratio among the firms increase[63].

3.2.2. Facilitating Coordination

Through acquisition of a minority shareholding in a competitor, the acquirer may have specific governance rights, which grant the acquirer the ability to influence the competitive behaviour of the target undertaking. This would be more visible in cases where a representative of an undertaking has a seat in the board of directors of the competitor since it would be easier to coordinate pricing and marketing policies of both firms[64]. The acquirer may find it more profitable to use its influence over the target undertaking in an attempt to coordinate its behaviour with that of the acquiring firm[65]. This is because acquisition of a minority shareholding in a competitor makes it easier and more profitable for competitors to coordinate their conduct. Hence a price increase arising from an increased market power could be inevitable. However, acquisition of such governance rights is not necessary for competition law concerns to arise. An acquisition could give rise to coordinated effects in cases where the change in market structure

[63] For similar results, please see, Ünal 2008, p. 20-21.

[64] Motta 2009, p. 144; Wilkinson and White 2007, p. 29-30; Ezrachi and Gilo 2006, p. 331-333.

[65] Gabrielsen et al. 2011, p. 841-845; U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010), Section 13, https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf accessed 09.11.2016; SINGH, M. and A. MEHTA (2016), "Acquisition of non-controlling minority shares: competitive concerns and implications", European Competition Law Review, p. 5; Koppenfels 2015, p. 12-13; Gonzalez-Diaz 2012, p. 4.

better enables the firms to reach and sustain a tacit collusion not to compete effectively[66]. This could also be the case for the acquisition of non-controlling minority shareholdings.

The coordinated effects arising from the acquisition of minority shareholding flow from the repeated interaction among undertakings, which provides a structure, where collusion is supported as a tacit collusive equilibrium but not as part of an explicit negotiation[67]. This collusive equilibrium is supported mainly by the threat, which could be considered as credible from an economics point of view, that any deviation may trigger punishment by the competitors. Therefore, while analysing the acquisition of minority shareholding, evaluating whether such acquisition changes the market behaviour of the undertakings in the market in a way to ease collusion, plays a significant role[68].

Acquisition of minority shareholding in a competitor may facilitate collusion especially in cases where such minority shareholding is multilateral and are in undertakings that are not mavericks (firms with the strongest incentive to deviate from collusion)[69]. However, in cases where the non-maverick undertakings are the ones acquiring minority shareholding, such acquisition will probably have no effect on the stability of the collusive outcome since the price cut of such firm will not be sufficient to break down the collusion and once the maverick finds it profitable to cut the price lower, it will break down the collusion regardless of the minority acquisition of others[70]. Moreover, if the competitor, where the undertaking has a minority shareholding in, acquires minority shareholding on the undertaking (i.e. both undertaking has minority shareholding in each other), the competition law concerns would be more visible[71].

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[66] Bishop and Walker 2010, p. 390.

[67] BRITO, D., R. RIBEIRO and H. VASCONCELOS (2013), "Quantifying the Coordinated Effects of Partial Horizontal Acquisitions", CEPR Discussion Papers 9536, C.E.P.R. Discussion Papers, p.2.

[68] Brito et al. 2013, p.2.

[69] GILO, D., Y. MOSHE and Y. SPIEGEL (2006), "Partial Cross Ownership and Tacit Collusion", RAND Journal of Economics, vol. 37, p. 93.

[70] Ezrachi and Gilo 2006, p. 332.

[71] Gilo et al. 2006, p. 93.

Furthermore, undertakings with a minority shareholding in a competitor, could have incentive to adjust their market behaviour according to the alignment of the common business objectives of the both undertakings that arise from the cross-minority shareholding[72]. To put it clearly, acquisition of minority shareholding in a competitor has a potential to facilitate collusion among competitors by reducing the gains derived from undercutting the other firm[73]. In case an undertaking does not have any influence in the business policies of the competitor, but solely has a silent share without any representative, the incentive to compete vigorously in the market could be reduced since the profit of the competitor would affect the undertaking's own financial benefit and an aggressive strategy including the deviation from a collusion, would be less profitable than if there is no minority shareholding[74]. Intuitively, once the undertaking with a minority shareholding in a competitor, deviate from the collusion, it will have to burden some of the loss made by the cartel participant in which it has minority shareholding. This, in turn, will make it less profitable to deviate from the collusion[75]. Therefore, markets where competitors are tied through minority shareholdings, are more open to collusive outcome.

Scenario 1

To illustrate the case with an example, let us assume that there are two independent firms (i.e. Firm A and Firm B) active in the market and the industry profit, π_m=100. In such case, the collusive profits would be π_A = 100/2 and π_B = 100/2 =50 TRY. In case Firm A or Firm B deviates, the deviating party will be able to get the whole market and the deviation profit will be 100 TRY. In the following stages, the

[72] RUSSO, F., M. P. SCHINKEL, A. GUNSTER and M. CARREE (2010), *European Commission Decisions on Competition,* Cambridge University Press, p. 357.

[73] IVALDI, M., B. JULIEN, P. REY, P. SEABRIGHT and J. TIROLE (2003), "The Economics of Tacit Collusion", No. 186, IDEI Working Papers, Institut d'Économie Industrielle (IDEI), Toulouse p. 53-54; Russo et al. 2010, p. 357.

[74] Motta 2009, p.144; Levy 2013, p. 733-734.

[75] However, it should also be noted that acquisition of minority shareholding might also lead to reduction in the punishment for the deviation from the collusion. Ünal 2008, p. 17-18.

market will be competitive and the price will be equal to marginal cost where none of the parties are able to make any profits.

Scenario 2

However, in case there are two firms (i.e. Firm A and Firm B) and the sole shareholder of Firm A holds 25% shares in Firm B, the collusive profits for the sole shareholder of Firm A would be $\pi_A = (100/2) + .25\pi_B$ and for the 75% shareholder of Firm B would be $\pi_B = (100/2) - .25\pi_B$. Once we solve it, we will see that the collusive payoff of the sole shareholder of Firm A will be $\pi_A = 60$ TRY and collusive profit for the 75% shareholder of Firm B will be $\pi_B = 40$ TRY. In case Firm A deviates from collusion, the profit for the sole shareholder of Firm A will be $\pi_A = 100 + .25\pi_B$ and the profit for the 75% shareholder of Firm B will be $\pi_B = 0 - .25\pi_B$, so $\pi_A = 100$ TRY and $\pi_B = 0$ TRY. The real payoff that Firm A will get will be $\pi_A = 100$ TRY and Firm B will get will be $\pi_B = 0$ TRY. In case Firm B deviates from collusion, the profit for the 75% shareholder of Firm B will be $\pi_B = 100 - .25\pi_B$ and $\pi_A = 0 + .25\pi_B$, so $\pi_A = 20$ TRY and $\pi_B = 80$ TRY. While in case there is no minority shareholding, the deviation profit will be 100 TRY for Firm B, in case there is minority shareholding, the deviation profit will decrease to 80 TRY. This is a clear indication that the collusion is more sustainable in the presence of Firm A's minority shareholding in Firm B.

Scenario 3

Furthermore, to illustrate the case of reciprocal cross shareholding with an example, let us assume that there are two independent firms (i.e. Firm A and Firm B) active in the market and the industry profit, $\pi_m = 100$ TRY. In such case, the collusive profits would be $\pi_A = 100/2 = \pi_B = 100/2 = 50$ TRY. If Firm A or Firm B deviates, the deviating party will be able to get the whole market and the deviation profit will be 100 whereas other will get 0.

However, in case Firm A and Firm B hold 25% shares in each other, the collusive profits would be:

$$\pi_A = (100/2) + .25\pi_B \text{ and } \pi_B = (100/2) + .25\pi_A$$

Once we solve it, we will see that πA = πB = 66.66 which indicates that the collusive payoff of both firm will be 66.67x0.75= 50. In case Firm A deviates from collusion, its profit will be $\pi_A = 100 + .25\pi_B$ and $\pi_B = 0 + .25\pi_A$, so $\pi_A = 106.66$ and $\pi_B = 26.66$. The real payoff that Firm A will get will be π_A=106.66x0.75=80[76] and Firm B will get will be π_B=26.66x0.75= 20[77]. Whereas there is no minority shareholding, the deviation profit for the deviating party were 100 TRY, if there is cross shareholding, the deviation profit for the deviating party decreases to 80. This is a clear indication that the collusion is more sustainable in the presence of cross shareholdings since the deviation profit will decrease from 100 TRY to 80 TRY. This makes the parties to the collusive behaviour less willing to deviate from the collusive outcome and makes the collusive outcome more sustainable.

