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LINER SHIPPING COLLABORATIONS AND A COMPARATIVE STUDY ON RELATED COMPETITION LEGISLATION

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DECLARATION

I hereby declare that this doctoral thesis titled as “Liner Shipping Collaborations and A Comparatıve Study on Related Competitıon Legislation” has been written by myself in accordance with the academic rules and ethical conduct. I also declare that all materials benefited in this thesis consist of the mentioned resources in the reference list. I verify all these with my honor.

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ABSTRACT

Doctoral Thesis

Doctor of Philosophy (PhD)

Liner Shipping Collaborations and A Comparative Study On Related Competition Legislation

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Economics, management and legal sciences are in constant interaction. A change in one of these disciplines affects others. Competition is the one of the good examples of this interaction. During the industrial revolution, the economists had supported the self-regulated market rules and state that the government should not interfere the market conditions. Based on this assumption, governments had avoided controlling market and companies had established strategies without any government intervention. This idea had triggered the monopolies after the industrial revolution. As a result of the discriminatory practices of monopolies, the smaller firms began to disappear and consequently social welfare has been damaged. States, with the support of economists, have enacted competition law rules with the purpose of preventing discriminatory practices of monopolies. Soon after the competition regulations, companies have implemented collaboration strategies in order to share risks and assets. The collaborations are also in the scope of competition regulations. Discriminatory strategies and abuse of dominant position of the collaborations are forbidden by competition law. Liner shipping companies have followed the collaboration strategy trend and implemented conferences, strategic alliances and mergers. In order to promote the liner shipping industry, the governments have given immunities via excluding them from

competition regulations. Today the legal authorities are discussing the necessity of the immunities and several governments have already removed the exemptions, while a few continued to give limited privileges. By considering all of these, in this thesis, firstly, place of collaboration strategies in the strategic management science and the liner shipping collaboration strategies are discussed. Secondly, the U.S. and E.U. competition regulations and related cases are studied in the frame of cartels and abuse of dominant position. Finally, the governing regulations about liner shipping collaborations of the U.S. and E.U. legislation are studied and leading cases of the U.S., E.U and Turkey are compared with each other to draw a road map for Turkey about how the liner shipping collaborations shall be regulated in order to promote the Turkish National liner shipping fleet.

Keywords: Collaboration Strategies; Competition Law; Cartel; Abuse of Dominant Position, Liner Shipping.

ÖZET

Doktora Tezi

Düzenli Hat Denizyolu Taşımacılığı İşbirlikleri ve İlgili Rekabet Mevzuatına İlişkin Karşılaştırmalı Bir Çalışma

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Ekonomi, yönetim ve hukuk bilimleri sürekli etkileşim içindedir. Bu bilim dallarının birinde meydana gelen bir değişim diğerlerini de etkilemektedir. Bu etkileşimin en çok hissedildiği alanlardan biri de rekabettir. Sanayi devriminden önce ki ekonomistler devlet müdahalesinin en aza indirilmesi görüşünü savunmuş ve hükümetler piyasaya müdahale etmekten kaçınmış, yöneticilerde piyasanın kendisini düzenlemesi için stratejiler ortaya koymuşlardır. Bu etkileşim sanayi devrimi süresince ve sonrasında monopollerin ortaya çıkmasına neden olmuştur. Monopollerin yıkıcı stratejilerinin sonucunda hem küçük şirketler hem de toplum refahı zarar görmeye başlamıştır. Devletler piyasanın artık kontrol altına alınması gerektiği düşüncesiyle ve ekonomistlerinde desteğiyle rekabet hukuk kurallarını yürürlüğe sokmuşlardır. Rekabet hukukunun pazarı düzenlemesinden sonra şirketler riskleri azaltmak ve bilgi paylaşımı yapmak amacıyla iş birliklerine yönelmişlerdir. İş birlikleri de rekabet hukuku tarafından düzenlemiş ve fiyat belirleme, pazar paylaşma stratejileri gibi rekabeti engelleyici stratejileri ile şirketlerin hâkim durumlarını kötüye kullanmaları rekabet hukuku tarafından engellenmiştir. Tarifeli denizcilik şirketleri de iş birliği trende uyarak ilk önce konferanslar sonra hukuki değişimler nedeniyle stratejik ittifaklar ve birleşmeler yoluyla işbirliklerine gitmişlerdir. Devletlerde sektörü desteklemek amacıyla ekonomik koşullarını da göz önünde alarak denizcilik işbirliklerine imtiyazlar

vermiş ve rekabet hukukundan muaf tutmuşlardır. Günümüz ekonomik şartlarında bu muafiyetler tartışmalara neden olmuş ve imtiyazlar çok kısıtlı şekilde verilmeye başlanmış veya kaldırılmıştır. Bu tezde tarifeli denizcilik şirketlerinin uyguladığı iş birliklerinin detayları incelenmiş; kartellerin ve hakim durumun kötüye kullanmanın Amerika Birleşik Devletleri ve Avrupa Birliği rekabet hukukundaki yeri belirtilmiştir. Son bölümde Amerika Birleşik Devletleri ve Avrupa Birliği rekabet mevzuatlarının ve muafiyetlerinin denizcilik iş birliklerine nasıl uygulandığını belirlenmiştir. Ayrıca, Amerika Birleşik Devletleri, Avrupa Birliği ve Türkiye'deki kararlar karşılaştırılarak, Türk Ulusal düzenli hat şirketlerinin desteklenmesi için Türkiye'nin rekabet mevzuatında uygulaması gereken değişiklikler hakkında tavsiyede bulunulmuştur.

Anahtar Kelimeler: İş Birliği Stratejileri; Rekabet Hukuku; Kartel; Hakim Durumun Kötüye Kullanılması; Düzenli Hat Denizyolu Taşımacılığı.

LINER SHIPPING COLLABORATIONS AND A COMPARATIVE STUDY ON RELATED COMPETITION LEGISLATION

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ABBREVIATIONS

AGCAC	Antitrust Guidelines for Collaborations Among Competitors
BCG	The Boston Consulting Group
CENSA	The Committee of European National Shipowners' Association
CFI	European Union Court of First Instance
CP	Canadian Pacific
DWT	Death Weight Tone
DOJ	The United States Department of Justice
E.U.	European Union
EC	European Council
ECJ	European Court of Justice
ECU	European Currency Unit
EEA	European Economic Area
EUMR	European Union Merger Regulation
FMC	The U.S. Federal Maritime Commission
FTC	Federal Trade Commission
GMTS	Guidelines on Maritime Transport Services
HHI	Herfindahl-Hirschman Index
HMG	Horizontal Merger Guidelines
HMT	Hypothetical Monopolist Test
JV	Joint venture
LPG	Liquefied petroleum gas
M&A	Merger and Acquisition
MOF	South Korea's Ministry of Oceans and Fisheries
MOFCOM	Chinese Ministry of Commerce
OECD	The Organization for Economic Cooperation and Development
OSRA	Ocean Shipping Reform Act
PPDs	Published Price of Dealers
R&D	Research and development

RMN	Relevant Market Notice
S.Ct	The U.S. Supreme Court
SSNIP	Small but Significant Non-transitory Increase in Price
TACA	Trans-Atlantic Conference Agreement
TCA	The Turkish Competition Authority
TEC	The Treaty Establishing the European Community
TEU	Twenty-foot Equivalent Unit
TFEU	2012 Consolidated Version of The Treaty on The Functioning of The European Union
U.K.	United Kingdom
U.S.	United States
UNCTAD	The United Nations Conference on Trade and Development
USSB	United State Shipping Board

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INTRODUCTION

The first pioneers of the economy science supported the *laissez faire* approach. According to this approach, the market should regulate itself via the market players and the government should focus more on strategic issues like education and defense. Due to the legal hole, the big companies had become stronger and they controlled the market for their own purposes. The economists have discussed the role of government and argued that the government should govern the market to protect the small firms and public welfare. Consequently, the United States (U.S.) Government introduced the first antitrust act, Sherman Act, in 1890.

In the regulatory environment, the companies are under the pressure of the competition regulations. Therefore, they have implemented the collaboration strategies in order to grow legally. The most common type of the collaboration strategies between the liner shipping companies are strategic alliances, merger acquisitions and joint ventures. Each of them has different features. In generally, the ship owners desire to share risk and costs when they establish a collaboration strategy.

The collaboration between ship owners is a kind of traditional. At the beginning of Sherman Act, the collaborations of shipping companies were considered as a cartel behavior or abuse of dominant position. According to the common law, the cartel behaviors are *per se* illegal. These behaviors generally involve price fixing and market allocation strategies. Legal authorities of the U.S. firstly implemented the common law attitude. However, In the *Standard Oil Case,* the *rule of reason* was implemented by the majority of five judges[1]. According to this rule, the Sherman Act provisions should be interpreted with the reasons. Even if the *rule of reason* has been implemented for several cases, it is not apply the cartel cases. Hence, it is believed that the consequences of the cartel agreements prevent the competition and therefore there is no requirement to make further investigation. The European Union (E.U.) legislation gives safe harbors to cartel cases. The cartel behaviors are illegal with respect to article 101(1) of 2012

[1] Phillip J. Scaletta and George D. Cameron, **Foundations of Business Law**, Business Publications INC, the U.S., 1986, p. 91.

Consolidated Version of The Treaty on The Functioning of The European Union (TFEU). However, if the results of the cartel agreements increase the social welfare, article 101(3) of TFEU provides safe harbor for cartels.

The abuse of dominant position cases are governed by similar rules in the U.S. and E.U jurisdictions. Both of them believed that not all dominant position means an abusive behavior. Therefore, they firstly investigate the relevant market and market share of the firm in order to determine whether there is an actual dominant position or not. If the answer is positive, the further investigation will be implemented. Under the second stage, the intent and conduct of the firm are questioned in order to determine whether the dominant firm abuses its power or not.

The legal authorities have been introducing the guidelines in the aim of showing how horizontal mergers and collaborations are evaluating by the legal authorities. These guidelines generally involve the tests and thresholds. In the absence of the block exemptions, the collaboration strategies are evaluated with respect to these guidelines.

In liner shipping industry, the U.S. and E.U. have been exempted from the antitrust rules since there was a common attitude that liner shipping structure was different from the other kind of industries. As a result of the exemptions, liner shipping collaborations had implemented restrictive strategies to its members and shippers. Consequently, the member of conferences, mainly container carriers, started to make individual service contracts with shippers. In response, the conferences had introduced more strict rules in order to avoid the individual service contracts.

Both the U.S. and E.U. legal authorities had tested both individual service contracts and conference contracts in order to determine which one of them is more beneficial for the market. Most of the cases showed that the new type of contracts offered high quality services when they compared with the conferences. Based on its benefits, the U.S. and E.U. have preferred to give immunities to new kind of contract system instead of conferences and they terminated antitrust immunities to conferences.

The Turkish Government has not introduced a regulation about the shipping industry yet. The U.S. and E.U. examples show that there is a requirement to establish a legal framework for liner shipping collaboration. In the absence of a regulation, there is

a requirement to show how liner shipping collaborations shall be interpreted in Turkey. Based on this assumption, this thesis aims to draw a road map for Turkish Authorities about how the liner shipping collaborations shall be evaluated. When the all regulations and cases are studied, it is found that in order to promote Turkish National liner shipping fleet and complies with the E.U. competition legislation; Turkish Government shall introduce block exemptions to consortia agreements.

Within this framework, in the first chapter, as a beginning, the economists' ideas about the government interventions to market are studied. Then, the liner shipping industry structure and the liner shipping collaboration strategies are investigated.

Under the second chapter, the U.S. and E.U. jurisdictions current competitive acts and their enforcement are investigated under the frame of cartels and abuse of dominant behaviors. Additionally, the guidelines about the horizontal mergers and horizontal collaborations are discussed. In order to show how the restrictive behaviors are evaluated in the absence of block exemptions.

In the third chapter, the evolution of the liner shipping competition legislation has been explained and the current policies of the U.S. and E.U. are discussed. Turkey's position against the liner shipping collaborations has been evaluated by comparing the selected primary cases the U.S., E.U. and Turkey. Based on all findings, the recommendations about how the liner shipping collaborations shall be evaluated by Turkish Government are listed.

CHAPTER ONE

COMPETITION AND COLLABORATIONS IN THE LINER SHIPPING

"Competition is one of society's most powerful forces for making things better in many fields of human endeavor"[2].

The term of competition is vital for human being and industrial world. In a competitive life conditions, every individual tries to do his best in order to overcome his rivals. Similarly, in the industrial level competition, managers determine several strategies to make their companies more longevity. Collaboration strategies are one of them. In order to overcome the restrictive environment of the competition, companies co-operate with each other and share the risks of the market.

However, it is not easy to determine the level of competition and to establish the correct collaboration strategy. Therefore, economic scientists have introduced competition models and the management scientists have studied how competition affects the managerial decisions of companies. Consequently, they have established several ideas about competition and collaboration relation.

Ship owners have been acting jointly for several years; collaborations are kind of tradition for ship owners. They have established an insurance system via sharing their assets, have collaborated under the conferences in order to fix freight rates and currently they have been implementing strategic alliances, mergers and other type of collaboration strategies for sharing their assets to enjoy the economics of scale.

Under this title, as a starting point, the main schools of the economic science about the competition will be studied in order to show the attitude of the economics against competition. Hence, the ideas of the economics had affected the both management scientist and lawmakers. Then, perspective of strategic management science about the competition and the collaboration will be studied in order to show how companies have reacted to change competitive environment. Finally, the features of the

[2] Michael E. Porter, **On Competition**, 11th ed., Harvard Business School Publishing, The U.S., 2008, (Competition), Introduction Page.

liner shipping and liner shipping collaboration strategies will be explained to show how economic and legal factors have affected the liner shipping structure.

1.1. COMPETITION TYPOLOGIES IN ECONOMY

In the economy science, competition is studied under the eleven different titles[3]. Each type of competition has very technical scope; therefore, instead of examining each of them, the main brains of economy science and their ideas about government intervention will be analyzed under following two titles.

1.1.1. The Classical Theory of Competition

Competition has entered into economic literature by classic economists[4]. A number of the classical conception of competition principles were established by Adam Smith, David Ricardo and Karl Marx[5]. Adam Smith and David Ricardo (Classical Economist) defined the competition as a turbulent process[6], in which rates of profit are balanced in the inter-industry level, qualified by independent mobility of capital and labor[7]. After this general explanation, it will be useful to give detailed information about their view on competition.

1.1.1.1. Invisible Hand

Various definitions of competition have been made by the literature of the economy and management. Adam Smith is considered the first academic economist and

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[3] Hugh. S. Norton, **Economic Policy Government and Business**, Charles E. Merrill Books, The U.S., 1966, p.72.

[4] George J. Stigler, ”Perfect Competition, Historically Contemplated”, **The Journal Of Political Economy**, Vol: 65, No: 1,1957, p. 1.

[5] G. Duménil And D. Lévy, “The Dynamics of Competition: A Restoration of The Classical Analysis”, **Cambridge Journal Of Economics**, Vol: 11, No: 2, 1987, p. 134.

[6] Donald J. Harris, “On The Classical Theory of Competition”, **Cambridge Journal of Economics**, Vol: 12, No: 1, 1988, p. 140.

[7] Lefteris Tsoulfidis and Persefoni Tsaliki “Marxian Theory of Competition and The Concept of Regulating Capital: Evidence From Greek Manufacturing”, **Review of Radical Political Economics**, Vol: 37, No:1, 2005, p. 7.

his philosophy was mainly based on effect of social and political factors on economic environment[8]. With respect to Smith, in a competitive society, if people or nations desire supremacy, "*shall do what they were best fitted to do"*[9]. In other words, a tailor does not stitch his own shoes, but purchase them from a shoe-dealer. A shoe-dealer does not presume to make his own dresses, but have a tailor to sew them[10]. Although, he believed that a man shall act with respect to his self-interests[11], he also focused on the *"invisible hand*" that encourages the free trade.[12]

Smith described the principles of specialization and division of labor, which led the mass production[13]. One of the Smith's primary objectives was to terminate activities of government that inhibit the free trade[14]. In this framework, he believed that the role of government should be less in the society. On the other hand, he stressed that states have to undertake appropriate measurements in specific cases such as safeguard the marine services that is the matter of national defense[15]. Indeed, his idea based on three government's duties, first duty is to preserve the country against foreign aggression, the second duty is to establish a justice system[16] and the third one is to maintain the public works and institutions such as the education. These duties are beneficial to human beings, and it would really be no justice when the citizens of the country were forced to pay the expense of constitute and maintenance of these government activities[17]. Government shall use its taxing power in order to finance these activities. According to Smith there are four principles for good taxation system; taxes must be proportional to incomes of the citizens, taxes must be foreseeable and no changeable at the time of

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[8] Eric Roll, **A History of Economic Thought**, 3rd ed., Prentice-Hall Inc., The U.S., 1953, p. 145.
[9] Dong-Sung Cho and Hwy-Chang Moon, **From Adam Smith to Michael Porter Evolution of Competiveness Theory**, World Scientific, London, 2014, p. 6.
[10] Jacob Oser and W.C. Blanchfield, **The Evolution of Economic Thought**, 3rd ed, Harcourt Brace Jovanovich Inc.,The U.S., 1975, p. 69.
[11] Willi Semmler, "Theories of Competition and Monopoly", **Capital and Class**, Vol: 18, 1982, p. 93.
[12] Lefteris Tsoulfidis, "Classical vs. Neoclassical Conceptions of Competition", **Munich Personal RePEc Archive**, No 43999, 2011, https://Mpra.Ub.Uni-Muenchen.De/43999/ (15.04.2018), p. 2.
[13] Tim Hindle, **Guide to Management Ideas and Gurus,** John Wiley&Sons, London, 2008, p. 127.
[14] Viner Jacob, "Adam Smith and Laissez Faire", **Journal of Political Economy**, Vol: 35, No: 2, 1927, p. 218.
[15] Cho and Moon, p. 6.
[16] According to smith, even judges shall compete each other like firms.
[17] Lewis H. Haney, **History of Economic Thought**, 5th ed., The Macmillan Company, The U.S., 1956, pp. 229-230.

payment, taxes must be levied at due date, taxes must be levied at minimum cost to the state[18].

The main theme of Adam Smith is *laissez faire* economy in which the market shall be competitive. In order to maintain the competitive environment, government shall focus on three duties that were discussed above. Ricardo extended the duties of government; such as minting, and in this manner, he strongly supported the establishment of a national bank of issue[19].

Stigler[20] summarized the Smith's competition idea depending on five conditions: (i) the parties must act individually (ii) the number of rivals must protect the market against the unusual acquirements (iii) the firms must have enough information about the market opportunities (iv) this information had to be used freely (v) adequate time must elapse for resources to flow in the way and amount wished by their owners.

1.1.1.2. Comparative Advantage

Smith's ideas were carried to the farthest point by David Ricardo (1772-1823) who strongly supported free-trade theory and Adam Smith's competition ideas[21]. Ricardo believed that, nations should focus on what they best do in order to be more competitive. Competiveness of a product depends on the rent, profit and wages and he compared the particular countries selected good based on these three variables[22]. For instance, for the same quantity of cloth, while England might require 100 men power, Portugal might require the labor of 90 men. Instead of producing the cloth, if the countries focused on wine, England would require labor of 120 men, Portugal would require 80 men power. It would be advantageous for Portuguese to import cloth in exchange of wine[23]. Based on these examples, it is possible to say that; if a state is more

[18] Oser and Blanchfield, p. 72.
[19] Tahany Naggar,"Adam Smith's Laissez Faire", **The American Economist**, Vol: 21, No: 2, 1977, p. 35.
[20] Stigler, p. 2.
[21] Roll, p.188.
[22] Cho and Moon, p. 9.
[23] David Ricardo, **Principles of Political Economy and Taxation**, Prometheus Books, 1996, New York, p. 94.

efficient than in producing a product, this country shall export this product in order to minimize the comparative costs.[24]

In addition, Ricardo has also adopted the invisible hand policy into his works. According to him, all types of contracts, including wage labor contracts, shall be subject to fair and free competition and government must abandon the control of the market[25].

1.1.1.3. The Capitalist Competition

Karl Heinrich Marx mainly discussed the capitalist system in his book *Das Kapital*. According to him, workers create and generate more value than they earn. The owners of capital are able to obtain profit by paying a subsistence wage to labor[26].

Marx had seen the competition as a kind of war grounding on its violent and turbulent nature. His ideas about competition are more extensive than other classical economists and he believed that without understanding the inner nature of capital, it is not possible to analyze the scientific aspect of competition[27]. Accretion of capital triggers the competition that is associated not only movement of goods but also production, liquidation and distribution of surplus value.[28]

Marx divided competition into two types; (i) competition within a particular branch of production (ii) competition among all branches of production[29]. In other words, the competition can be seen both inner-industry and inter-industry levels. Within each industrial type, firms aim to increase their market share by gaining price competition[30]. The cheapness of goods bases, *ceteris paribus*, on the effectiveness of workforce and this in turn increase the scale of production. Consequently, the smaller companies are beaten by the larger ones. At the macro industrial level, all industries increase diachronically. For instance, the cotton industry can have extraordinarily high

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[24] Oser and Blanchfield, p. 92.
[25] Haney, p. 301.
[26] Karl E.Case and Ray C. Fair, **Principles of Economics**, 7th ed, RR Donnelly & Sons, The U.S., 2004, pp. 343-344.
[27] Tsoulfidis and Tsaliki, p. 9.
[28] Semmler, p. 111.
[29] Roll, p. 275.
[30] Maria Daniela Giammanco, "Competition and Technical Progress in Marx: Two Different Perspectives", **History of Economic Ideas**, Vol. 10, No. 2, 2002, p. 76.

profit rates at one term. On the other hand, the industry might be less beneficial or even suffers deprivation as a result of the economic changes. Meanwhile, other industries can yield high profits. Therefore, in order to be more competitive, capital shall be transferred from one sphere to another[31].

1.1.2. Neo-Classical Theory of Competition

The excessive position of the idea of individualism was not followed by the classical economists who have dealt with social problems. On the other hand, most of neo-classical economists have continued to support the individualist and invisible hand theories. Neo-Classical economists improved new aspects that were against capitalism[32]. The main idea of competition in the neo-classical theory is based on perfect competition model[33]. In this kind of competition, model goods' sell and buy prices are not affected by any variable[34]. In other words, companies, individually, are able to affect the homogeneous prices[35].

1.1.2.1. Selfishness and Competition

The Neo-Classical tradition was established by Cambridge University lecturers who were the students of Marshall[36]. Therefore, it is important to focus on his ideas about competition.

At the beginning of his career, Marshall (1842-1924) had believed that the idea of laissez-faire collapsed in certain conditions both theoretically and practically. But However, Marshall did not insist on this unique discussion very far; afterwards, he

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[31] Tsoulfidis and Tsaliki, p. 6.
[32] Daniel R. Fusfeld, **The Age of Economist, The Development of Modern Economic Thought**, Scott, Foresman and Company, The U.S., 1966, p. 72.
[33] Tsoulfidis, p.4
[34] Aldo Rustichini and Nicholas C. Yannelis, "What Is Perfect Competition?", **Equilibrium Theory in Infinite Dimensional Spaces**, (Ed. M. Ali Khan and Nicholas C. Yannelis), Springer-Verlag Berlin Heidelberg Gmbh, The U.S., 1991, p. 249.
[35] Case and Ray. C. Fair, **Principles of Economics**, 3rd ed, Prectice Hall, Inc. The U.S., 1994, pp. 56-57.
[36].P Bhatnagark and S Bahadur, **A History of Economic Thought**, 3rd ed., Kishore Publishing House, Kanpur, 1957, p. 351.

accepted the free market[37] in which both buyers and sellers can compete without intervention. In this framework, Marshall assumed that there was only one price market at one and the same time[38]. Moreover, he demonstrated that in the long run prices in competitive markets would tend toward the lowest possible costs of production at which the amounts desired by consumers would be provided[39].

With respect to Marshall, the modern industrial life is not more competitive than earlier. Competition is an individual process in which one-person races against another during selling or purchasing of anything. Selfishness is triggered by competition. However, there is less deliberate selfishness in early than those in modern forms of market[40]. In other words, individual freedom and independence are more important than competition in today's word[41].

In addition, he changed the perfect competition concept by demonstrating that perfect competition does not necessarily increase output. Output can be increased beyond the maximum yield by competition by restricting decreasing returns industries and expanding increasing returns industries[42]. After he mentioned this theory, the depression conditions became serious. Market prices were determined by cartels. In that kind of market conditions, Marshall's students developed monopolistic and perfect competition ideas[43].

1.1.2.2. The Failure of Laissez Faire

After World War II, ideas of Keynes began to get attention among economists and government due to the studies of employment[44]. He refused the classical view of

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[37] John Maynard Keynes, "Alfred Marshall, 1842-1924", **The Economic Journal**, Vol:34, No:135, 1924, (Marshall), p. 352.
[38] D. C. Hague, "Alfred Marshall and The Competitive Firm", **The Economic Journal**, Vol:68, No:272 1985, p. 676.
[39] Fusfeld, p. 74.
[40] Alfred Marshall, **Principles of Economics**, 8th ed., The Macmillan Press LTD, London, 1920, pp. 4-8.
[41] Overton H. Taylor, **A History of Economic Thought**, Mcgraw-Hill Book Company Inc, The U.S., 1960, p. 339.
[42] Bhatnagark and Bahadur, p. 350.
[43] Bhatnagark and Bahadur, p. 355.
[44] Case and Fair,7th ed, p. 532.

employment and triggered the modern employment theory[45]. In his book, the possibility of stable equilibrium with high unemployment was studied[46]. He believed that his system brought more peaceful environment since pressure of unemployment and competitive struggle for market trigger the wars[47]. These problems also cause the failure of the market system to provide the correct alarms and cannot be pursued elementally to the entity of big agents, like unions or monopolies[48].

Keynes rejected the laissez-faire because he believed that without state control the economic system could not work smoothly[49]. Moreover, he mentioned that private enterprises were checked by public authority via lending the credits to them[50]. Keynes has stated that

> *"Under the system of domestic laissez-faire, there was no means open to a government whereby to mitigate economic distress at home except through the competitive struggle for markets. For all measures helpful to a state of chronic or intermittent under employment were ruled out*[51]*".*

To sum up, it is understood that according to the economic studies competition is an important key to determine the market rules. Some of the philosophers believed that these rules shall be established by the private enterprises and society without government interventions. However, this kind of ideology causes monopolies. Therefore, some of the authors discussed that a government have to show his face in the market to determine the market principles.

Naturally, it is possible to study and to give detailed information about economic literature. Instead of it, focusing on the strategic management aspect of competition is preferred.

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[45] Campbell R. Mcconnell, **Economics, Principles, Problems, and Policies**, 4th ed, Mcgraw-HILL Book Company, The U.S. 1969, p. 209.
[46] Roy F. Harrod, T**he Life of John Maynard Keyness**, Augustus M.Kelley Publishers, Newyork, 1969, p. 107.
[47] John Maynard Keynes, **The General Theory of Employment Interest and Money**, Macmillan and Co, Limited, London, 1951, (Theory), p. 381.
[48] Oliver Hart, "A Model of Imperfect Competition With Keynesian Features", **The Quarterly Journal of Economics**, Vol: 97, No: 1, 1982, p. 135.
[49] Bhatnagark and Bahadur, p. 374.
[50] Harrod, p. 348.
[51] Keynes, Theory, pp. 381-382.