3.2.3. Other Potential Competition Concerns[78]

3.2.3.1. Increased Transparency

Even in cases where the acquirer is not able to exert influence over the commercial behaviour of the target firm, acquisition of a non-controlling minority shareholding in a competitor can increase the transparency in the market especially the transparency between the

[76] Since 25% of the Firm A is hold by Firm B, we will need to multiply the payoff of Firm A with 0.75 in an attempt to find the real payoff of Firm A.

[77] Gilo et al. 2006, p. 86.

[78] Depending on the specific facts of a case other competition law concerns could also arise from an acquisition of minority shareholdings. To illustrate, Jovanovic and Wey claims that merger control systems which does not cover the acquisition of minority shareholdings, create an incentive among firms to engage in sneaky takeovers. They further indicate that such takeovers proceed in two steps. In the first step, the acquirer solely acquires minority shareholding (which decreases the consumer welfare) in an attempt to avoid a notification. In the second step, the acquirer acquires the remaining shares of the target. The second step is likely to be accepted by the competition authorities since it increases the consumer welfare. However, once both steps are evaluated in its entirety, it might be detrimental to consumers. Intuitively, an acquisition of minority shareholding reduces the minimal synergy level necessary to leave consumer surplus unaffected by a merger, and acquirers can use acquisition of minority shareholdings in an effort to relax the synergy requirement. JOVANOVIC, D. and C. WEY (2014), "Passive partial ownership, sneaky takeovers, and merger control", Economics Letters 125 (1), 32–35. Another example could be given

acquirer and the target undertaking[79]. In cases where the acquiring firm can access to competitively sensitive information of the target firm, the acquiring undertaking can use this information to adjust its market behaviour, which in turn could ease the coordination[80].

It is clear that more frequent price adjustments may lead to quick retaliation in cases where one of the undertakings undercuts the others. However, identification of such deviation plays a significant role for the purpose of retaliation. Hence, the collusion would be more difficult to sustain in cases where the market is not transparent and the firms are not able to monitor each other's prices[81].

Moreover, the acquiring firm can use its minority shareholding in a competitor to signal the market its intention to compete less aggressively in an attempt to induce the competitors to reduce the competition. However, this would be the case if the maverick undertaking invests in a competitor and this investment is credible and visible to all the market players[82].

3.2.3.2. Increasing the Competitor's Price

Even in cases where the acquiring undertaking does not raise its own prices, it can still have incentive to use its influence over its competitor where it has minority shareholding in an attempt to raise its competitor's price[83]. The acquiring firm can benefit from such price increase since while the acquiring firm can fully benefit from the price increase of the target firm (competitor), it bears only part of the costs arising from

on the entry deterrence. SANXI, MAB and ZENGB uses a model to illustrate that cross holding can be used as a strategic device for an incumbent to deter entry for a potential entrant. For further information, see SANXI L., H. MAB, C. ZENGB (2015), "Passive cross holding as a strategic entry deterrence", Economics Letters 134, 37–40.

[79] BAS, K. (2015), "Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?", World Competition 38, no. 1 p. 82.

[80] Gonzalez-Diaz 2012, p. 4; U.S. *Horizontal Merger Guidelines* (2010), Section 13; Wilkinson and White 2007, p. 30; MOAVERO MILANESI, E. and A. WINTERSTEIN (2012), p.15; Levy 2013, p. 734.

[81] Ivaldi et al. 2003, p.22.

[82] PINI, G. D. (2012), "Passive-Aggressive Investments: Minority Shareholdings and Competition Law", European Business Law Review, Vol. 23, No. 5, p. 630.

[83] Stuhmeier 2016, p. 307; Ezrachi and Gilo 2006, p. 330-331.

the lost sales since the acquiring firm can recover some of the losses through its own sales made to the customers which left the target firm due to the price increase. In this regard, it should be emphasised that the effect of such price increase would heavily depend on the amount of the interest the acquiring undertaking have on the target undertaking. In cases where the acquiring undertaking have sufficient influence over the target undertaking to stop the target undertaking competing the acquiring firm, such acquisition of minority shareholding would have the entire disadvantages of a transaction which grants control to the acquiring undertaking while there would not be any efficiency gains arising from such acquisition[84]. In the absence of any efficiency gains, the price increase by the parties together with the outsiders would be highly likely.

3.2.3.3. Input or Customer Foreclosure

Acquisition of a minority shareholding in an undertaking active in an upstream or downstream market may also lead to competition concerns similar to the vertical merger or acquisitions in particular in relation to input or customer foreclosure[85]. The acquiring firm may have incentive to use its influence over the target company in an attempt to prevent competitors from acquiring inputs or prevents competitors from accessing to the customers[86]. Needless to say, such foreclosure will heavily depend on the level of the influence that the acquisition of minority shareholding grants to the acquirer over the business decisions of the target undertaking and the ability of the remaining

[84] EUROPEAN COMMISSION (2014) C*ompetition Policy Brief, Minority Power - EU Merger Control and the acquisition of Miority Shareholdings* available at <ec.europa.eu/competition/publications/cpb/2014/015_en.pdf> accessed on 15.09.2016.

[85] For further information concerning the competition concerns arising from the non-horizontal mergers see HOVENKAMP, H. (1999), *Federal Antitrust Policy, The Law of Competition and Its Practice,* Second Edition, Hornbook Series, West Group, USA, p. 369-391; SULLIVAN, L. A and W. S. GRIMES (2000), *The Law of Antitrust: An Integrated Handbook,* Hornbook Series, West Group, USA p. 628-647; Bishop and Walker 2010, p. 424-471; Motta 2009, p. 302-411.

[86] BARDONG, A., D. BOSCO, P. FREEMAN, J. P. GUNTHER, P. KALBFLEISCH, D. SPECTOR and B. VAN DE WALLE DE GHELCKE (2011), "Merger control and minority shareholdings: Time for a change?" Concurrences N° 3-2011, p. 17.

of the shareholders to resistance of such influence[87]. Moreover, the possibility of reaching the commercially sensitive information of competitors through an existing vertical link could also be problematic from a competition law perspective[88].

3.3. Evaluation

The uncertain legal status of the acquisition of non-controlling minority shareholding mainly stem from the issue that competition authorities has a tendency to evaluate transactions in quantifiable terms which renders anything outside of such parameter legally non-actionable[89]. In other words, the tendency of the competition authorities to create certain safe harbours leads to the impunity of the less-anti competitive concerns[90]. However, creation of such safe harbours (i.e. acquisition of control) does not prevent potential anti-competitive concerns arising from the acquisition of non-controlling minority shareholdings. However, it is certain that acquisition of minority shareholding in a competitor is a common practice and such acquisitions could raise competition law concerns, which needs to be addressed case by case basis[91].

Intuitively, acquirer internalizes a competitive externality through the acquisition of minority shareholding in a competitor, which adds an element to the profit-maximizing calculus of the acquirer. Since the acquirer will consider the target undertaking's profit when deciding on its competitive behaviour, its incentive to compete vigorously

[87] European Commission, *White Paper, Towards more effective EU merger control*, COM (20140 449 final, July 9, 2014), available at <http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf> accessed on 05.11.2016, para. 31.

[88] WILLIAMSON, G. and M. HUSUNU (2014), "Non-Controlling Minority Shareholdings in EU Merger Control", Business Law International, Vol. 15, Issue 2, p. 127; EUROPEAN COMMISSION (2014) C*ompetition Policy Brief, Minority Power - EU Merger Control and the acquisition of Miority Shareholdings* available at <ec.europa.eu/competition/publications/cpb/2014/015_en.pdf> accessed on 15.09.2016.

[89] This is also the case for the merger and acquisition transactions, which does not trigger the turnover thresholds but has a potential to lessen the competition in the market.

[90] Singh and Mehta 2016, p. 5.