1.2. COMPETITION AND COLLABORATION TYPOLOGIES IN STRATEGIC MANAGEMENT

The competition and strategic management are interrelated terms and have effects on the companies' market position. Therefore, in the following sub sections strategic management authors' attitudes on competition will be discussed. Before moving on the sub sections, it is beneficial to examine a case to show how the strategic management decisions change the competition position of a firm.

Schwinn Bicycle Company was the leader in the U.S. bicycle market. In the 1960s, one of every four bikes was a Schwinn. However, its high market share fell from 1 million bikes in 1987 to 500.000 in 1991. During the collapsing period, company lost almost 50 million dollars and, eventually, the company went bankrupt. They never took into consideration competition seriously, they never focused on Research and Development (R&D), and they never made long-term plans. Because they believed that, they were leader of the market, in which there would be no competition[52].

This example clearly shows that the environment of the companies has been evolving day by day. Managers shall be flexible enough to follow changes on the market conditions.

1.2.1. Competition Typologies in Strategic Management Discipline

Although early evidences of the management can be traced as far back as Mesolithic age dated about 10.000 to 9.000 B.C., the origins of a number of modern concepts and practices are shown in the Sumerian civilization 4.000B B.C[53]. During the Sumerian period, the role of priests became more prominent since the new gods were derived from the novice daily life. Beside their regional duties, priests directed and ruled these diversified societies[54]. Sumerian civilization was led to architectural structures,

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[52] J. David Hunger and Thomas L. Wheelen, **Strategic Management and Business Policy Toward Global Sustainability**, 5th ed., Addison-Wesley Publishing Company, The U.S., 1996, pp 1-2.
[53] George JR. S.Claude, **The History of Management Thought** , Prentice-Hall Inc, The U.S. 1968, p. 4.
[54] W. Robin Winks, **World Civilization: A Brief History**, 2nd ed. Collegiate Press, The U.S. 1993, p. 3.

government and even managerial developments of Egypt[55]. Egyptian contributed to management science by using of job descriptions and determining long range planning[56]. In addition, Egyptians used management practices to build pyramids[57]. The Hebrews, ancient Chinese and Greeks are also some important early historical societies that provided insights into management theories and practices[58]. Romans used organization structure for communication and control. Chinese used extensive organization structure for state agencies and the arts[59].

During the dark ages, like other sciences, the management studies interrupted in the Europe, while, at that time, Islamic society grew and expanded[60]. About the 900's, Al-Farabi studied about managing a kingdom and he listed the features of the virtuous manager[61]. In 1100, Ghazali studied the virtue of the manager[62].

In the late 1700s, Industrial Revolution has triggered the machine and factory production that is the most popular system of production today[63]. After the Industrial Revolution, home manufacturing was placed by the fabrication system[64]. Together with its benefits, the fabrication created problems in control and coordination of capital costs, labor, materials and machinery[65]. Industrial Revolution also brought with the importance of personal freedom[66]. Workers had freedom to choose their workplace. Therefore, a British industrialist and reformer Robert Owen (1771-1858), focused on the importance

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[55] Claude, p. 4.
[56] Fred Luthans, **Introduction to Management a Contingency Approach**, Mcgraw-Hill Inc, The U.S.A, 1976 p. 4.
[57] W. Ricky Griffin, **Management**, International Student ed., Houghton Mifflin Company, The U.S., 1993, p. 34.
[58] Luthans, p. 4.
[59] Griffin, p. 31.
[60] Al-Gahazal S.K. , The Influence of Islamic Philosophy and Ethics on The Development of Medicine In The Islamic Civilization", **FSTC Limited,** 2007, Http://Www.Muslimheritage.Com/Uploads/The_Influence_Of_Islamic_Philosophy_On_Development_Of_Medicine.Pdf, (12.04.2015)
[61], Demokaan Demirel, "Fârâbi'nin İdeal Devleti: Erdemli Şehir", **Niğde Üniversitesi İİBF Dergisi,** Cilt: 7, Sayı: 1, 2014, p. 10.
[62] Claude, p. 34.
[63] D.C. Mosley, P.H Pietri. and L.C. Megginson, **Management Leadership in Action**, 5th ed. Harper Collins College Publishers, The U.S. 1996, p. 43.
[64] J. L. Massie, **Essentials of Management**, 4th ed,. Prentice Hall Inc, The U.S., 1987, p. 14.
[65] Claude, p. 49.
[66] Donald J. Clough, **Concepts in Management Science**, Prentice-Hall of India Private Limited, New Delhi, 1968, p. 12.

of human resources. Owen concerned with workers welfare and he set better working conditions for workers[67].

After the World War II, management process of the firms became more complex due to the increases in the size and number of competing firms and government interventions. Government had expanded its role as a buyer, seller, regulator and competitor in the free enterprise system. Companies laid emphasis on environmental or external determinants while establishing their long range planning, programming, budgeting policies. This new managerial process was called as *strategic management*[68].

The competition and the strategic management can be considered as best friends. Therefore, in the following chapter it will be discussed the relationship among the competition and strategic management chronically.

1.2.1.1. Strategic Planning Period

When the companies had noticed the importance of competition, they did not know where they shall run. Consequently, they needed consultant to universities like Gordon-Howell report, which was supported by Ford Foundation and the Carnegie Corporation. This report suggested that business education shall be applied at larger level and shall involve a capstone lecture named business policy. Most of the universities accepted and developed this idea. New syllabus comprised social responsibilities and ethical rules of companies as well as potential impact of political, legislative and economic factors on the market. These newer courses caused the evaluation of business policy to strategic management[69].

Strategic management as new academic discipline is very delicate and it requires more attention[70]. Some authors believed that the following authors and their studies had

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[67] Griffin, p. 34.

[68] J.A. II Pearce, **Strategic Management Formulation, Implementation and Control**, 4th ed, R.R. Donnelly &Sons Company ,The U.S., 1991, p. 2.

[69] Samuel C. Certo and J.Paul Peter, **Strategic Management Concepts and Applications**, 2nd ed., Mcgraw-Hill INC, The U.S., 1991, p. 4.

[70] Rajiv Nag, Donald C. Hambrick and Ming-Jer Chen, "What Is Strategic Management, Really? Inductive Derivation of a Consensus Definition of The Field", **Strategic Management Journal**, Vol:28, Issue:9, 2007, p. 935.

triggered the strategic management studies: "*Alfred Chandler's Strategy and Structure (1962); Igor Ansoff's Corporate Strategy (1965); and the Harvard textbook Business Policy: Text and Cases"*. These studies had evaluated the researchers' perspective and the doctrine realized that the external environment of the firms should be considered while implementing a strategy[71]. These studies did not only change their time, the consequences of them still effect today. Almost every big the U.S. companies had lost their power and cannot come todays. As a consequence of the restrictive competition they merged with other firms[72].

During the 1970's, the Design School was shaped by Chandler who mainly focused on the position of the American Industry after the World Wars. During the literature review, it was noticed that he wrote a book which name is The Visible Hand. *Prima facie*, it can be considered that Adam Smith's Invisible Hand was discussed by Chandler due to his book name. However, in introduction part Chandler clearly showed the aim of his book. *"The title of the book indicates it theme but not its focus or purpose. In many indusrtys of the economy the visible hand of management replaced what Adam Smith referred to as the invisible hand of market forces[73]."* It means that the nature of the economic theory had evaluated from perfect competition to imperfect competition. The invisible hand control on the small traditional firms' production caused the perfect competition in the market in which success depends on resource allocation skills. However, modernity brought multiunit enterprises who struggled with imperfect competition and misallocation of resources. According to Chandler, only managerially strong companies can overcome the difficulties of the modernity[74]. Furthermore, the effect of the government policies and regulations on the firms was discussed by Chandler who believed that structure and strategy of firms are directly affected by the

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[71] Olivier Furrer, Howard Thomas and Anna Goussevskaia, "The Structure and Evolution of The Strategic Management Field: A Content Analysis of 26 Years of Strategic Management Research", **International Journal of Management Reviews,** Vol:10, Issue:1, 2008, p. 3.
[72] Michael A. Hitt, R. Duana Ireland and Robert E. Hoskisson, **Strategic Management Competitiveness and Globalization**, 3rd ed., South-Western College Publishing, The U.S., 1999, Globalization**,** p. 7.
[73] Alfred D. Chandler, Jr., **The Visible Hand**, The Belknap Press of Harvard University Press, The U.S., 1977, (Hand), pp. 1.
[74] Chandler, Hand, p. 12.

antitrust policies and therefore, the antitrust policies can transform the market a monopoly into an oligopoly[75].

The Boston Consulting Group (BCG) matrix shows place of a firm in terms of its product range. This matrix leads the firm about which of its products or services are more efficient. Relative market share and rate of market growth of the products are calculated by BCG Matrix and in order to show the results four imagery; question marks, dogs, cash and cows, were used[76]. If the product takes place in the dogs, it will have low market share and low growth rate. The future of this product is not shiny. Although cash cows possess the first place in terms of market share, their market is not growing. If a product has the high share and high growth product, it will be a star. In the question mark unit, products growth quickly however it has low market share.[77] The rate of market growth determines the competitive response of the product. If a product is a star or question marks, which have high growth markets, it will have more rivalry power than dogs or cows. Since when the market has high growth rates, competition is considered less aggressive[78]. In addition, this matrix shows that a firm's business portfolio must be stable. In order to support to its stars, companies shall have enough cash cow. It shall be not forgotten that these stars eventually turn into cash cows since companies have to have adequate number of stars[79].

Igor Ansoff was the important brain of strategic management science. At the beginning of his studies, he discussed the term of strategy. According to him, the origin of the term "strategy" comes from the military art. Strategy consists of a number of tactics that is a specific scheme for employment of allocated sources[80].

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[75]Alfred D. Chandler, Jr, **Strategy and Structure: Chapters in The History of The American Industrial Enterprise**, The MIT Press, The U.S., 1990, (Strategy), p. 384.
[76]Bruce Henderson, "The Product Portfolio", **BCG Henderson Institute**, 1970, Https://Www.Bcg.Com/Publications/1970/Strategy-The-Product-Portfolio.Aspx, (02.02.2018).
[77]John A. Seeger, "Reversing The Images of BCG's Growth/Share Matrix", **Strategic Management Journal**, Vol:5, No. 1,1984, pp. 94-97.
[78] Robin Wensley, "PIMS and BCG: New Horizons or False Dawn?", **Strategic Management Journal**, Vol. 3, No. 2, 1982, p. 151.
[79] Glenn Bosemann, Arvind Phatak and Robert E. Schellenberger, **Strategic Management Text and Cases**, John Wiley&Sons, The U.S., 1986, p. 80.
[80] H. Igor Ansoff, **The New Corporate Strategy**, John Wiley&Sons, The U.S., 1988, (New), p. 88.

During the 1950s diversification and internationalization strategies were discussed by strategists to enlarge companies' portfolio. However, changes in the first-generation industries[81], new technologies, and accelerated product substitution, internationalization of competition, government regulation and political upheavals reshaped the idea of competitive behavior[82]. These changes made R&D departments more important and the companies increasingly focused on R&D that have gained superiority on rivalry[83]. Moreover, market differentiation became another component of competitive strategy. Companies with skillful advertising and promotions became more attractive in the market[84].

Ansoff has drawn the diagram of decision flow about competitive analysis process which starts with setting tentative objectives. The second step is to extrapolate the future performance of the company. After these steps, a manager shall measure the total gap between objectives and forecast. When there is no gap between them, manager can stop the analysis. However, if the manager found that there is a gap, he will revise objectives with respect to the measurements of forecast. Afterwards a manager shall focus other successful rivals' strategies in order to investigate strengths and weakness of his firm and determine the portfolio potential against his competitors. After this analysis, a new forecast can be constructed. When there is no gap between new forecast and objectives, the manager can terminate the process. On the other hand, in the case of a gap, a new set of objectives was established. These new forecast and objectives determine the portfolio gap, which will remain after the firm optimized the performance of its present portfolio. After these analyses, a manager finally reaches the competitive position of the company. At that point, many firms follow diversification strategy in order to close the competitive gap. In any decision, managers shall determine the available resources for the company's performance against fluctuations. Thus, a manager can change firm's portfolio and resources together with the expansion

[81] Like Steel, Machine Tools and Agricultural Equipment Industries.
[82] Ansoff, New, pp. 102-103.
[83] H. Igor Ansoff and J.M. Stewart, "Strategies For A Technology Based Business", **Harvard Business Review,** 1967, Vol:45, No:6, p. 76.
[84]Ansoff , New, p. 86.

requirements. Finally, if a manager is not satisfied at the last stage of the diagram, he can revise the objectives with respect to this analysis[85].

As a general acceptation, Igor Ansoff was the one of the important frontiers of strategic management science. Indeed, he described the logic of strategic management in his competition process diagram. Thus, he had showed that strategic management and competition are interrelated and mutualistic terms.

1.2.1.2. Positioning School

When competition and strategic management relation had discussed, Michael Porter took scientific attention. Hence, he made a great impact on strategic management science when he published Competitive Strategy in which the forces[86] of competition in market, differences among industries, and changes in the industries were discussed. On the other hand, this book was the first academic study explaining the concept of competitive advantage. This new academic discipline was criticized, tested and more importantly widen by other scientists. He considered these comments seriously and decided to write Competitive Advantage[87]. He has been enhancing his ideas in accordance with new developments in the market. He also wrote Competition in Global Industries, The Competitive Advantage of Nations and several articles related to the competition.

Competitive strategy of a firm is affected by both its market structure and environment. The position of competition in a market is rested on five basic competitive forces; *"(i) bargaining power of suppliers, (ii) bargaining power of buyers, (iii) threat of new entrants, (iv) threat of substitute products or services and (v) rivalry among existing firms"*. The intensity of market competition and profitability are determined by these forces[88].

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[85]Ansoff, New, pp. 105-107.
[86] Five Forces
[87] Michael E. Porter, **Competitive Strategy**, Free Press, New York, 1998, (Competitive), Introduction Part.
[88] Tony Grundy, "Rethinking and Reinventing Michael Porter's Five Forces Model", **Strategic Change**, Vol: 15, 2006, p. 214.

New entrants enlarge capacity of market and they wish to get market share. Therefore, prices are reduced by these new companies. Due to the enlargement in the production after the new entries, sources become rare. In order to use other market resources, companies follow acquisition strategies. Six major sources of barriers of entry protect the existing competitors against the new entries[89]. Instead of examining all barriers, only government policy will be discussed. Since under the following chapters, how governments regulate the competition in the market will be studied. States can restrict or even inhibit entry into industry with policies and regulations such as licensing requirements and policy control requirements. Some of the government requirements need more investments and it creates a kind of obstacle for capitally weak companies. Rivalry among existing firms is unavoidable because all players want to win the competition game. The game in some industries is called as warlike, bitter, cutthroat, or polite. In order to outperform the game, companies shall establish some tactics such as price discrimination, unfair advertising etc. Firms are not only competing in their industries, but also competing against substitute industries. A decrease in the substitute products causes profit changes in an industry. For example, electronic security systems are cheaper than guard services. In this case guard services can offer packages which include both electronic security systems and security guards rather than to try to outcompete. Buyer group is the important determinant of competition. Bargaining power of buyer will be higher if they purchase larger volumes of goods. In that case buyers are able to fix the price in a volatile market. Some big companies can make pressure to their small supplier who earns low profits. In addition, backward integration of big companies creates menacing environment for small supplier. Like powerful buyers, powerful suppliers can affect the competition of the market. If the supplier of a firm escalates the prices, automatically, profitability of customer firm will be squeezed[90].

In the same book, Porter also established three generic strategies; *"overall cost leadership, differentiation and focus"*, which can be considered as the gate of competitive success. Cost leadership strategy became popular after the experience curve

[89] M.E. Porter, Competitive, pp. 3-13.
[90] M. E. Porter, Competitive, pp. 13-27.

concept. These strategy aims to sell the companies' goods at the cheaper prices than the current market prices. Therefore, a company shall minimize its overhead and shall construct efficient scale facilities. Cost of the product is the only one determinant of this strategy and quality of the good and other variables are not important. Unlike to the cost leadership strategy, a number of variables such as quality of goods, brand image, customer services, and technology are important in the differentiation strategy that brings customer loyalty. This strategy also protects the firm against five forces threats. Both of these two strategies are targeting all industry. However, focus strategy narrows the target and aims to reach determined customers. This strategy can be called requirements-driven and needs of the target group are met better than other strategies[91].

Porter has evaluated the competition ideas from outside a firm to inside. Competitive Strategy focuses on industry while Competitive Advantage focuses on the firm. He mentioned that competitive advantage is the most important thing for company in rivalry industries. Therefore, he built value chain in order to examine all the activities of a firm. In the value chain, companies' activities were divided into two groups; support and primary activities. Even though companies operate in same industry, they can have their own and different value chains which are the key sources of competitive advantage. Establishing a useful value chain causes the production of more valuable goods, thus companies increase their profitability[92].

One year after the Competitive Advantage, Competition in Global Industries has been published by Porter. In that book, authors discussed the international competition in the terms of market, companies and government. With respect to Porter, each industry has its unique features and the structure of international competition differs from market to market. In order to enter domestic market, international companies asked for the market necessities from local companies. This information sharing was called as know-how. Although knowledge sharing is an important factor of global competition, it is not enough by itself. Manager abilities are also important. Hence, there will be number of

[91] M. E. Porter, Competitive, pp. 35-39.
[92] Michael E. Porter, **Competitive Advantage**, The Free Press, New York, 1985, (Advantage), pp. 33-36.

linkages among countries and integration of these linkages requires well-established process realized by skillful managers[93].

Porter also discussed how internet affects the competition position of companies. Like other technological improvements, internet has brought better opportunities for firms to strength their competition position. Companies, who are on the internet, can enlarge their market share volume. On the other hand, internet is a good channel for suppliers to reach end customers and reduce differences among competitors[94].

In addition, he discussed the competitive advantages of nations. According to Porter, when the world met the global competition, nations became more important. The innovation capacity of a nation's industry affects its competitiveness. Previously, the competition determinants consisted of labor costs, interest and exchange rate. Nowadays, creation and assimilation of knowledge and differences in national values, culture, and economics have become the core factors of the competition. Consequently, companies have been establishing mergers, alliances, collaborations and strategic partnerships. The governments support companies for those strategies in order to promote the international trade. Besides, the governments take some measurements to protect the national competitiveness via exchange rate and antitrust policies. In this framework, domestic firm strategies, structures and rivalry, demand conditions of home market, factor conditions of the nation and the presence or absence of related and supporting industries of the firm are the determinants of the national advantage[95].

Also in 1980's Entrepreneurial school ideas were studied by Peter F. Drucker who discussed the abandonment of *laissez faire.* He strongly disagreed that depression and unemployment were triggered by *laissez faire.* According to the Drucker, *laissez faire* means the absence of constrictive rules nothing more. Although countries had abandoned the *laissez faire* policy, they were still struggling with economic problems.

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[93] Michael E. Porter, **Competition in Global Industries**, Harvard Business School Press, The U.S. 1986, (Global), pp. 16-18.
[94] Michael E. Porter, "Strategy and The Internet", **Harvard Business Review on Advances In Strategy Book** , 5th ed, Harvard Business School Press, 2002, The U.S., (Internet), pp. 1.
[95] M. E. Porter, Competition, pp. 171-188.

Therefore, competitive economic environment requires extraordinary competence and experience in the making of policy decisions[96].

It has been observed that none of management authors had studied business and government relations in their books except Peter Drucker. In his book, he focused on that topic in a different way by stating that establishing a good relationship between government and company is the one of the important responsibilities of a manager. In this framework, he believed that governments and companies shall work in harmony. Therefore, laws of a state shall protect the autonomy and accountability of companies and the governments shall also assure a free and elastic community capable of change[97].

Moreover, he believed that the market became socialist not capitalist after the World War I[98]. Instead of ownership of a company, managerial abilities were important for him. Indeed, big firms got bank loans that were financed by savings and fees of middle class and workers. Therefore, the real ownership of production was not belonging to private capitalist. Although the changes in the ownership, the competition remained same, companies would compete with each other in each major market. On the other hand, some markets such as the telephone and postal services shall be naturally monopolistic. These kinds of markets cannot be organized with respect to competition rules[99]. Albeit, he supported that social competition deals with the components of the job, the rate of operation, he cannot measure the efficiency of these components. In addition, social competition still focused on current process, while a manager shall be more futuristic[100].

Drucker has mainly focused on government-company relationships instead of company-company relationships. He reported that firms and states have to work cooperatively in order to be more competitive.

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[96] Peter F. Drucker, **The New Society The Anatomy of Industrial Order**, Harper&Bret All Publishers Newyork, 1950, (Industrial), pp. 9-10.
[97] Peter F. Drucker, **Management Tasks Responsibilities and Practices**, Heinemann, London, 1974, (Task), pp. 352-364.
[98] They set up a powerful socialization commission to work out the transition from a capitalist to a socialist economy.
[99] Drucker, Task, pp. 154-157.
[100] Drucker, Industrial, p. 278.

Between 1980's and 2000's, Mintzberg studied the market as a school where each organization is the teacher of the others. In other words, firms can learn the rules of the market from competitors. Collaborations of buyers and suppliers have been changing the game rules, which are not simple as previous[101].

On the other hand, competition has been used as policy for conflict and confrontation. This policy can cause a battle in which the dominant firm enjoys the gains of the war. Consequently, losers' club learns that they shall change their game strategies, like giving people more responsibility, in order to promote effectiveness[102].

1.2.1.3. Resource Based View

According to the Barney, the well-established firm culture makes the company more powerful. However, there are three conditions for success. First, culture must add financial value to the company via enhancing sales and decreasing costs. Second, culture must be rare and shall have unique characteristics. Finally, culture must be imperfectly imitable; that is other firms shall not able to imitate the culture. If a firm has a culture having these three conditions, it will have a sustained competitive advantage[103].

Later, he recognized that culture is a part of firm sources and he decided to study the how firm resources affect sustained competitive advantage. Similar to culture, he mentioned that heterogenic and immobile sources shall be valuable, rare and imperfectly imitable. He also added one more determinants "*there cannot be strategically equivalent substitutes for the sources that are valuable but neither rare nor imperfectly imitable.*"[104]

Miller had believed that configuration theory is a variable or quality that can generate or ruin competitive advantage. Studies on competitive analysis deal with part of

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[101] Henry Mintzberg, Bruce Ahlstrand and Joseph Lampel, **Strategy Safari**, The Free Press, The U.S., 1998, pp. 175-222.
[102] Henry Mintzberg and James B.Quinn, **The Strategy Process**, 3rd ed., Prentice-Hall Inc, The U.S.,1988, p. 762.
[103] Jay B. Barney, "Organizational Culture: Can It Be a Source of Sustained Competitive Advantage?" **The Academy of Management Review,** Vol. 11, No. 3, 1986, (Culture), p. 658.
[104] Jay B. Barney, "Firm Resource and Sustained Competitive Advantage", **Journal of Management**, Vol: 17, No1, 1991, (Resource), pp. 101-103.

strategies rather than wholes. Therefore, managers and scholars are unable to understand how a comprehensive strategy effectively develop and implement. Configurational approach had solved this problem. The most useful configurations of rivalry tactics, organizational abilities and resources, decision method and coordinative mechanism are in the focus of this approach. Establishing a unique organizational resources or skills are less important for companies' competition position since they can be imitated from others. The most important factor is to coordinate market domain, skills, resources and routines, technologies, departments and decision-making process of a firm. The ability of coordination requires synergy, clarity of direction, difficulty of imitation, distinctive competences, commitment, speed and economy[105].

1.2.2. Collaboration Strategy Typologies in Strategic Management Discipline

Frontiers of strategic management science have made their own unique definition while studying the concept of collaboration. Ansoff I.H.[106] has mentioned that acquisition is a growth strategy to enter new strategic business areas. Byars L.L.[107] has also studied the collaboration as a growth strategy, mainly as a diversification strategy, like Ansoff and Byars, Wright P. and et al[108]determined the collaboration strategies as a kind of growth strategy but as a vertical integration of unrelated business. David F.R.[109]has discussed collaboration as a kind of defensive strategy. Volberda H.W and et al[110]has examined it as a growth strategy and as a cooperative strategy. Hitt M.A. and et al[111]has scrutinized the strategies under different chapters in their book in which strategic alliances were discussed as a way of managing competition and achieving

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[105] Danny Miller, "Configurations Revisited", **Strategic Management Journal**, Vol:17, No:7, 1996, pp. 509-510.
[106] Ansoff , New, p. 107.
[107] Lloyd L. Byars, **Strategic Management, Planning and Implementation**, Concepts and Cases", 2nd ed., Harper & Row Publishers, New York, 1987, pp. 64-87.
[108] Peter Wright, Charles D. Pringle and Mark J. Kroll, **Strategic Management Text and Cases**, 3rd ed., Allyn and Bacon, The U.S.,1992, pp. 94-96.
[109] Fred R. David, **Strategic Management**, 6th ed., Prentice Hall, New Jersey, 1997, p. 54.
[110] Henk W. Volberda, Robert E. Morgan, Patrick Reinmoeller, R. Duana Ireland, Robert E. Hoskisson, **Strategic Management: Competitiveness and Globalization, Concepts and Cases**, Cengage Learning, Singapore, 2011, pp. 147.
[111] Hitt et al, Globalization, pp. 152, 194-213, 243.

competitive advantage. Merger and Acquisitions (M&A) strategy has been studied in separately as a growth strategy. Both of them have also been studied as an entry mode to international market by Hitt M.A. et al. and Wheelen T.L. and Hunger J.D.[112] have mentioned that strategic alliances are cooperative strategies, acquisitions are a kind of international entry options, and joint ventures are both cooperative strategies and international entry options. It can be added much more examples like these. However, as it is understood from the literature study, most scholars study these strategies under the cooperative strategies which are described as any type of agreement among companies who work together to achieve their goals[113].

Actually, either collaboration or cooperation is similar forms of acting jointly. Cambridge Dictionary[114] defines the collaboration as "*the action of working with someone to produce or create something".* On the other hand, cooperation is defined "*The process of working together to the same end."*

Even though collaboration and cooperation have similar meanings in the dictionaries, the management literature points the differences in between them. The parties of a collaborative agreement produce or design a product or a process together[115]on the basis of long-term relationships which include openness, honesty and risk sharing[116]. In cooperation agreements, the parties desire to share information, support managerial and technical training, supply capital and provide market information[117]. In this type of environment, individual aims will be accomplished and the agreement life will be subject to project. In other words, it is a kind of specific

[112] Wheelen and Hunger, pp. 195, 212, 213.
[113] Paul W. Beamish and Nathaniel C. Lupton, "Cooperative Strategies in International Business and Management: Reflections on The Past 50 Years and Future Directions", **Journal of World Business**, Vol: 51, Issue: 1, 2016, p. 163. and Erol Eren, **Stratejik Yönetim ve İşletme Politikası**, 9th ed, Beta Basım A.Ş., İstanbul, 2013, p. 297.
[114] Https://En.Oxforddictionaries.Com/Definition/Us/Cooperation, (12.03.2016).
[115] Polenske Karen, "Competition, Collaboration and Cooperation: An Uneasy Triangle In Networks of Firms and Regions" **Regional Studies**, Vol 38-9, 2004, p. 1032.
[116] Paul J. Thompson and Steve R. Sanders, "Peer-Reviewed Paper- Partnering Continuum", **Journal of Management in Engineering**, September-October-1998, p. 75.
[117] Polenske, p. 1032.

project partnership[118]. It can be considered that long-term relations are subject to collaboration while short terms are cooperation[119].