[91] Pini 2012, p. 575–725.

will decrease. The change in the incentive of the acquirer depends on some transaction and market specific elements, which necessitates a case-by-case analysis[92]. To illustrate, if the controlling shareholder of the undertaking acquire minority shareholding from the controlled undertaking's competitors, the incentive of the shareholder to reduce competition is usually greater since the lower the amount of the controlling shareholding, the more weight the controller shareholder will put on the minority shareholding in the competitor. The controlling shareholder can even increase the potential anti-competitive effects solely by reducing its share in the undertaking that it controls without bothering to increase its minority share in the competitor.[93] Moreover, the greater the amount of share acquired, the greater the risk of unilateral price increase will be. It should also be emphasised that in concentrated markets characterized by high entry barriers, the anticompetitive concerns are more likely to arise since there will not be a credible threat of retaliation by the outsiders or new entrants.

4. ENFORCEMENT MODELS FROM THE WORLD

4.1. European Union

Under the EU merger control regime, a merger or an acquisition transaction would fall within the scope of the EU merger regulation in cases where (i) the transaction triggers the turnover thresholds and (ii) there is a lasting change in the control of the target undertaking. Acquisition of any percentage interest may be subject to a merger filing obligation before the European Commission, in case such acquisition grants the acquirer the ability to exercise control over the target company[94]. Therefore, if there is no change in control, the Commission will not have competence to evaluate whether the transaction will

[92] Pini 2012, p. 630.
[93] Pini 2012, p. 630.
[94] HATTON, C. and D. CARDWELL (2010), "Treatment of minority acquisitions under EU and international merger control", European Competition Law Review, Volume 31, Issue 11, p. 436.

significantly impede competition [95–96]. The change in control may take the form of sole of joint control and can be defined as the possibility of exercising decisive influence over the target[97]. However, acquisition of minority shareholding is insufficient to result in change in control since it does not impart a decisive influence which could be defined as the ability to influence the business strategy of the target[98]. Acquisition of veto right on the important business decisions including the business strategy or competitive actions, may comprise the basis for a decisive influence[99].

Lately, the Commission proposed amendments with a public consultation to extend the scope of the European merger control in an attempt to include the acquisition of non-controlling minority shareholdings. Following the public consultation, the Commission reviewed the concerns and published the White Paper "Towards more effective EU merger control", a Commission Staff working Document and an Impact Assessment[100].

The Commission within the scope of the White Paper opts for the Targeted Transparency System among the proposed systems (i.e.

[95] Williamson and Husunu 2014, p. 124.

[96] Under European merger control regime, there is a clear separation of competences between the Commission and the National competition authorities for merger control. For the transactions triggering the thresholds of the Merger Regulation, the principle of "one stop shop" is applicable and the Commission assesses such transactions. However, the transactions remaining below the Commission's thresholds (without EU dimension) could still be evaluated by the national competition authorities. There is also the possibility to refer the case to the Commission by one or more national competition authorities or vice versa for the case to be dealt with more effectively. Koppenfels 2015, p. 9; ELLIOTT, P. and ACKER J. V. (2015), "A critical review of the European Commission's proposal to subject acquisitions of non-controlling minority stakes to EU merger control", European Competition Law Review, 36(3), p. 98-99.

[97] OECD (2009), Directorate for Financial and Enterprise Affairs Competition Committee, "Antitrust issues involving minority shareholding and interlocking directorships" DAF/COMP (2008)30, p. 184.

[98] FRENZ, W. (2016), *Handbook of EU Competition Law,* Springer, p. 1115, para. 3301.

[99] Frenz 2016, p. 1116, para. 3304; Hatton and Cardwell 2010, p. 436.

[100] BALITZKI, A. and R. PUGH (2016), "Mind the Gap? An Analysis from a German Competition Law Perspective of the European Commission's Proposal to Review Non-Controlling Minority Shareholdings Under European Merger Control Law", International Review of Intellectual Property and Competition Law August 2016, Volume 47, Issue 5, p. 596; Singh and Mehta 2016, p. 5.

a mandatory notification system, a voluntary self-assessment system and a targeted transparency system). Under Targeted Transparency System, the parties to the proposed transaction would be under the obligation to submit an information notice if the transaction creates a competitively significant link[101]. The competitively significant link is considered as the case where (i) the target is a competitor of the acquirer or active in an upstream or downstream market and (ii) the acquired shareholding is (a) around 20% or (b) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "*de-facto*" blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target[102]. The White Paper further states that the parties are obliged to self-assess whether the transaction creates a "competitively significant link". If so, the parties need to submit an information notice to the Commission who will then decide whether to investigate the transaction [103_104].

4.2. National Level

Three of the EU member states (i.e. Austria, Germany and the United Kingdom) have a different system than the EU. The national competition authorities (NCA) of these three member states has jurisprudence over the acquisition of non-controlling minority shareholdings under certain conditions.

In Germany, the *Bundeskartellamt* may have jurisdiction over acquisition of minority shareholding. According to the German Competition Act, the transaction would be notifiable in case of an "*acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach:*

[101] Balitzki and Pugh 2016, p. 598; Koppenfels 2015, p. 20.

[102] European Commission, White Paper, Towards more effective EU merger control, COM (20140 449 final, July 9, 2014), available at <http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf> accessed 05.11.2016, para. 47.

[103] For critical analysis of the Commission's proposal see; Elliot and Acker 2015, p. 97-100.

[104] To date, there has not been any legislative change made.

(...) 25 percent of the capital or the voting rights of the other undertaking."[105] To put it clearly, the transactions will be notifiable if (i) it involves an acquisition of at least 25% of the shares (capital or voting rights) of the target or (ii) enables one or several undertakings to directly or indirectly exercise competitively significant influence on another undertaking[106]. The concept of competitively significant influence could be defined as any kind of influence that the acquirer has over the target, which enables the acquirer to shape the competitive behaviour of the target[107]. Therefore, it is clear that acquisition of more than 25% of the shares of a target will be notifiable regardless of whether such acquisition confers control to the acquirer.

According to Austrian Cartel Act, acquisition of more than 25% shares[108] of an undertaking will be notifiable regardless of whether such shares confer control over the target. Therefore, acquisition of below 25 % share with more than 25% of voting rights or acquisition of more than 25% with less than 25% voting rights will be notifiable[109] under the Austrian national merger control regime[110].

The merger control regulations of the UK, where there is a voluntary filing system, are broader than the European Commission and acquisition of non-controlling minority shareholdings could be scrutinize by the Competition and Market Authority (CMA)[111]. According to Section 26 of the Enterprise Act, other than the acquisition of a controlling

[105] SCHMIDT, J. P. (2013), "Germany: Merger control analysis of minority shareholdings - A model for the EU?", Concurrences N° 2-2013, p. 208.
[106] OECD 2009, p. 111-112; BADTKE, F. and R. DIAMANTATOU (2016), "Should the acquisition of non-controlling minority shareholdings be treated as concentrations?", Journal of European competition law & practice. Vol. 7 (2016), no.1, p.3.
[107] Badtke and Diamantatou 2016, p.3; Hatton and Cardwell 2010, p. 437; Williamson and Husunu 2014, p. 124; MONTAG, F. and M. WILKS (2015), "EU merger review of the acquisition of non-controlling minority shareholdings: where to now?", Zeitschrift für Wettbewerbsrecht. Volume 13, Issue 2, p. 74-75; BURNSIDE, J. A. (2013), "Minority Shareholdings: An Overview of EU and National Case Law", e-Competitions Bulletin Minority Shareholdings, Art. N° 56676, p. 5-6.
[108] Similar to the German law, the Austrian threshold of 25% refers both to capital and voting rights.
[109] Badtke and Diamantatou 2016, p. 4; Hatton and Cardwell 2010, p. 437.
[110] Montag and Wilks 2015, p. 78.
[111] Williamson and Husunu 2014, p.131.

interest in a target (de jure control conferred by a greater than 50 per cent share of voting rights) and the acquisition of ability to control the policy of the target (de facto control conferred by shareholdings below 50 per cent), acquisition of the ability to materially to influence the policy of the target firm, can also trigger a merger control filing before the CMA[112]. The acquisition of material influence over the target is relevant for the acquisition of non-controlling minority shareholdings but the relevant Act does not contain any concrete information concerning the material influence. CMA sees the acquisition of more than 25% of the voting rights as likely to confer material influence and even though there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more to see whether such shareholding confer the ability to materially influence the firm's policy[113].

4.3. Other Examples from Different Jurisdictions

4.3.1. USA

According to Section 7 of the US Clayton Act, an acquisition, which may substantially lessen competition or tend to create monopoly, is prohibited. This prohibition is also applicable for the acquisitions, which does not lead to change in control. Even though the US courts does not have a sharp standard for the amount of shares to be acquired to raise competition concerns, the acquired shares were most of the time, at least 15% when the acquisitions have been held to violate Clayton Act[114]. Moreover, US Horizontal Merger Guidelines clearly puts forward that the competition concerns mentioned within the

[112] OECD 2009, p. 165-166; Montag and Wilks 2015, p. 76.

[113] COMPETITION & MARKETS AUTHORITY, Mergers: Guidance on the CMA's Jurisdiction and Procedure, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf> accessed on 14.10.2016, para. 4.16 and 4.17; Badtke and Diamantatou 2016, p. 4.

[114] EUROPEAN COMMISSION (2013), *Non-controlling minority shareholdings and EU merger control*, Annex to the Commission Staff Working Document, Towards more Effective EU Merger Control, <ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex2_en.pdf> accessed on 13.10.2016, para. 75-76.

scope of the guideline also apply to one firm's acquisition of minority shareholding of a competitor. It is further stated that the acquisitions of minority shareholding from a competitor, even if such minority positions do not necessarily or completely eliminate competition between the parties, needs to be reviewed[115].

4.3.2. Canada

Since the Canadian Federal Competition Act (FCA) defines a merger as any transaction, which confers a party to obtain a significant interest in the target, acquisition of minority shareholding might be caught by the FCA. The Canadian Merger Enforcement Guidelines (MEG) reveals that the acquisition of significant interest could occur at as low as 10 % share acquisition or other means that allow material influence over the target business. Under Canadian merger control regime, acquisition of control is not necessary to trigger a merger control filing. So long as the jurisdictional thresholds are met, the transaction will be notifiable in case of an acquisition of more than 20% of the shares of a public company[116], or more than 35% of the shares of a private company or interests in a partnership [117–118] .

4.3.3. Japan

According to Japanese Antimonopoly Act (AMA), an acquisition that may be substantially restrain competition is prohibited and a notification is mandatory if the thresholds, which are defined by percentages, are met. The crucial point is that a change in control is not necessary for the purpose of mandatory filing. A filing will be mandatory if an undertaking (with assets exceeding certain thresholds) acquires or holds the shares of another undertaking (with assets exceeding certain

[115] U.S. *Horizontal Merger Guidelines* (2010), Section 13; Montag and Wilks 2015, p. 79; Burnside 2013, p. 6-7.

[116] The threshold will be 50% if the acquirer already owned 20% or more before the proposed transaction.

[117] This threshold will be more than 50 per cent if 35 per cent or more was owned before the proposed transaction.

[118] EUROPEAN COMMISSION (2013), *Annex to the Commission Staff Working Document, Towards more Effective EU Merger Control*, para 83-84.

thresholds) and at the end of the acquisition the voting right-holding ratio exceeds 10%, 25% or 50% by this shareholding[119].

4.3.4. Brazil

Under Brazilian merger control regime, acquisition of control over an undertaking is subject to notification before the Conselho Adminsitrativo de Defesa Econômica (CADE) regardless of the amount of the share acquired (assuming financial thresholds are triggered). In terms of the acquisition of non-controlling minority shareholding, there is a distinction concerning the relationship among the parties. In cases where the acquirer and the target are neither competitors nor have any vertical overlapping activities, (i) the acquisition of 20% or more voting or capital stock of the target or (ii) the acquisition by the holder of an interest of 20% or more of the capital stock or voting capital of the target, provided that the direct or indirect shareholdings acquired of at least one individual seller is equal to or higher than an interest of 20% of the capital stock or voting capital is subject to filing before the CADE. In cases where the acquirer and the target are competitors or have vertical overlapping activities, (i) the acquisition of an interest of 5% or more of the capital stock or voting capital or (ii) the last acquisition that, individually or accumulated with others, results in an increase in the shareholdings 5% or more, in cases in which the investor already holds an interest of 5% or more of the capital stock or voting capital of the target will be notifiable before the CADE[120]. CADE cleared the transaction concerning the acquisition of a minority shareholding in the social capital of Usiminas by CSN (two largest players in the flat steel market) on the condition that CSN will reduce its shareholding in Usiminas. CADE clearly emphasized that control

[119] EUROPEAN COMMISSION (2013), *Annex to the Commission Staff Working Document, Towards more Effective EU Merger Control*, para 87-88.

[120] SCHAEFFER, F. and M. C. HARPER, *A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact on Cross-Border Transactions*, <http://www.jonesday.com/files/Publication/ee7ed7df-d4fd-4ff4-bf76-55a933c7cf49/Presentation/PublicationAttachment/f4ef687d-1c40-4ffc-a1e9-5ae02b69463f/ABA%20Antitrust%20Source%20Article%20-%20A%20Fundamental%20Shift.pdf> accessed on 14.11.2016.

is not a necessary element for potential anti-competitive concerns in a concentrated market. In another precedent, CADE cleared the transaction concerning the acquisition of cattle slaughtering unit of BRF by Minerva. As part of the transaction Minerva transferred its 16.77% shares to BRF. Together with other concerns, the concern that the minority shareholding of BRF in Minerva could potentially lead to coordination between the processed food businesses of the two undertakings, was raised and thus the transaction was authorized subject to certain divestitures of assets[121].

5. THE TOOLS OF THE AUTHORITY

5.1. The Inadequacy of the Article 4 and 6 of the Law No. 4054

The issue of whether the rules on restrictive agreements set out in Article 4 of Law No. 4054 and the rules on abuse of dominant position set out in Article 6 of Law No. 4054 would be sufficient tool for the Board to evaluate the problematic non-controlling minority shareholding is not trivial and requires a special emphasise. Article 4 of Law No. 4054 is in principle not applicable to the concentrations but rather applicable to the agreements lead to a coordination of the market behaviour of the independent undertakings. Thus, the Board's ability to use Article 4 of Law No. 4054 to intervene against acquisition of non-controlling minority shareholding would be limited since it is not clear whether acquisition of non-controlling minority shareholding would be considered as an agreement having the object or effect of restricting competition within the meaning of Article 4 of Law No. 4054[122].

This is clear that under certain circumstances, acquisition of non-controlling minority shareholdings could fall within the scope of Article 4 of Law No. 4054 given the existence of an agreement among

[121] GIBSON DUNN (2015), Antitrust Merger Enforcement Update and Outlook, <www.gibsondunn.com/publications/documents/2015-Antitrust-Merger-Enforcement-Update-and-Outlook.pdf> accessed on 14.11.2016.

[122] ROTH QC, P., ROSE V. (2008), Bellamy & Child European Community Law of Competition, Sixth edition, Oxford University Press, Oxford, p. 790.

the parties[123] or an exchange of information to a shareholder who is also a competitor. However, it is not clear whether acquisition of non-controlling minority shareholding would constitute an agreement having the object or effect of restricting competition in all cases. Straightforward share acquisition over a stock exchange without any agreement would not fall within the scope of Article 4 of Law No. 4054 since there is no agreement in place[124]. Even in cases where the acquisition of minority shareholding constitutes an agreement, it should further be determined on an ex post basis whether such agreement has the object or effect of restricting competition[125].

Moreover, Article 6 of Law No. 4054 is designed to control the abusive behaviour of the dominant player on an *ex post* basis and does not prohibit an undertaking from holding a dominant position. Thus, to enforce the Article 6 of Law No. 4054, the acquirer needs to be in a dominant position and such acquisition should constitute an abuse within the meaning of Article 6 of Law No. 4054[126].