As it is mentioned above collaboration strategies can be taken in many forms; "*outsourcing, information sharing, joint marketing, joint research and development, joint ventures, partnerships, alliances, mergers acquisitions and etc*"[120]. In this study, it is preferred to examine strategic alliances, M&A and joint ventures. Hence, liner shipping companies have been generally adopting these strategies.

1.2.2.1. Strategic Alliances

In their study, Emanuel Gomes, Bradley R. Barnes and Tehmina Mahmood[121] examined 800 articles that are related to strategic alliances. With respect to their findings, strategic alliances studies had also involved other collaboration strategies. Consequently, at the first step interrelation of all collaboration strategies will be emphasized.

As mentioned, companies shall determine competitive strategies to gain competitive advantage against industry rivals. Even though, these strategies have been considered as an important source of successful competition, there are some available strategies for competition like alliances[122]. Strategic alliances among the competitors have become a fashion in the modern business environment. The new paradigm had brought unavoidable question; why a firm has been establishing a strategy with their rivals[123]. The answer of this question lies in globalization, technological innovations and regulation changes[124]. Naturally, it has been mentioned that competition is a kind of war

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[118] Thompson and Sanders, p. 75.
[119] Aaron Anvuur and Mohan Kumaraswamy , "Better Collaboration Through Coopertion", **Collaborative Relationships In Construction: Developing Frameworks and Networks** (ed. Hedley Smyth, Stephen Pryke), Wiley Blackwell, Singapore, 2008, p. 109.
[120] David, 13th ed., p. 156.
[121] Emanuel Gomes, Bradley R. Barnes and Tehmina Mahmood, "A 22 Year Review of Strategic Alliance Research in The Leading Management Journals", **International Business Review,** Vol: 25, 2016, p. 17.
[122] Wheelen and Hunger pp. 195-196.
[123] Willem P. Burgers, Charles W.L. Hill and W. Chan Kim, "A Theory of Global Strategic Alliances: The Case of The Global Auto Industry", **Strategic Management Journal**, Vol:14, 1993, p. 3.
[124] Refik Culpan, "The Role of Strategic Alliances in Gaining Sustainable Competitive Advantage For Firms", **Management Revue**, Vol. 19, No. 1/2, 2008, p. 98. and David, 13th ed., p. 157.

in which industrial rivals fight for success. However, today's competition environment is has been evaluating toward a new era. Competitors have been establishing long-term agreements to gain mutual benefits. Consequently, this kind of agreement is called strategic alliances[125]. The strategic alliances offer lots of advantageous to its members who can reach each other market without making long-term contracts, can share know-how to implement new technologies, can share the financial risks and can jointly use each other's assets without spending a penny[126].

On the other hand, some alliances cannot be long lasting. Success of the strategic alliances depends on the interactions of the agreement companies. Instead of acting separately, partners shall establish strategies jointly and shall share the outcomes of the policies. Without harmony, partners cannot have mutual trust[127]. Without mutual trust, member of alliances cannot overcome the problems of agreement procedure and cannot respond to environmental changes[128]. In times when the members of the alliance inquire to strength their agreement, they shall provide termination penalties in to the agreement. Since penalties of termination appear to be consolidating dependency between interests and they increase alliance performance[129].

Agreement companies of strategic alliances can make pressure to their suppliers to reduce raw material prices. In that case, partners gain cost advantages against their rivals[130].

Furthermore, competitive environment of the industries are affected by the strategic alliances. Some alliances become an entry barrier via limiting market access to new rivals. Powerful members of alliances gain more market power by means of increasing the costs of raw material. Consequently, some alliances can damage the

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[125] Wheelen and Hunger, p. 196.

[126] Dean Elmuti and Yunus Kathawala," "An overview of Strategic Alliances**", Management Decision**, Vol. 39 Issue: 3, 2001, p. 206.

[127] Yves L. Doz, "The Evolution of Cooperation In Strategic Alliances: Initial Conditions or Learning Processes?", **Strategic Management Journal**, Vol. 17, 1996, p. 78.

[128] George S. Day, "Advantageous Alliances", **Journal of The Academy of Marketing Science**, Vol:23, No. 4, 1995, p. 299.

[129] Monica L Perry, Sanjit Sengupta and Robert Krapfel, "Effectiveness of Horizontal Strategic Alliances in Technologically Uncertain Environments: Are Trust and Commitment Enough?" **Journal of Business Research**, Vol:57, Issue 9,2004, p. 952.

[130] Charles W.L. Hill and Gareth R. Jones, **Strategic Management An Integrated Approach,** 3rd ed, Houghton Mifflin Company, The U.S.,1995, p. 266.

public interest[131]. In addition to that, members of the alliance compete with each other. This kind of competitive environment is named as "*coopetition*"[132].

1.2.2.2. Merger & Acquisition

Today's other most-established strategy is named M&A. In the merger strategy, two or more companies associate their operations to generate a new organization. In the acquisition strategy, instead of integration the operations wholly, agreement companies share their business units with each other's[133].

The main reason behind the M&A strategies is to gain a competitive advantage through having more market power. Also like alliances, agreement companies become a barrier for new entries via increasing investment costs. M&A strategies can speed the process up when the companies desire to develop new products. Hence, agreement companies are able to share their knowledge and experts. Moreover, partners of M&A agreement can avoid the competitive pressure of the market[134]. Due to the M&A strategy, partner companies are able to access each other manufacturing installations, and able to have alternative distribution channels and more importantly partners' shares can raised up by this strategy[135]. This joint acting can also preserve companies from seasonal and cyclical fluctuations. Under the M&A umbrella, agreement companies do not get wet in the rain of risks[136].

Beside its benefits, companies can experience some problems during the agreement period. Cultures of firms cannot be suitable to work jointly, cost of the agreement tends to rise and companies' anticipation from the collaboration cannot be same, for instance. As a result of these and similar reasons, some M&A can eventually

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[131] Ferenc Vissi and Patricia Austin, "Strategic Alliances and Global Monopolies", **Russian & East European Finance and Trade,** Vol. 33, No. 2,1997, p. 77.
[132] Maria Bengtsson and Sören Kock, "Coopetition In Business Networks—To Cooperate and Compete Simultaneously". **Industrial Marketing Management**, Vol: 29, Issue 5, 2000, p. 412.
[133] Robert Mcglashan and Timoty Singleton, **Strategic Management,** Merrill Publishing Company, The U.S.,1987, p. 113.
[134] Hitt et al, Globalization, pp. 196-202.
[135] Byars, pp. 78-80.
[136] Michael Lubatkin and Hugh M. O'Neill, "Merger Strategies and Capital Market Risk", **The Academy of Management Journa**l, Vol. 30, No. 4,1987, p. 677.

expire[137]. In order to implement profitable M&A, managers shall clearly *pinpoint and spell out* their aims and anticipations of their bosses. Moreover, managers of each company shall test that firms' resources can fit with each other[138]. More importantly, companies cannot achieve a successful consensus when they have acculturative stress. As a result of the stressful environment, key managers and employees can quit their jobs. Therefore, top managers shall investigate the cultural fitness of agreement companies[139]. It can be easily stated that behind every great M&A, there is a great manager[140]. Hence, the skeletons of two companies are reshaped by managers for generating a new one[141].

1.2.2.3. Joint Ventures

A joint venture (JV) can be described as

"*cooperative business activity, formed by two or more separate organizations for strategic purposes, that creates an independent business entity and allocates ownership, operational responsibilities, and financial risks and rewards to each number, while preserving their separate identity/ autonomy*[142]*".*

Political, technological and economic changes trigger the joint venture strategies. Some countries force the foreign investors to find a local partner to enter their market[143]. For instance, the People's Republic of China has been forcing the *Law on Joint Ventures Using Chinese and Foreign Investment.* Because of this law, many foreign companies, usually the U.S. ones, have been collaborating with Chinese firms via joint ventures[144]. Additionally, a company may not able to finish a project or produce a designated good. In this case, the company can collaborate with another firm to use its source to finish the

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[137] Hill and Jones, p. 289.
[138] Byars, p. 84.
[139] Afsaneh Nahavandi and Ali R. Malekzadeh, "Acculturation in Mergers and Acquisitions", **The Academy of Management Review,** Vol:13, No. 1, 1988, p. 79.
[140] Michael A. Hitt, Robert E. Hoskisson and R. Duane Ireland, "Mergers and Acquisitions and Managerial Commitment to Innovation in M-Form Firms", **Strategic Management Journal**, Vol. 11, Special Issue: Corporate Entrepreneurship, 1990, (Merger), p. 32.
[141] Matteo Rossi, Shlomo Yedidia Tarba and Amos Raviv, "Mergers And Acquisitions In The High-Tech Industry: A Literature Review", **International Journal of Organizational Analysis**, Vol. 21 Issue: 1, 2013, p. 75.
[142] Wheelen and Hunger, p. 160.
[143] Wright et al, p. 76.
[144] Certo and Peter, p. 210.

job[145]. Companies make joint ventures since they require knowledge from outside of the company to develop their skills for having competitive position[146].

Unfortunately, 70% of joint ventures do not accomplish their objective because in the process of the joint venture developing, managers spend 23% of their time, while, for implementing the strategy they only spend 8% of their time[147]. Consequently, problems arise during the operation of JV. Agreement companies try to understand and internalize new strategy and try to integrate sources and cultures[148].

The advantages of JV cannot be ignored. Similar to other collaboration strategies, member of agreement companies share the market risks. If JVs are compared with acquisition strategies, joint ventures will be cheaper to enter a foreign market. Local partner of agreement can provide source of raw materials to foreign partner who can access to local markets. Additionally, local partner can be a bridge between local government and JV, get loan from local banks, have tax incentives and more importantly can provide local management[149]. On the other hand, members of joint venture have competitive effectiveness against their rivals; hence acting jointly can aggravate competition. Moreover, partnership companies can determine market prices and can accelerate changes in technology[150].

Although these positive effects, managers have to keep away from the JV strategy, if their companies long range planning are not suitable for this strategy. In addition, even if some countries encourage the foreign firms to transact business in their market via joint venture with local firms, some of them can restrain this policy[151]. Managers shall aware of the disadvantages of joint ventures. As a nature of acting

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[145] Wright et al, p. 76.

[146] Robert A. Pitts and David Lei, **Strategic Management Building Sustaining and Competitive Advantage**, West Publishing Company, The U.S.,1996, p. 222.

[147] Lawrance R. Jauch and William F. Glueck, **Business Policy and Strategic Management**, 5th ed, Mcgraw Hill INC, Singapore, 1988, p. 306.

[148] José C Casillas and Ana M Moreno-Menéndez," Speed of The Internationalization Process: The Role of Diversity and Depth In Experiential Learning", **Journal of International Business Studies**, Vol. 45, No. 1, 2014, pp. 98-99.

[149] Y.N. Chang and Filemon Campo-Flores**, Business Policy and Strategy**, Goodyear Publishing Company, INC, The U.S., 1980, p.16.

[150] Kathryn Rudie Harrigan, "Joint Ventures and Competitive Strategy", **Strategic Management Journal**, Vol. 9, No. 2, 1988, p. 155.

[151] Duane Hall, "International Joint Ventures Pros and Cons", **SAM Advanced Management Journal**, 1984, pp. 4-11.

jointly, agreement companies share the profits that lead lower profitability. In the some cases, managers can dispute each other[152].

1.3. COMPETITION AND COLLABORATIONS IN THE LINER SHIPPING INDUSRTY

Competition and collaboration is two interlinked terms and their relation affects all industries. Liner shipping industry is one of them and due to its global nature, the consequences of the competition- collaboration sprit all over the world. Under this title, as a begging, the future of liner shipping will be discussed and then the liner shipping collaboration strategies will be analyzed with examples

1.3.1. General Characteristics of Shipping Industry

First civilizations use the seas for fishing. Rafts or in dugout canoes were used for sailing[153]. During the 2000 B.C., Tigris and Euphrates rivers testified to first maritime transportation activities.[154]. Egyptians had used water transportation during the construction of pyramids. Ships carried the stones from the quarries to the pyramids construction sites. Ships were not only used to support the construction of the pyramids, Egyptians had also used them for fishing, fowling and transportation. Moreover, the earliest Egyptians kings benefited from the advantage of maritime forces to conquer their enemies, to threaten their rivals, to coerce their allies and to consolidate their power[155].

Today along with the technological developments, economic and cultural factors, ocean carriage trigger global integration. In a sense, maritime transportation facilitates

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[152] Chang and Flores, p. 121.
[153] C.Ernest Fayle, **A Short History of The World's Shipping Industry**, 2nd ed, Routledge-Taylor & Francis Group, The U.S., 2006, p. 26.
[154] Martin Stopford, **Maritime Economics**, 3rd ed, Routledge- Taylor & Francis Group, The U.S., 2008, p. 6.
[155] Gregory P. Gilbert , "Ancient Egyptian Sea Power and The Origin of Maritime Forces", **National Library Of Australian Cataloguing-In-Publication Entry**, 1962, p. 6, Http://Www.Navy.Gov.Au/Sites/Default/Files/Documents/Intsp_1_Ancient_Egyptsp.Pdf , (03.05.2017)

the globalization movement[156]. In the same manner, shipping activities are affected by results of globalization[157]. For instance, most of the ship-owners prefer to carry foreign flags[158].

Shipping bears striking similarities with other transportation types. The main objective of maritime transportation, like others, is to carry of cargoes from one point to other[159]. On the other hand, shipping differs considerably from other transportation modes since large amount of goods are carrying at low prices via seas. Beside it benefits, sea transportation is slower than other modes[160]. Maritime transportation comprises three key components: "*fixed infrastructure such as ports or terminals, vehicles such as ships or barges using the fixed infrastructure to move cargoes; organizational systems necessary to ensure that the vehicles and the fixed infrastructure are used effectively and efficiently"*[161].