Self-assessment procedure for the application of Article 4 and 6 of Law No. 4054 could create a high degree of legal uncertainty since an infringement finding leads to a retroactive nullity of an acquisition[127]. Moreover, the theories of harm arising from the acquisition of minority

[123] Articles of incorporation of the company could be considered as an agreement among the shareholders of the company which governs the shareholders' relationships with each other and with the company. Burnside 2013, p. 2; Bas 2015, p. 94. However, if the acquisition is made through hostile-takeovers, there will not be an agreement among the parties. Rusu 2014, p. 9.

[124] Montag and Wilks 2015, p. 83.

[125] European Commission, Commission Staff Working Document Accompanying the document White Paper Towards more effective EU Merger Control, Brussels, SWD (2014), para 61-62.

[126] O'DONOGHUE, R. and J. PADILLA (2006), *The Law and Economics of Article 82 EC*, Hart Publishing, p. 41; European Commission, Commission Staff Working Document Accompanying the document White Paper Towards more effective EU Merger Control, Brussels, SWD (2014), 221 available at: <http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf> para 61-62. Even though the Commission Staff Working Document and other articles concerning the EU merger control regime mention the Article 101 and 102 of TFEU, since Article 101 and 102 of TFEU is similar to Article 4 and Article 6 of Law No. 4054, we believe that can reach the same conclusion for the purpose of Article 4 and 6 of Law No. 4054.

[127] Montag and Wilks 2015, p. 83.

shareholding would not be similar to the theories of harm associated with the infringement of Article 4 or 6 of Law No. 4054, rather similar to those arising from acquisitions of control (e.g coordinated, non-coordinated, and vertical effects) within the meaning of Communiqué No. 2010/4.

In conclusion, the procedures of Article 4 and 6 of Law No. 4054 seem to be less appropriate tools for examining the effect of lasting acquisitions of minority shareholdings than the procedural framework of the merger control regime[128]. This is mainly because Article 4 and 6 of Law No. 4054 are intended to assess the past anti-competitive conduct on an *ex post* basis and not meant to evaluate the creation of a lasting structural link for the future. Moreover, unlike Communiqué No. 2010/4, Article 4 and 6 of Law No. 4054 do not allow for a swift resolution of competition issues which in turn increase the legal certainty in the business world. Therefore, it would be prudent to address the concerns by amending the scope of the Communiqué No. 2010/4 rather than using the existing tools[129].

[128] Koppenfels 2015, p. 15-18; Rusu 2014, p. 14. However, BAS, in its Article concerning the minority shareholding in EU, argues that only a limited number of problematic transactions that could potentially raise competition law concerns cannot be addressed under current competition rules. Therefore, BAS asserts that widening the scope of the Merger Regulation would not be the appropriate solution for the potential competition law concerns arising from the acquisition of minority shareholdings. Bas 2015, p. 93. For similar conclusion see Levy 2013, p. 737.

[129] Similar conclusion can be reached for the EU merger control regime. According to O'Donoghue and Padilla, Article 102 of TFEU can in principle apply to transactions that fall outside the scope of EU Merger Regulation. However, at the time of the adoption of the EU Merger Regulation, the Commission referred that it would not seek to apply Article 102 (82 of EC) of TFEU to the transactions that does not fall within the scope of EU Merger Regulation that were *de minimis*. Even though, the Commission, once, applied Article 102 of TFEU to acquisition of minority shareholding in a competitor, since this transaction took place before the adoption of EU Merger Regulation, it is highly unlikely that the Commission would have the same action today. O'Donoghue and Padilla 2006, p. 41; FRIEND, M. (2012), "Regulating minority shareholdings and unintended consequences", European Competition Law Review, 33(6), p. 303; Zevgolis and Fotis 2016; Koppenfels 2015, p. 15-18.

5.2. Board's Evaluation for the Structural Links

5.2.1. Introduction

In cases where the acquisition of a minority shareholding does not include a change in control, the Board will not have competence to intervene such acquisition within the meaning of the Communiqué No. 2010/4. However, only the existing minority shareholding held by one of the transaction parties in a competitor can be considered for the purpose of the analysis made within the scope of the Article 7 of Law No. 4054 and the Communiqué No. 2010/4. It could be argued that even though acquisitions of non-controlling minority shareholding are not notifiable, they may still be reviewed by the Authority under Article 4 of Law No. 4054, which prohibits "*(...) agreements and concerted practices between undertakings, (…) which have as their object or effect or likely effect the prevention, distortion or restriction of competition (…).*" In other words, the Authority seems to implicitly accept that the Communiqué No. 2010/4 fails to enclose such transactions within its scope and use its powers arising from the Article 4 of Law No. 4054.

5.2.2. Board's Precedents

In *Orica*[130] decision, the Board reviewed the transaction concerns the acquisition by the Orica Group of the activities of Dyno Nobel Holding ASA in Europe, Middle East, Africa, Asia and Latin America. While reviewing the case, the Board found out another transaction and ex officio, examined another transaction whereby Orica Group acquired 25% of the shares of Nitro-Mak Makine Kimya-NitroNobel Kimya San.A.Ş., one of its main competitors in an oligopolistic market. The Board clearly stated that even though the latter transaction, which concerns the acquisition of 25% share of a rival in an oligopolistic market, does not fall within the scope of the Communiqué No. 1997/1 (which was replaced by Communiqué No. 2010/4), the Board can review such acquisition of minority shareholding under Articles 4 and

[130] The Board's *Orica* decision dated 29.3.2007 and numbered 07-29/268-98.

5 of the Law No. 4054. However, since the parties decided to sell their minority shareholding following the ex officio review of the Board, the Board decided not to assess the case further.

The Board through its *Flat Iron and Steel*[131] decision, where it investigated whether Law No. 4054 was breached in the market for flat iron and steel, analysed the cross ownership among the competitors. In the market, Erdemir has 9.34% share in the Borcelik, which is jointly controlled by ArcelorMittal Group and Borusan Group. ArcelorMittal Group also has around 25% shares in Erdemir, which does not grant ArcelorMittal control over Erdemir. Within the scope of its decision, the Board emphasised that (i) the limited number of market players active in the market, (ii) high concentration ratios, (iii) existence of the barriers to entry, (iv) existence cross shareholdings among the competitors and (v) the interlocking directorates among the competitors, form a basis for explicit or implicit collusion among the competitors[132]. The Board further found the fact that around 40% of the customers of ArcelorMittal Group and Erdemir in the market for hot, cold galvanized and canister products overlaps, as a factor, which increase the risk of coordination[133]. The Board evaluated that the regular and intense exchange of competitively sensitive information between Erdemir and Borcelik results from the existence of cross shareholdings[134] and such exchange of information restricts competition through facilitating the collusion given the market structure and the nature of the information exchanged[135]. Based on these grounds, the Board concluded that Erdemir's shareholding on Borcelik should be divested in an attempt to facilitate competition in the market.

In *Ytong*[136] decision, the Board evaluated whether the undertakings active in the market violated the Article 4 of Law No. 4054 through cartel arrangements. The Board concluded that the fact that Turk

[131] The Board's *Flat Iron and Steel* decision dated 16.06.2009 and numbered 09-28/600-141.
[132] *Ibid*, para. 660.
[133] *Ibid,* para. 650.
[134] *Ibid,* para. 1650.
[135] *Ibid,* para. 1680.
[136] The Board's *Ytong* decision dated 30.5.2006 and numbered 06-37/477-129.

Ytong, one of the cartel participant, has minority shareholding in Gaziantep Ytong, one of Turk Ytong's competitors, and Turk Ytong's being represented by two members in the board of Gaziantep Ytong, facilitated and eased the violation of Article 4 of Law No. 4054.

Through its *Izmir Port*[137] decision, concerning the privatization of İzmir port through transferring its operating rights for 49 years, the Board blocked a transaction through privatization mainly due to a minority shareholding. The acquiring party (which want to acquire Izmir Port) was the joint venture consisting of Babcock and Brown Turkish Ports Ltd. (Bobcock), PSA Europe Pte. Ltd. (PSA) and Akfen Altyapı Yatırımları Holding A.Ş. (Akfen) and among the three undertakings only the Bobcock had single control of the joint venture while the other two undertaking only had minority shareholding which does not grant any control over the joint venture. The critical issue concerning the transaction was the fact that the non-controlling shareholders of the joint venture, holds the operating rights of another port located in Mersin. Therefore, the Board, in an attempt to analyse whether the transaction would restrict the competition, delved into the details of the minority shareholdings of the PSA and Akfen. Based on its thorough analyses which basically emphasized that even though PSA and Akfen will not have any direct control over Izmir Port, they may have incentive to arrange their market behaviour in an effort to reduce the competition in the market, the Board concluded that minority shareholding of PSA and Akfen in the joint venture (their main competitor) would restrict competition significantly[138].