Grounding on these components, shipping industry has been divided into main sub industries as liner and tramp[162]. At the beginning of 1900's, small, general-purposes ships were sailed crankily to carry coal, ores, and grain for transoceanic transportation. Any type of cargo without determined routes were carried by undisciplined sailors. Therefore, they earned a reputation as *"tramp steamers".* Through the period, "*tramp steamers"* was abbreviated as *"tramps"*[163]. Tramp shipping was officially defined in the

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[156] James J. Corbett and James Winebrake, "The Impacts of Globalization on International Maritime Transport Activity", **Global Forum on Transport and Environment in a Globalizing Word**,10-12 November 2008, Guadalarjara,Mexico, p. 4.
[157] Ioannis Theotokas, "On Top of World Shipping: Greek Shipping Companies' Organization and Management", **Maritime Transport: The Greek Paradigm Research In Transportation Economics**, Vol:21, p. 64.
[158] Stopford, p. 692.
[159] Y.H.V. Lun, K.-H. Lai and T.C.E. Cheng, **Shipping and Logistics Management**, Springer, London, 2010, p. 2.
[160] A. Güldem Cerit, "Maritime Transport As An Area of Competitive Advantage In International Marketing", **International Journal of Maritime Economics**, Vol:1, Number 3, 2000, p. 52.
[161] Lun et al, pp. 2-3.
[162] Suat Hayri Aka, "General Characteristics of The Liner Shipping and Analysis of Turkish Liners within Turkish Trade and Shipping", **World Maritime University**, Dissertations Paper: 99, 1990, p. 1.
[163] Lane C. Kendall, **The Business of Shipping**, 5th ed., Cornell Maritime Press, London, 1986, p. 12.

British Shipping Act 1935[164] that was imposed for giving financial support to tramp shipping companies due to the depression[165]. The act has stated the definition as;

> *"the vessels to which the Act applies are ships which are neither fishing vessels nor constructed or adapted for the carriage of liquid cargoes in bulk, nor so constructed or adapted that the space insulated for the carriage of special cargoes is in excess either of 50,000 cubic feet or of Io per cent. of the total space available for cargo[166]."*

The satisfactory definition has been made by Mexates as*; "any vessel with a tonnage of 4,000 dwt or above which in the long run does not have a fixed itinerary, and which carries mainly dry-cargoes in bulk over relatively long distances and from one or more ports to one or more ports, is an ocean or a deep-sea tramp.[167]*" Tramp ships do not follow certain routes and do not carry regular cargoes without fixed schedule[168].

Bulk cargos are mainly carried by tramp shipping companies[169]. There are two different types of bulk carriage; liquid and dry. In the liquid bulk shipping cycle crude oil, oil products, liquid gases and specialist cargoes are carried by tankers and handled by pumping system[170]. Big producers are located in the Middle East and America. From that regions crude oil has been delivered all over the world by large tanker ships[171]. As its understood from the name, dry bulk shipping carries dry bulk cargoes, generally categorized as either major bulks or minor bulks[172]. The major bulks cargoes are most curial products for daily life and industry. They are usually shipped in large bulk

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[164] L. Isserlis, "Tramp Shipping Cargoes, and Freights", **Journal of The Royal Statistical Society**, Vol: 101, No: 1, 1938, p. 60.
[165] Tramp Shipping Subsidy, 1935, Http://Filestore.Nationalarchives.Gov.Uk/Pdfs/Small/Cab-24-257-Cp-35-213.Pdf, (11.06.2018).
[166] Isserlis, p. 60.
[167] B. N. Metaxas, "The Future of The Tramp Shipping Industry", **Journal of Transport Economics and Policy**, Vol. 6, No. 3, 1972, p. 271.
[168] Clarkson Research Studies**, The Tramp Shipping Market**, April 2004, p. 10, Http://Www.Clarksons.Net/Archive/Research/Freestuff/Tramp_Shiopping_Market_April_2004.Pdf (07.04.2018).
[169]Gül Denktaş Şakar, "Deniz Ulaştırması: Yükler, Gemiler,Rotalar", **Denizcilik İşletmeleri Yönetimi** (Ed. A. Güldem Cerit, Ali Deveci and Soner Esmer), Beta, İstanbul, 2013, p. 35.
[170] Stopford, p. 432.
[171] F. Hennig, B. Nygreen, K. C. Furman, J. Song and G. R. Kocis "Crude Oil Tanker Routing and Scheduling", **INFOR: Information Systems And Operational Research**, Vol: 49:2, pp. 155-156
[172], Shun Chen, "Modelling and Forecasting In The Dry Bulk Shipping Market", Master of Science, **Shanghai Maritime University**, 2011, p. 1. Http://Citeseerx.Ist.Psu.Edu/Viewdoc/Download?Doi=10.1.1.837.9526&Rep=Rep1&Type=Pdf, (12.12.2017).

carriers. Five main categories of major bulks are "*iron ore, grain, coal, phosphates and bauxite".* Other commodities are considered as minor bulks that are carried in shiploads. The main examples of this kind of bulk carriage forest products and steel products[173].

1.3.2. Liner Shipping Industry Structure

Contrary to tramp shipping, timing is the most important factor for liner shipping. A ship is sailed on the determined route at determined schedule. Once a port is marked on the route, it does not matter whether there is enough cargo or not, ship must sail over that route. Therefore, liner services are more expensive than other shipping modes[174]. Moreover, liner ship owners do not overload their ships and generally have enough room for undetermined cargoes. On the other hand, if a liner ship is chartered for a long period, ship owners prefer full shiploads[175]. Liner ships are more expensive than other types of the ships. Consequently, liner services are more expensive than other shipping types. Due to the expensive ships, most of liner companies are generally supported by governments. In some countries, governments established their own liner fleet[176]. Due to the government supports and rate of return, there are relatively less liner shipping companies than tramp shipping companies and thus liner shipping companies have more bargaining power against their customer while determining freight rates[177]. As seen, there is only one similarity between liner and tramp; both of them are carrying goods on the seas. However, there are number of differences that are listed at Table 1.

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[173] Haifeng Wang, "Shipping Pools In Bulk Shipping Markets", **World Maritime University**, Dissertations. Paper: 226. 200, p. 5. Http://Commons.Wmu.Se/All_Dissertations, (08.10.2017).
[174] Necmettin Akten and Mehmet Ali Albayrak, **Deniz Taşımacılığı Kılavuzu**, Ekim Yayınları, 1988, İstanbul, 1988, p. 9.
[175] J.O. Jansson and D. Shneerson, **Liner Shipping Economics**, Chapman and Hall, London, 1987, p. 16.
[176] Aka, p. 2.
[177] Şakar, p. 36.

Table 1: The main differences between tramp shipping and liner shipping[178]

TRAMP SHIPPING	LINER SHIPPING
CARGO TYPE	
Generally raw materials which fulfill the docks	All types of final products or semi-finished products
FREIGHT RATES	
Due to the seasonal fluctuations, freight rates have differential nature	Freights are generally steady
ROUTES	
Tramp ships are sailed wherever cargo is available under the unterminated schedule	Liner ships are operated under the fixed route and schedule
ORGANIZATIONAL STRUCTURE	
Smaller than liner shipping, specially they have no marketing department	They have complex and big organization structure due to the market opportunities and thus they have effective marketing departments
COLLABORATIONS	
Shipping Pools	Conferences and Alliances

1.3.2.1. Cargoes in Liner Shipping

In the early days of liner shipping, ships were carrying sacks and barrels[179] but after the 1960's liner shipping evolved, containers were entered to the shipping industry[180]. Even though carriage types have been changing from time to time, cargoes remain same; mainly general cargoes are carried by liner ships[181]. General cargoes were classified by Stopford[182] as following;

[178] Şakar, p. 37.
[179] Murat Yıldiz, "**Layner Ulaştirma Sistemlerinde Optimum Filo Planlamasi Modeli**", (Phd Thesis), Istanbul University, Graduate School of Natural and Applied Sciences, Istanbul, 2008, p. 9.
[180] Theo Notteboom and Jean-Paul Rodrigue,"Containerization, Box Logistics and Global Supply Chains: The Integration of Ports and Liner Shipping Networks", **Maritime Economics & Logistics**, Vol:10, 2008, p. 156.
[181] Jansson and Shneerson, p. 22.
[182] Stopford, p. 65.

- *"Loose cargo, individual items, boxes, pieces of machinery, etc., each of which must be handled and stowed separately.*
- *Containerized cargo, standard boxes, usually 8 feet wide, often 8 feet 6 inches high and mostly 20 or 40 feet long, filled with cargo*
- *Palletized cargo, for example cartons of apples, are packed onto standard pallets, secured by straps or pallet stretch film for easy stacking and fast handling.*
- *Pre-slung cargo, small items such as planks of wood lashed together into standardized packages.*
- *Liquid cargo travels in deep tanks, liquid containers or drums.*
- *Refrigerated cargo, perishable goods that must be shipped, chilled or frozen, in insulated holds or refrigerated containers.*
- *Heavy and awkward cargo, large and difficult to stow."*

1.3.2.2. Liner Ships and Main Routes

Liner ships are classified in five categories as; Conventional General Cargo Ships (Tween Deck Ships), Multi-Purpose Ships, Container Ships, Ro-Ro Ships, Barge Carrying Ships[183]. With respect to Table 2, tramp ships outnumber the liner ships. When the death weight tones (DWT) of vessels are studied, oil tankers and bulk carriers have been always taking first place since 2011. As a liner ships, container and general cargo ships are not hold a candle to tramp shipping. From 2001 to 2017 every shipping type have tendency to increase except general cargo.

The most common liner ship type is container ships that look like an open-top box[184]. Liner shipping has changed ineradicably after 1960 when container was introduced[185]. Not only liner shipping, world trade and global freight transportation culture had been changed by containers. Containers decrease the handling times that leads a greater momentum in freight distribution. Due to the velocity of freight distribution, export and import figures moved up and globalization process gained speed[186]. Consequently, it can be easily said that speed is the main feature of container transportation. In order to get more speed, container ships designs have been

[183] Aka, pp. 3-6.
[184] Stopford, p. 581.
[185] Proshanto K. Mukherjee and Mark Brownrigg, **Farthing On International Shipping**,4th ,ed., Springer 2013,p. 22.
[186] Notteboom and Rodrigue, p 155.

changing[187]. First containers were carried with other commodities by cargo ships. However, this kind of ship was not appropriate for fast loading and unloading. Therefore, new types of ships were built. These new ships were rigged with cell guides in order to decrease handling time[188]. Also, the size of containers ships have been growing day by day since bigger ships have a lower expense per Twenty-foot Equivalent Unit (TEU)-mile than smaller units with the identical load factor[189]. Nowadays, giant big boxes are sailing all over the world. Recently 10,000 TEU and 12,500 TEU containerships was launched by Japanese[190].

[187] Stopford, p. 582.
[188] Niko Wijnolst and Frans Waals, **Shipping Industry Structure,** Delft University Press**,** Netherlands, 1999, p.155.
[189] Thoe E. Notteboom, "Container Shipping and Ports: An Overview", **Review of Network Economies** Vol:3, Issue:2, 2004, p. 88.
[190] Akio Imai, Etsuko Nishimura, Stratos Papadimitrio and Miaojia Liu, "The Economic Viability of Container Mega-Ships",**Transportation Research,** Part E-42, 2006, p. 22.

Table 2: World Merchant Fleet Types Dead Weight Tons in Thousands[191]

YEARS/SHIP TYPES	TOTAL	CONTAINER	CONTAINER %	OIL TANKER	OIL TANKER %	BULK CARRIER	BULK CARRIER %	GENERAL CARGO	GENERAL CARGO %	OTHER TYPES OF SHIPS	OTHER TYPES OF SHIPS %
2001	802.771	69.124	8,6	284.864	35,5	280.323	34,9	99.895	12,4	68.565	8,5
2002	822.011	77.329	9,4	286.001	34,8	294.780	35,9	95.693	11,6	68.208	8,3
2003	841.735	83.281	9,9	308.683	36,7	296.140	35,2	96.457	11,5	57.173	6,8
2004	863.667	91.621	10,6	320.658	37,1	308.935	35,8	94.331	10,9	48.122	5,6
2005	907.474	100.226	11,0	340.748	37,5	325.666	35,9	91.827	10,1	49.007	5,4
2006	965.006	112.702	11,7	356.109	36,9	349.721	36,2	96.392	10,0	52.249	5,4
2007	1.042.328	128.321	12,3	382.975	36,7	367.542	35,3	100.934	9,7	62.554	6,0
2008	1.117.779	144.655	12,9	407.881	36,5	391.127	35,0	105.492	9,4	68.624	6,1
2009	1.192.317	161.919	13,6	418.266	35,1	418.356	35,1	108.881	9,1	84.895	7,1
2010	1.276.137	169.158	13,3	450.053	35,3	456.623	35,8	108.232	8,5	92.072	7,2
2011	1.415.110	183.691	13,0	439.932	31,1	547.192	38,7	81.159	5,7	163.135	11,5
2012	1.532.114	196.821	12,8	454.349	29,7	624.022	40,7	78.138	5,1	178.784	11,7
2013	1.625.750	206.547	12,7	472.890	29,1	686.635	42,2	77.589	4,8	182.090	11,2
2014	1.688.886	216.199	12,8	481.579	28,5	730.296	43,2	74.989	4,4	185.825	11,0
2015	1.747.417	228.230	13,1	490.847	28,1	762.322	43,6	74.538	4,3	191.480	11,0
2016	1.805.543	244.436	13,5	506.132	28,0	779.565	43,2	75.121	4,2	200.288	11,1
2017	1.862.241	245.762	13,2	535.864	28,8	795.839	42,7	74.961	4,0	209.815	11,3

[191] http://unctadstat.unctad.org, (08.08.2018)

Ro-Ro ships were firstly used to carry steams trains, which were not able to cross to the bridges due to their size. During Second World War Ro-Ro ships carried tanks, cars and other war machines. This practice was applied to commercial shipping later on and it became very popular since it offers various advantageous like speed[192]. Even though, container ships give an opportunity for fast transportation, todays' cargo owners desire to send their products more quickly to their customers. Therefore, they seek new alternatives for container ships. In order to answer this requirement, ship owners had offered them Ro-Ro ships. Modern Ro- Ro ships look like a babushka doll; they carry trucks, cars and trains, which are carrying general cargoes. As seen, cargoes of the Ro-Ro ships have their own wheels, therefore for loading and unloading ro-ro ships do not require cranes or any type handling equipment. Cargoes enter the ships' open deck via ramps[193]. In addition, Ro-Ro ships are the most important chain of the intermodal transportation. It plays a bridge role among road transportation and sea transportation[194].