In *Ulusoy Ro-Ro*[139] decision, the Board evaluated whether Ulusoy Ro-Ro Group and UN Ro-Ro Group violated article 4 of Law No. 4054 through an agreement on the freight charges in the market for Ro-Ro transportation between Turkey and Italy. The Board, at the end of its investigation, concluded that the fact that both group has same people in their management (interlocking directorates) facilitates collusion in such a concentrated market. Even though the main concern seems to be

[137] The Board's *Izmir Port* decision dated 20.6.2007 and numbered 07-53/615-204.
[138] OECD 2009, p. 159-160.
[139] The Board's *Ulusoy Ro-Ro* decision dated 13.7.2005 and numbered 05-46/668-170.

the interlocking directorates, it is clear that the source of this problem is the minority shareholding among these undertakings[140] since Ulusoy Group has 26.4% shareholding in UN Group and the right to appoint a member in the board arises from this minority shareholdings.

Both in Ulusoy Ro-Ro and Izmir Port decisions, the Board evaluated the minority shareholdings among competitors and the interlocking directorates arising from such structural links, together with the cartel agreement. Therefore, it cannot be referred from these precedents whether the Board would have shown the same interest in the absence of a potential cartel arrangement among competitors[141]. However, the Board through its aforementioned Orica decision made it clear that even though an acquisition which does not fall within the scope of the Communiqué No. 2010/4, the Board can review such acquisition of minority shareholding under Articles 4 and 5 of the Law No. 4054.

The above precedents of the Board clearly put forward that the Board currently reviews either the pre-existing minority shareholdings held by one of the merging parties to a notified concentration or review the acquisition of minority shareholding within the meaning of Article 4 of Law No. 4054 and there is no precedent of the Board where the Board reviews the acquisition of minority shareholding which does not confer control to the acquirer within the meaning of Article 7 of Law No. 4054 and Communiqué No. 2010/4.

CONCLUSION

As clearly shown above, acquisition of non-controlling minority shareholdings could raise competition law concerns in cases where the parties are either competitors or there is a vertical overlap among their business activities. Yet, under Turkish merger control regime, there is no appropriate tool for the Board to use against the acquisition of non-controlling minority shareholdings. Since such acquisitions do not fall within the scope of the Communiqué No.2010/4, they are not notifiable before the Authority. Moreover, Article 4 and 6 of Law No.

[140] Ünal 2008, p. 57.
[141] Ünal 2008, p. 57.

4054 are not the most appropriate tools as shown by the lack of well-established practice.

Given the qualitative and quantitative evidence together with the legal concerns, it would be prudent for the Board to have a chance to evaluate the acquisitions of non-controlling shareholdings which has potential to raise competition law concerns. In this regard, different approaches could be adopted. An alternative could be widening the scope of the Communiqué No. 2010/4 to the problematic acquisitions of non-controlling shareholdings[142]. Despite the limited number of problematic acquisitions of non-controlling minority shareholdings, the administrative burden would not be disproportionate since it still will ensure that some problematic cases are caught[143]. Moreover, information requirement for a filing concerning the acquisition of minority shareholding could be hold relatively light compared to standard merger notifications which could also decrease the administrative burden. Furthermore, review period of the Board could also be shortened[144] for the acquisition of minority shareholdings and such limitation could also help not to cause a lot of burden to the business world.

However, if the scope of the Communiqué No. 2010/4 extended to cover the acquisition of non-controlling minority shareholdings,

[142] ELLIOTT and ACKER raises the issue that some of the acquisitions of non-controlling minority shareholdings only make business sense if they remain confidential which will be impossible following a notification to the Authority. This would be the case for many strategic investments in innovative start-up companies. Publicly announcing these investments which would make business sense if they remain confidential, raises important risks for the acquirer. Firstly, such announcement may potentially reveal the business strategy of the acquirer to its competitors and its competitor may use this information to acquire control of the target company. This potential effect may reduce the access to capital for start-ups which greatly need it. Elliott and Acker 2015, p. 98-99.

[143] YPMA, PATRICIA, P. MCNALLY, L. BOUCON and I. KOKKORIS (2016), Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings, available at http://ec.europa.eu/competition/publications/reports/KD0416839ENN accessed on 5.11.2016, p. 3-4.

[144] Removing the standstill obligation could also be considered as an option. However, if such approach is adopted, a voluntary system for the acquisitions of less than 25% of the shares which we are suggesting below, should not be adopted as it may contradict with the voluntary system adopted for the acquisitions of non-controlling minority shareholdings.

there will be a need for clarity on the relevant test for the filing since legal certainty is one of the most important element of the commercial world[145]. Needless to say, there needs to be certain threshold since the Board does not need to assess all sorts of acquisitions regardless of (i) the amount of shares acquired or (ii) whether there is an overlap among the business activities of the parties, since not all the acquisitions could potentially be problematic from a competition policy perspective. Moreover, evaluating all the transactions regardless of the amount of shares acquired or whether there is an overlap among the activities of the transaction, would excessively increase the workload of the Board. Since the greater the amount of share acquired, the greater the risk in terms of potential competition law concerns will be, the threshold of 25% could be considered as a good proxy. In other words, the Board could review the acquisitions by the acquirer of more than 25% of the non-controlling shares of a target.

Nevertheless, there is a risk that the transactions could easily be designed to avoid the test by simply acquiring the 24.99% of the target. In this regard, there may be a need for a voluntary filing system for the transactions concerning the acquisitions of less than 25% shares if the parties to the transaction finds it prudent to have the green-light of the Board before closing the deal in an attempt to avoid future intervention of the Board. Since the Parties will know that the Board may always intervene to the transactions concerning the acquisition of less than 25% shares even if the transaction is not notifiable before the Authority, it could be argued that the parties will not have incentive to design the transaction (such as acquisition of 24.9% shares of the target) to avoid the filing before the Authority. Even though a potential transaction concerning the acquisition of less than 25% shares of a target will not be notifiable before the Authority and the approval of the Board is not necessary to close the deal, if the parties, who will most likely to have necessary information to evaluate as to whether the transaction raises any competition law concerns, expects the anti-competitive concerns to be in a level which requires an intervention

[145] Friend 2012, p.306.

from the Authority, will have incentive to submit the transaction before the Authority in an attempt to avoid future intervention. In this regard creation of a safe harbour below which a notification will not be required, would also increase the legal certainty in the business life. Such safe harbour could potentially be set as 10% for Turkey since in order to be considered as minority and have the rights granted to the minority shareholders within the meaning of Turkish Commercial Code, 10% of the shares are needed to be possessed.

Moreover, there should be another condition concerning the competitive link among the parties since the Board should not necessarily need to evaluate an acquisition of 25% or more non-controlling shares from a target which is neither a competitor of the acquirer nor active in the upstream or downstream market. However, it is clear that this test could raise uncertainty in terms of the market definition especially for the markets that was not defined by the Board before[146]. Therefore, in an attempt to increase the legal certainty for the businesses, the Board needs to issue a very clear guideline which includes the types of the transactions in which the Board intend to intervene. This would also reduce the legal uncertainties raised by granting the Board the right to intervene a transaction ex post although the transaction is not notifiable.

[146] Friend 2012, p.306.

BIBLIOGRAPHIA

ALTAY, S.A. (2009), *Anonim Ortaklıklar Hukuku'nda Sermayeye Katılmalı Ortak Girişimler (Equity Joint Ventures)*, Vedat Kitapçılık, İstanbul.

ASLAN, Y. (2007), *Rekabet Hukuku* (Competition Law), Ekin Yayınevi, Bursa.

BADTKE, F. and R. DIAMANTATOU (2016), "Should the acquisition of non-controlling minority shareholdings be treated as concentrations?" Journal of European competition law & practice. Vol. 7 (2016), no.1, pp. 1-7.

BALITZKI, A. and R. PUGH (2016), "Mind the Gap? An Analysis from a German Competition Law Perspective of the European Commission's Proposal to Review Non-Controlling Minority Shareholdings Under European Merger Control Law", International Review of Intellectual Property and Competition Law, Volume 47, Issue 5, pp. 595-616.

BARDONG, A., D. BOSCO, P. FREEMAN, J.P. GUNTHER, P. KALBFLEISCH, D. SPECTOR and B. VAN GHELCKE (2011), "Merger control and minority shareholdings: Time for a change?" Concurrences N° 3-2011.

BAS, K. (2015), "Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?" World Competition 38, no. 1, pp. 77–106.

BERFIN AKYUZ, H. (2007), *Türk Rekabet Hukuku Kapsamında Şirketlerde Birleşme ve Devralmalar* (Mergers and Acquisitions under Turkish Competition Law Regime), Adalet Yayınevi, Ankara.

BISHOP, S. and M. WALKER (2010), *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, London.

BRESNAHAN, T. and S. SALOP (1986), "Quantifying the competitive effects of production joint ventures", International Journal of Industrial Organization, 4, pp. 155-175.

BRITO, D., R. RIBEIRO and H. VASCONCELOS (2013), "Quantifying the Coordinated Effects of Partial Horizontal Acquisitions", CEPR Discussion Papers 9536, C.E.P.R. Discussion Papers.

BRITO, D., A. OSÓRIO, R. RIBEIRO and H. VASCONCELOS (2015), "Unilateral Effects Screens for Partial Horizontal Acquisitions: The Generalized HHI and GUPPI", available at SSRN: https://ssrn.com/abstract=2627103 accessed on 05.12.2016.

BURNSIDE, J. A. (2013), "Minority Shareholdings: An Overview of EU and National Case Law", e-Competitions Bulletin Minority Shareholdings, Art. N° 56676.

CHARLETY, P. and M. C. FAGART and S. SOUAM (2009), "Incentives for Partial Acquisitions and Real Market Concentration", Journal of Institutional and Theoretical Economics (JITE), Mohr Siebeck, Tübingen, vol. 165(3), pp. 508-534.

COMPETITION & MARKETS AUTHORITY, Mergers: Guidance on the CMA's Jurisdiction and Procedure, para. 4.16 and 4.17, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf> accessed on 14.10.2016.

COURNOT, A. (1938), *Researches into the Mathematical Principles of Theory of Wealth* (Homewood, RD Irwin, 1986).

DOGAN, C. (2017) "Private Enforcement of Turkish Competition Law: A Brief Overview", Global Competition Litigation Review, 10(2), p. 62-71.

ELLIOTT, P and ACKER J.V. (2015), "A critical review of the European Commission's proposal to subject acquisitions of non-controlling minority stakes to EU merger control", European Competition Law Review, 36(3), pp. 97-100.

ERDEM, E. (2007), *Türk-İsviçre Rekabet Hukuklarında Birleşme ve Devralmalar* (Mergers and Acquisitions under Turkish-Swiss Competition Law), Rekabet Hukuku ile İlgili Makaleler, Beta Yayınevi, İstanbul.

ERDEM, E. (2003), *Türk ve AT Rekabet Hukukunda Birleşme ve Devralmalar* (Mergers and Acquisitions under Turkish and EU Competition Law), Beta Yayınevi, İstanbul.

ESIN, I. and T. LOKMANHEKİM (2003), *Uygulamada Birleşme ve Devralmalar* (Mergers and Acquisitions in Practice), Beta Yayınevi, İstanbul.

EUROPEAN COMMISSION (2014) *Competition Policy Brief, Minority Power - EU Merger Control and the acquisition of Miority Shareholdings* available at <ec.europa.eu/competition/publications/cpb/2014/015_en.pdf> accessed on 15.09.2016.

EUROPEAN COMMISSION, *White Paper, Towards more effective EU merger control*, COM (20140 449 final, July 9, 2014), available at <http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf> accessed on 05.11.2016.

EUROPEAN COMMISSION (2014), Commission Staff Working Document Accompanying the document White Paper Towards more effective EU Merger Control, Brussels, SWD 221 available at: <http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf> accessed on 13.10.2016.

EUROPEAN COMMISSION (2013), *Non-controlling minority shareholdings and EU merger control*, Annex to the Commission Staff Working Document, Towards more Effective EU Merger Control, <ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex2_en.pdf> accessed on 13.10.2016.

EUROPEAN COMMISSION (2013), *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")* ANNEX to the COMMISSION STAFF WORKING DOCUMENT Towards more effective EU merger control available at <http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex1_en.pdf> accessed on 21.10.2016.

EZRACHI, A. and D. GILO (2006), "EC Competition Law and the Regulation of Passive Investments Among Competitors", Oxford Journal of Legal Studies, Vol. 26, No. 2, pp. 327–349.

FARRELL, J. and C. SHAPIRO (1990a), "Horizontal Mergers: An Equilibrium Analysis", 80(1) The American Economic Review pp. 107-126.

FARRELL, J. and C. SHAPIRO (1990b), "Asset ownership and market structure in oligopoly", 21 Rand Journal of Economics, pp. 275-292.

FLATH, D. (1991), "When is it rational for firms to acquire silent interests in rivals?" International Journal of Industrial Organization, 9, pp. 573-583.

FOROS, Ø., H. J. KIND and G. SHAFFER (2010), "Mergers and Partial Ownership", CESifo Working Paper Series No. 2912; Simon School Working Paper No. FR 10-11.

FRENZ, W. (2016), *Handbook of EU Competition Law*, Springer, Aachen.

FRIEND, M. (2012), "Regulating minority shareholdings and unintended consequences", European Competition Law Review, 33(6), pp. 303-306.

GABRIELSEN, T. S., E. HJELMENG and L. SORGARD (2011), "Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention", European Law Review 36(6) pp. 837-860.

GIBSON DUNN (2015), *Antitrust Merger Enforcement Update and Outlook,* www.gibsondunn.com/publications/documents/2015-Antitrust-Merger-Enforcement-Update-and-Outlook.pdf accessed on 14.11.2016.

GILO, D., Y. MOSHE and Y. SPIEGEL (2006), "Partial Cross Ownership and Tacit Collusion", Rand Journal of Economics, vol. 37, pp. 81-99.

GONZALEZ-DIAZ, F. E. (2012), "Minority Shareholdings and Interlocking Directorships: The European Union Approach", CPI Antitrust Chronicle, vol 1.

GÜNGÖRDÜ, A. (2003), *AT ve Türk Rekabet Hukukunda Yoğunlaşmalarda Kontrol Unsuru* (The Control of Concentrations under Turkish and EU Competition Law), Rekabet Kurumu Yayınları, Ankara.

GUVEN, P. (2003), *Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme ve Devralmaların Denetlenmesi* (The control of Mergers and Acquisitions under Turkish and EU Law), Yetkin Yayınevi, Ankara.

GUVEN, P. (2008), *Rekabet Hukuku* (Competition Law), Yetkin Kitabevi, Ankara.

HATTON, C. and D. CARDWELL (2010), "Treatment of minority acquisitions under EU and international merger control", European Competition Law Review, Volume 31, Issue 11, pp. 436-438.

HOVENKAMP, H. (1999), *Federal Antitrust Policy, The Law of Competition and Its Practice*, Second Edition, Hornbook Series, West Group, USA.

IVALDI, M., B. JULIEN, P. REY, P. SEABRIGHT and J. TIROLE (2003), "The Economics of Tacit Collusion", No. 186, IDEI Working Papers, Institut d'Économie Industrielle (IDEI), Toulouse.

JOVANOVIC, D. and C. WEY (2014), "Passive partial ownership, sneaky takeovers, and merger control", Economics Letters 125 (1), pp. 32–35.

KAPLOW, L. (2012), "On the choice of welfare standards in competition law", in Daniel Zimmer (ed.), The Goals of Competition Law, Edgar Elgar Publishing, pp. 3-26.