Multi-Purpose vessels are another type of liner ships. Multi-Purpose ships' tween decks are designed to carry full load containers as well as general cargo[195]. Heavy and formless commodities cannot be sailed in the containers. Therefore, these kinds of cargoes are putted into bulks in order to increase deadweight utilization[196].

Tween-Deck ships are the simplest liner ship type. The main usage of this kind of ships is to carry general cargo and bulk cargo like grain simultaneously[197]. After the 1950s, tween deck ships lost their fame. Multipurpose ships were used for carriage big bulks and containers[198].

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[192] I.M.O and Ro-Ro Safety, January 1997, Http://Www.Imo.Org/Enourwork/Safety/Regulations/Documents/RORO.Pdf. (19.02.2018).
[193] Stopford, p. 586.
[194] Şakar p. 44.
[195] Aka, p. 4.
[196] Stopford, p. 586.
[197] Şakar, p. 45.
[198] Stopford, p. 589.

1.3.3. Collaboration Strategies of Liner Shipping

As it is previously discussed, liner ships sail over the determined route even if not there is an adequate cargo and yet ship owners had faced with profitability risks. Initially, in order to overcome this problem, ship owners were banded together under the conference systems[199], which were exempted from anti-competitive legislation by US Sherman Act[200]. When the conference system was collapsed, market structure of liner shipping, mainly container carriage companies, industry had been reorganized by collaboration strategies[201], which are slot chartering, vessel sharing agreements, alliances, M&A and joint ventures[202]. Additionally, the globalization has triggered the international trade. Consequently, liner shipping companies have established these strategies in order to decrease transport costs via risk and cost sharing[203]. The collaborations are vital for companies' longevity[204]. Each collaboration strategies have unique futures therefore under this chapter joint ventures, conference, alliances, and M&A deeply in the scope of container shipping companies' strategies will be discussed.

1.3.3.1. Conference System

When the Suez Canal and steamship were introduced to shipping world, liner market became more competitive[205]. In order to find a remedy for this problem, ship-owners established the conference system and in 1875, first conference was introduced

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[199] Stopford, p. 555.
[200] Rogan Mclellan, "Liner Shipping Development Trends", **Maritime Policy and Management** Vol:33 No:5, 2006, p. 519.
[201] Brian Slack, Claude Comtois and Robert Mccalla, "Strategic Alliances in The Container Shipping Industry: A Global Perspective", **Maritime Policy and Management**, Vol: 29:1, 2002, p. 65.
[202] Theo O. Notteboom, Francesco Parola, Giovanni Satta and Athanasios A Pallis, "The Relationship Between Port Choice and Terminal Involvement of Alliance Members in Container Shipping" **Journal of Transport Geography**, Vol: 64, 2017, pp. 158-173.
[203] Çimen Karataş Çetin and A. Güldem Cerit, "Organizational Effectiveness at Seaports: a Systems Approach", **Maritime Policy and Management,** Vol: 37:3, p. 201.
[204] Photis M. Panayides and Robert Wiedmer, "Strategic Alliances in Container Liner Shipping", **Research in Transportation Economics**, Vol: 32, 2011, p. 25.
[205] Mariner Wang, "The Formation of Shipping Conference and Rise of Shipping Alliance", **International Journal of Business Administration**, Vol: 6 No:5, 2015, p 22.

by the route between the United Kingdom (U.K.) and Calcutta[206]. Through conference agreement, ship owners purposed a sustainable liner market[207] in order to achieve they set pricing strategy[208].

By establishing the conferences ship owners aim to overcome the competitive stress by means of freight rate controlling, restrict first entries, and tidy up sailing routes for fast and better services[209]. In addition, member parties can share the routes, in other words, they can determine that which member will sail from one port to another. By sharing the routes, they can prevent aggregation of ships at the ports. From the customer point, they have knowledge about when the ship will arrive and the price of transportation, therefore customer can make agreements that are more lucrative[210].

Even though the conferences were established for members' welfare against intense competition environment, there is always a risk that members are still in the same industry and they compete with each other. Therefore, in order to avoid competition among members, conference agreements involve following rules; fixed rate clauses and sailing borders. Additionally, agreements comprise penalties in the case of acting against these rules[211]. Some of articles of conference agreements can permit the parties to sign profitable freight contracts with non-conference members[212].

Companies, who did not involve to the conferences, are under the pressure of member firms in the terms of selling prices. Soon after, number of existing firm dwindled. The market sources were wasted by conference members. Because of rare sources, member parties contended with each other. Financially strong companies

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[206] Stopford, p. 555.

[207]Marco Benacchio, Claudio Ferrari and Enrico Musso. "The Liner Shipping Industry and EU Competition Rules ", **Transport Policy,** Vol:14, Issue:1, 2007, p. 1.

[208] Enna Hirata, "Contestability of Container Liner Shipping Market in Alliance Era", **The Asian Journal of Shipping and Logistics**, Vol: 33 (1), 2017, p. 29

[209] Niko, p. 135.

[210] "Advantages and Disadvantages of Shipping Conferences and Agreements in the American Foreign Trade".**The Annals of the American Academy of Political and Social Science**, Vol: 55, 1914, p. 247.

[211] Jeroo Kurus Coyaji" Structure of Liner Shipping Freight Market in India: I: Organisation of Shipping" **Economic and Political Weekly**, Vol: 8, No. 35, 1973, p. 1603.

[212] Paul S. Clyde and James D. Reitzes" The Effectiveness of Collusion Under Antitrust Immunity The Case of Liner Shipping Conferences" **Bureau of Economics Staff Report Federal Trade Commission Washington, D.C**. 20580 December 1995, (Effectiveness), p. 4.
https://www.ftc.gov/sites/default/files/documents/reports/effectiveness-collusion-under-antitrust-immunity-case-liner-shipping-conferences/232349.pdf, (25.04.2016) (The Effectiveness of Collusion).

reduced the freight rates[213]. Moreover, conferences lose their price determination power due to containerization and globalization[214]. Round the world companies, mainly container companies were powerful enough to compete with conferences[215]. As a result of diminishing return, liner conference lost their bargaining power against regulatory authorities. Most of the authors and states started to discuss that why liner conferences were exempted from anti-trust regulations. Soon after the negations, liner conferences became subject to anti-trust regulations[216]. Unavoidably, conferences cannot come until today. Under these circumstances, liner companies, mainly companies, established alliances, mergers in order to minimize unit costs[217].

1.3.3.2. Strategic Alliances

New York was the point of departure for cruise ships because of its large rail road connections. Unfortunately, the cruise ships had to sail under the bad weather conditions and the trips took long twenty-four hours in order to reach the final stop, Caribbean. The scenario has been changed by airline industry that offered two or three hours travelling time from Miami to Caribbean. Therefore, departures ports were moved to Miami. Over the years, liner shipping companies and airline companies arranged their schedules consentaneously. This joint acting has produced positive results. One of the first liner alliance agreements was established by cruise ship companies and airways companies. With respect to this alliance, the passenger used planes for the voyage from the U.S. to one part of Europe and then sailed to other European countries[218]

In 1990's, strategic alliances were born because of technological innovations, high capital costs, deregulation policies and high competitive environment[219]. The first strategic alliances struggled with serious problems like complex organizations and

[213] The Annals of the American Academy of Political and Social Science, p. 247.
[214] Stopford, p. 555.
[215] Niko, p. 135.
[216] Panayides and Wiedmer, p. 26.
[217] Stopford, p. 557.
[218] Kendall, p. 395.
[219] Pietro Evangelista and Alfonso Morvillo, "Alliances In Liner Shipping: An Instrument To Gain Operational Efficiency or Supply Chain Integration?", **International Journal of Logistics: Research and Applications**, Vol:2-1, 1998, p. 25.

competition among alliance member[220]. In 1997, more than half of the main global maritime trade routes were surrounded by the four main strategic alliances that contain top 10 container companies[221]. Table 3 gives detailed information about container shipping alliances evaluation. With respect to table 3, the formation of the alliance has been changing year by year. Some of the alliances' names were changed or some of the alliance members were entered the other alliances. In 2017, 2M, Ocean Alliance and The Alliance survived[222]. Even though, some alliances had lost their favor, it is obvious that frontiers of the container market have been following the alliance strategy instead of conferences. Beside the conferences legal position, alliance strategies have more strategically beneficial for shipping companies but it is more complex than conferences. When the conferences and strategic alliances are compared, it will be found that conferences was aiming the cost reduction and risk sharing, but then, strategic alliances are aiming cost reduction, risk diversification, horizontal magnification, improvements in services[223].

When the calendars showed 2011, CKYHE Alliance had 11.3% market share, Grand Alliance had 9.2% and The New World Alliance had 8.5. In 2016 the market conditions were changed. 2M Alliance was the clearly market leader, with the amount of 27, 7% market share. The Ocean 3, G6 and CKYHE Alliances shares did not change dramatically during the 5 years period[224]. The data of New World Alliance and Grand Alliance did not appear in 2016 numbers hence in 2012, New World Alliance members (APL, Hyundai and MOL) and Grand Alliance members (Hapag-Lloyd, NYK and OOCL) have established a new alliance, G6 Alliance[225]. Table 4 illustrates that the

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[220] Hua-An Lu, James Cheng and Tai-Shen Lee, "An Evaluation of Strategic Alliances in Liner Shipping – An Emprical Study of CKYH", **Journal of Marine Science and Technology**, Vol:14, No:4, 2006, p. 202.
[221] Pierre, Cariou, **Strategic alliances in liner shipping: An analysis of "operational synergies**". (PhD Thesis) Nantes: University of Nantes, 2000, p. 2.
[222] Notteboom et al, p. 161.
[223] Renato Midoro and Alessandro Pitto, "A Critical Evaluation of Strategic Alliances In Liner Shipping", **Maritime Policy & Management**, Vol:27:1, 200, p. 31.
[224] Philipp Rau and Stefan Spinler "Alliance Formation in a Cooperative Container Shipping Game: Performance of a Real Options Investment Approach" **Transportation Research**, Part E 101, 201, p. 156.
[225] Sheng Teng Huang and Shigeru Yoshida "Analysis of Key Factors for Formation of Strategic Alliances in Liner Shipping Company: Service Quality Perspective on Asia/Europe Route after Global Economic

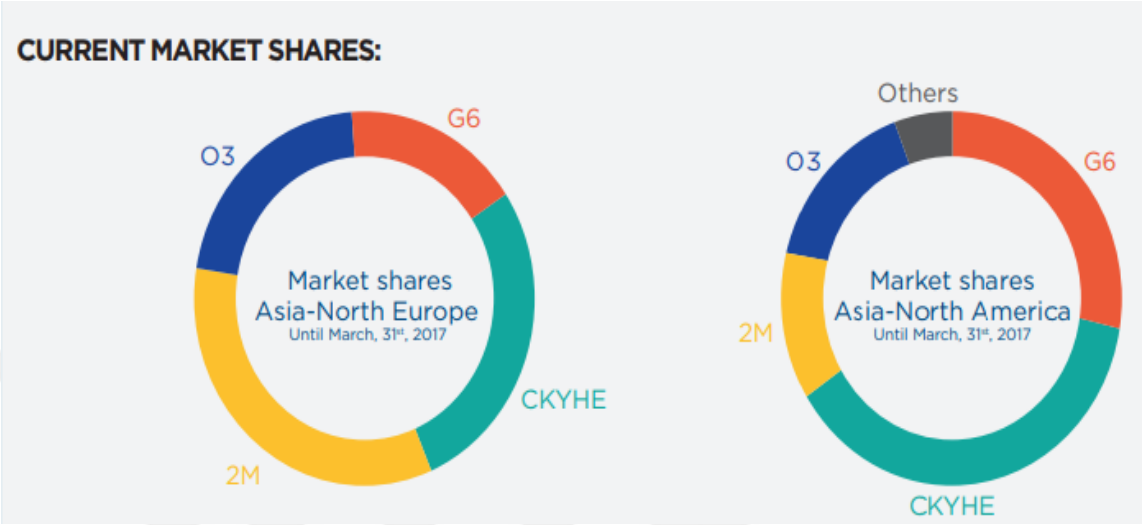
market shares varies from the market to market. In 2017, CKYHE is the leading position in the Asian-North America route. Besides, it is in the second place after 2M alliance in the Asian-North Europe market. Taking into account all of these, in order to discuss all alliances, Ocean Alliance, G6 Alliance, 2M Alliance, 3P Alliance and CKYHE Alliance will be examined in favor of their market power and validity.