KESICI, B. (2017), *Rekabet Hukukunun Ihlalinden Kaynaklanan Haksız Fiil Sorumluluğu* (Tort Liability Arising from the Competition Law Infringement), On Iki Levha Yayınevi, Istanbul.

KOPPENFELS, U. V. (2015), "A Fresh Look at the EU Merger Regulation? The European Commission's White Paper 'Towards More Effective EU Merger Control'", Liverpool Law Review, Volume:36, Issue:1, pp. 7-31.

LEVY, N. (2013), "EU Merger Control and Non-Controlling Minority Shareholdings: The Case Against Change", European Competition Journal Vol. 9, Issue 3, pp. 721-753.

MOAVERO MILANESI, E. and A. WINTERSTEIN (2012), "Minority shareholdings, interlocking directorships and the EC Competition Rules - Recent Commission practice", EC Competition Policy Newsletter, No. 1, pp. 15-18.

MONTAG, F. and M. WILKS (2015), "EU merger review of the acquisition of non-controlling minority shareholdings: where to now?" Zeitschrift für Wettbewerbsrecht. Volume 13, Issue 2, pp. 69-92.

MOTTA, M. (2009), *Competition Policy, Theory and Practice*, Cambridge University Press, 12th printing.

NAIN, A. and Y. WANG (2012), *The Anti-Competitive Effects of Minority Stake Acquisitions*, available at: <https://www.mcgill.ca/desautels/files/desautels/channels/attach/wang_yan_-_the_anti-competitive_effects_of_minority_stake_acquisitions.pdf > accessed on 08.11.2016.

NERA (1999), Merger Appraisal in Oligopolistic Markets, Prepared for the Office of Fair Trading by National Economic Research Associates, November 1999, Research Paper 19.

OECD (2009), Directorate for Financial and Enterprise Affairs Competition Committee, "Antitrust issues involving minority shareholding and interlocking directorships" DAF/COMP (2008)30.

OFFICE OF FAIR TRADING (2010), *Minority Interests in Competitors, A Research Report Prepared by DotEcon Ltd.*

OKUTAN NILSSON, G. (2009), *Türk Ticaret Kanunu Tasarısı'na Göre Şirketler Topluluğu Hukuku* (Corporate Group Law under the Draft Turkish Commercial Law), On İki Levha Yayınevi, İstanbul.

O'DONOGHUE, R. and J. PADILLA (2006), *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford.

PASLI, A. (2009), *Anonim Ortaklığın Devralınması* (Acquisition of Joint Stock Company), Vedat Kitapçılık, İstanbul.

PINI, G. D. (2012), "Passive-Aggressive Investments: Minority Shareholdings and Competition Law", European Business Law Review, Vol. 23, No. 5, pp. 575 - 725.

REED, B.J. (2010), "Private Equity Partial Acquisitions: Towards a New Antitrust Paradigm", 5 Virginia Law & Business Review, pp. 303-347.

REITMAN, D. (1994), "Partial Ownership Arrangements and the Potential for Collusion", The Journal of Industrial Economics, Vol. 42, No. 3, pp. 313-322

REYNOLDS, R. J. and B. SNAPP (1986), "The Competitive Effects of Partial Equity Interests and Joint Ventures", International Journal of Industrial Organization Vol. 4, issue 2, pp. 141-153.

ROTH QC, P., ROSE V. (2008), *Bellamy & Child European Community Law of Competition*, Sixth edition, Oxford University Press, Oxford.

RUSSO, F., M. P. SCHINKEL, A. GUNSTER and M. CARREE (2010), *European Commission Decisions on Competition*, Cambridge University Press.

RUSU, C. S. (2014), "EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings - The State of Play", CLaSF WP Series No. 10.

SALOP, S. C. and O'BRIEN, D. P. (2000), "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control", 67 Antitrust Law Journal. pp. 559-614.

SANLI, K.C. (2000), *Rekabetin Korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği* (Prohibitive Provisions of Law on Protection of Competition and Invalidity of the Agreements and Decisions of Association of Undertakings Contrary to These Prohibitive Provisions), Competition Authority Publication, Ankara.

SANXI L., H. MAB, C. ZENGB (2015), "Passive cross holding as a strategic entry deterrence", Economics Letters 134, pp. 37–40.

SCHMIDT, J. P. (2013), "Germany: Merger control analysis of minority shareholdings - A model for the EU?", Concurrences N° 2-2013, pp. 207-212.

SCHAEFFER, F. and M. C. HARPER, *A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact on Cross-Border Transactions*, http://www.jonesday.com/files/Publication/ee7ed7df-d4fd-4ff4-bf76-55a933c7cf49/Presentation/PublicationAttachment/f4ef687d-1c40-4ffc-a1e9-5ae02b69463f/ABA%20Antitrust%20Source%20Article%20-%20A%20Fundamental%20Shift.pdf accessed on 14.11.2016.

SHELEGIA, S. and SPIEGEL, Y. (2012), "Bertrand competition when firms hold passive ownership stakes in one another", Economics Letters, 114(1), pp. 136–138.

SINGH, M. and A. MEHTA (2016), "Acquisition of non-controlling minority shares: competitive concerns and implications", European Competition Law Review, pp. 122-127.

STUHMEIER, T. (2016), "Competition and Corporate Control in Partial Ownership Acquisitions", Journal of Industry, Competition and Trade September 2016, Volume 16, Issue 3, pp. 297–308.

SULLIVAN, L. A. and W.S. GRIMES (2000), *The Law of Antitrust: An Integrated Handbook*, Hornbook Series, West Group, USA.

TEKINALP, U. (2009), "Türk Ticaret Kanunu Tasarısının Şirketler Topluluğuna İlişkin Düzenlemesinde Kontrol İlkesi" (The Concept of Control Under the Draft Turkish Commercial Code's Provisions Concerning the Corporate

Group Law), Prof. Dr. Hüseyin Hatemi'ye Armağan, C. II, Vedat Kitapçılık, Istanbul, pp. 1543 – 1557.

Turkish Competition Authority, *Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control*.

U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf accessed on 09.11.2016.

ÜNAL, S. M. (2008), *Sanayi İktisadı ve Rekabet Hukuku Açısından Rakipler Arası Azınlık Hisse Devirleri* (Acquisition of Minority Shareholdings Among Competitors from Competition Law and Industrial Organization Perspective), Rekabet Uzmanlığı Tezi, Ankara.

WHISH, R. and D. BAILEY (2012), *Competition Law*, Oxford University Press, Seventh Edition.

WILKINSON, L.A. and J. F. WHITE (2007), "Private equity: antitrust concerns with partial acquisitions", Antitrust 21 (2), pp. 28–34.

WILLIAMSON, G. and M. HUSUNU (2014), "Non-Controlling Minority Shareholdings in EU Merger Control", Business Law International, Vol. 15, Issue 2, pp.123 - 132.

YPMA, P., P. MCNALLY, L. BOUCON and I. KOKKORIS (2016), *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings*, available at http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf accessed on 05.11.2016.

ZEVGOLIS, E.N. and P.N. FOTIS (2016), "A Rule of Reason Approach in the Assessment of Passive Minority Interests", <http://www.cresse.info/uploadfiles/2016_pa8_pa2.pdf> accessed on 10.11.2016.

Table of Cases

The Board's Cicek Sepeti decision dated 16.12.2010 and numbered 10-78/1623-623.

The Board's *Medikal Park* decision dated 25.11.2009 and numbered 09-57/1392-361.

The Board's *Kale Power* decision dated 04.01.2001 and numbered 01-02/3-1.

The Board's *Hedef Medy*a decision dated 29.03.2012 and numbered 12-14/445-127.

The Board's *International Restaurants* decision dated 11.09.2008 and numbered 08-52/795-324.

The Board's Orica decision dated 29.3.2007 and numbered 07-29/268-98.

The Board's *Flat Iron and Steel* decision dated 16.06.2009 and numbered 09-28/600-141.

The Board's *Izmir Port* decision dated 20.6.2007 and numbered 07-53/615-204.

The Board's *Ytong* decision dated 30.5.2006 and numbered 06-37/477-129.

The Board's *Ulusoy Ro-Ro* decision dated 13.7.2005 and numbered 05-46/668-170.