Table 3: A Chronological Table of Shipping Alliances[226]

DATE	ISSUE
1994	**The Global Alliance** formed (*APL, MOL, OOCL, Nedlloyd)*
1995	**Grand Alliance** formed (*Hapag Lloyd, NYK, NOL, P&O and MISC*[227])
1998	**New World Alliance** formed (*APL, MOL, Hyundai Merchant Marine*)
2000	**CKYH Alliance** formed *(COSCO, K-Line, Yangming, Hanjin*)
2011	**G6 Alliance** formed (*APL, MOL, Hyundai, Hapag Lloyd, NYK, OOCL*)
2013	**3P Alliance**[228] formed *(Maersk.MSC, CMA-CGM)*
2014	**2M Alliance** formed (*Maersk, MSC*)
2014	**O3 Alliance** formed (*CSG, CMA-CGM, UASC*)
2014	**CKYHE Alliance** formed with *Evergreen* joined
2017	**O3 Alliance** to be renamed to **Ocean Alliance** consisting of CMA(APL), Cosco(CSG), Evergreen, OOCL **The Alliance** to be formed with Yang Ming, Hapag Lloyd(UASC) and NYK/K-Line/MOL

Crisis", **World Academy of Science, Engineering and Technology International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering,** Vol:7, No:6, 2013 p. 1414.
[226] Hirata, p. 28.
[227] With regard to Notteboom et al, p. 161. , MISC was the member of the stated alliance.
[228] The source did not mention this alliance.

Table 4: March 2017 Market Shares of Alliances in the Selected Routes[229]



At the end of the last century, three Far East companies, K Line (Japanese), Yang Ming (Taiwan) and COSCO (China) have established a slot charter in order to swap open seas services. As time passes by, they re-established their collaboration to joint fleet agreement. These successful collaborations brought the other shipping companies attention and in 2003, a Korean firm Hanjin has cooperated with these companies. This collaboration bred a new alliance called CKYH[230]. In 2014, CKYH Alliance welcomed the Evergreen and then renamed CKYHE[231]. The CHYHE alliance is focusing on the Asia and Northern Europe Market with six joint schedules and four legs are allocated to the Asia-Mediterranean route in order for to have efficient and high quality shipping services. By this means, transit times declines and shipping frequency rise. Moreover, the members aim to have an environmental sensitive alliance. In order to achieve this goal, ships are sailed under eco-slow steaming policy that reduces oil consumption and CO2 emissions[232].

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[229] CMA-CMG webpage, https://www.cma-cgm.com/static/Communication/Attachments/MAG%2057%20final_UK_BD_25-01-17.pdf, (12.09.2018)
[230] Mariner Wang, p. 31.
[231] Hirata, p. 31.
[232] Evergreen webpage, https://www.evergreen-line.com/tuf1/jsp/TUF1_Html.jsp?page=TBN1_140220.jsp, (23.05.2017).

Lu and et al[233]discussed the CKYH alliance in terms of reasons and success of collaboration. The primary aim of CKYH alliance is to enlarge services. Other purposes are to create more sustainable shipping services and to penetrate quickly to new routes. The study also investigated the success of CKYH alliance According to the study, the ability of the acting jointly and mutual trust are the main factor of successful collaboration. These two determinants rust upon each other. If the members approach cooperativeness manner, there will be more trustworthy environment[234].Not surprisingly, number and size of the members affects the alliance progress. Consequently, number of parties must be chosen in terms of their size and selected members must create coherence[235].

As it is mentioned above, in 2011, members of Grand Alliance and New World Alliance have collaborated with each other under the G6 Alliance in order enlarge their routes. The G6 Alliance routes encompass the Asia-to-Europe-and-Mediterranean market[236]. This alliance is the cornerstone of the container shipping in terms of six members who can fulfill their ships with more containers to enlarge load ability with almost 100 ships[237]. The new alliance offers quickest transit times, worldwide port

On 18th of March 2013, three giant container carriers CMA CGM, Maersk Line and MSC Mediterranean Shipping Company had signed a long term alliances for Asia-Europe, Trans-Pacific and Trans-Atlantic market, named P3 alliance[238] which was focusing to have steady, continual and elastic services and operations in order to achieving to the high cost efficiencies[239]. In this manner, 225 vessels on 29 loops were delegated[240]. P3 alliance was controlling the 37% of World container volume. 42% of

[233] Lu, pp. 202-212.
[234] Panayides and Wiedmer, p. 27.
[235] LU, pp. 202-212.
[236] Orient Overseas Container Line web page
http://www.oocl.com/eng/pressandmedia/pressreleases/2012/Pages/08feb12.aspx (11.09.2018)
[237] Mariner Wang, p. 33.
[238] CMA-CMG webpage.
[239] Mariner Wang, p. 33.
[240] CMA-CMG webpage.

Maersk capacity, 34% of MSC capacity and 24% of CMA CGM capacity were charged with P3 operations[241].

The generation of the P3 alliance had affected its competitors who changed their market concentration parallel with the P3 routes. However, P3 was one-step ahead of them due to its market power. P3 alliance can easily schedule and coordinate ships to gain network economies, can deploy bigger and top model vessels to obtain scale economies, and can have strong bargaining power[242].

In 2014 legal process started for P3. E.U. and the U.S. authorities were approved the alliance however it was terminated as a result of Chinese Ministry of Commerce (MOFCOM) decision. With respect to MOFCOM, the alliance market share reached 47% market share in Asia-Europe route, such a market power gave more power that is competitive to the members. Taking into account of the market power of the members, P3 alliance was forbidden in accordance with public interest[243].

After the failure of the 3P alliance, in 2014, Maersk and MSC have announced 2M alliance, which involves 10 years vessel sharing policy[244]. Even though approval process of P3 alliance was adversity, China, the U.S. and E.U. confirmed the 2M alliance[245]. This kind of collaboration is another way of acting jointly. Hence as Lars Jensen, Seaintel Maritime Analysis chief executive had stated that *"if the authorities are not allowed to do alliances, companies will look more and more at vessel sharing agreements[246]".*

Maersk and MSC have submitted all their ships to 2M alliance in Asia-Europe, Transpacific and Transatlantic routes[247], which comprise 23 legs for fast transit times[248].

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[241] Mariner Wang, p. 33.
[242] Wei Yim Yap,"P3 Alliance and Its Implications on Contestability in Major Gateway Ports in NorthAmerica" **Transportation Journal**, Vol. 53, No. 4, 2014, p. 499.
[243] Rawindaran Nair," Study on Economic Regulation of Collaborative Strategies among Container Shipping Companies Following Repeal of European Union Regulation 4056/86", **The Asian Journal of Shipping and Logistics,** Vol:32(2), 2016, pp. 92-93.
[244] https://worldmaritimenews.com/archives/149314/2m-alliance-officially-launched/, (23.06.2018).
[245] Federico Quartieri, "Are Vessel Sharing Agreements Pro-Competitive?", **Economics of Transportation**, Vol:11-12, 2017, p. 34.
[246]https://www.lloydsloadinglist.com/freight-directory/sea/P3-rejection-is-not-the-end-of-the-world/1072.htm#.W6DqQXszaM8 , (22.06.2018).
[247] Mariner Wang, p. 34.

The main purpose of the 2M alliance was summarized by Maersk Representative Michael Storgaard emphasized that "*2M will allow us to realize cost savings while addressing regulatory concerns*"[249]. Liu had compared the efficiencies of the 2M alliance and the CKYHE alliance in the view of revenue maximization, determined that 2M alliance is more remunerative than CKYHE alliance with the total revenue $2.109 billion[250]. In 2016, 2M alliance was controlling 37% of the global shipping market[251]. In the Transpacific trade, the share was 42%[252].

In 2016, 2M were welcomed its new member, Hyundai Merchant Marine (HMM) and 2M renamed to 2M+H strategic cooperation. The new collaboration entered into force in April 2017. Through this agreement, HMM is able to attain a place in the 2M members' network and Maersk and MSC can reach the HMM Asia-US West Coast services.[253]

In 2016, COSCO Container Lines, CMA CGM, Evergreen Line and Orient Overseas Container Line established the Ocean Alliance[254], which allows the members to serve competitive products and a wide range of routes. The alliance aimed to give value added and fast shipping services[255]. More than 40 maritime services and 331 ships are gathered together through ocean alliance that is the broadest operational

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[248] Corianne Egan, "2M Alliance Reveals Finalized Service Strings" 2014, https://www.joc.com/maritime-news/container-lines/2m/2m-alliance-reveals-finalized-service-strings_20141203.html, (16.06.2018).

[249] https://www.lloydsloadinglist.com/freight-directory/adviceandinsight/From-P3-to-2M-a-China-story/1383.htm#.W6DqJHszaM8, (22.06.2018).

[250] Ruixiao Liu, "Analysis of The Efficiency of Current Liner Shipping Alliance between Asia and Europe",(Master Thesis), **Erasmus University** in Maritime Economics and Logistics, Rotterdam, 2014/2015 p. 35.

[251] UNCTAD, "Review of Maritime Transport" 2017, p. 49., https://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf (22.06.2018)

[252] Philip Dawas, "Shifting Alliances and The Impact on Terminal Operators A few strategic issues", Drew Maritime Advisors. https://events.joc.com/sites/events.joc.com/files/events/PPNA2016/Presentations/PhilipDamas_Drewry%20presentation%20to%20JOC%20v2%2020161206.pdf (19.06.2018).

[253] Hyundai Merchant Marine, Customer Advisory, HMM webpage https://www.hmm21.com/cms/business/U.S./information/news/__icsFiles/afieldfile/2016/12/14/HMM_REACHES_AGREEMENT_WITH_2M_ALLIANCE.pdf, (21.06.2018).

[254] http://www.apl.com/wps/portal/apl/apl-home/services/OCEANALLIANCE, (21.06.2018).

[255]Cosco Shipping Web Page, http://lines.coscoshipping.com/home/News/detail/14611437304137691710/50000000000000233?id=50000000000000233, (21.06.2018).

memorandum ever signed between shipping firms.[256] The alliance offers 20 transpacific services (estimated 160 port pairs, with 13 Asia - West Coast North America services, 7 Asia - East Coast North America and the U.S. Gulf services), 6 Asia - Europe services (estimated 110 port pairs), 5 Asia - Mediterranean services (estimated 165 port pairs), 3 Transatlantic services (estimated 70 port pairs), 5 Asia – Middle East services (estimated 70 port pairs), 2 Asia - Red Sea services (estimated 35 port pairs)[257].

Legal authorizes, Ministry of Transport of the People's Republic of China, the U.S. Federal Maritime Commission (FMC) and South Korea's Ministry of Oceans and Fisheries (MOF) have ratified the OCEAN Alliance. Furthermore, The OCEAN Alliance is accordant with EU legislation[258].

Finally, by April 2017, The Alliance, Ocean Alliance and 2M have reached the capacity of 15.862.743 TEUs., which means that they have 75% of the market share. However, the alliances' formations have been showing an alternation. The Ocean Alliance are involving CMA-CGM, China COSCO, Evergreen and OOCL. Hapag-Lloyd, was merged with UASC, MOL, NYK line and Yang Ming under The Alliance. Frontiers of the market Maersk and MSC have established the 2M alliance in which Hyundai Merchant Marine has affiliate[259].

A member of a strategic alliance can increase the freight incomes, keep down the costs if the all members of alliances create a mutual trust environment and establish good communication skills[260]. More importantly, parties to the strategic alliances are able to use the member ships without spend money. As it is mentioned above, liner ships are more expensive than the other ships therefore ship owners had followed strategic alliance strategy in order to reduce capital investments[261]. Moreover, members of the

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[256] https://www.cma-cgm.com/products-services/ocean-alliance, (21.06.2018).
[257]Evergreen Line Web Page, https://www.evergreen-line.com/tuf1/jsp/TUF1_Html.jsp?page=TBN1_161103.jsp, (11.06.2018).
[258]Orient Overseas Container Line web page, http://www.oocl.com/eng/pressandmedia/pressreleases/2016/Pages/03nov16.aspx, (11.06.2018).
[259] Anneta Varbanova, "Concentratıon in Lıner Shippıng and Alliances Formatıon: Issues and Challenges" **Scientific Proceedings XIV International Congress**, "Machines. Technologies. Materials." Summer Session, Year I, Volume: VI, 2017, pp. 497-500.
[260] Lu, pp. 202-212.
[261] Slack et al, p. 66.

agreement have an opportunity to enter new markets and extend their activity area[262]. When all is said and done, Panayides and Wiedmer[263] divided the objective of liner shipping alliances into five groups; financial, economic, strategic, marketing and operational. In terms of finance, ship owner expectations from strategic alliance are to have higher incomes, to get more wealth, to share financial risks. Economies of scale and cost sharing are the economic benefits of alliances[264]. In addition, strategically an alliance enables the ship owners to enter new markets, to enlarge their routes, to have more purchasing power. The alliances offer more satisfactory services to customers. Because members are able to use each other ships and routes. Therefore, a member can have more chance to offer value added services to customers. Moreover, the share-based policies give more operational advantages while planning the vessel schedules[265], managing the containers, chartering the ships and using the ports[266]. In addition to horizontal collaborations, liner companies prefer to collaborate with their suppliers or to aggregate their transport chains by means of strategic alliances[267]. Parallel with this strategy, strategic alliances not only include vessel-sharing policies, but also involve common use of ports, logistic facilities and procurement[268]. In 2017, 2M alliance had provided participants with 8 terminals includes Rotterdam and Antwerp. The Ocean Alliance had four terminal usage agreements in Rotterdam and Antwerp. The Alliance only signed an alliance with two ports in Hamburg and Rotterdam[269]. Even if the alliances do not make collaborations with the terminals, they have more bargaining power against terminal operators since the members of alliances have remarkable share of trade[270].

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[262] Midoro and Pitto, p. 33.
[263] Panayides and Wiedmer, p. 27.
[264] Ji-Feng Ding and Gin-Shuh Liang,"Using fuzzy MCDM To Select Partners of Strategic Alliances For Liner Shipping", **Information Sciences**, Vol: 173, 2005, p. 199.
[265] Panayides and Wiedmer, p. 26.
[266] Stopford, p. 558.
[267] Evangelista and Morvillo, p. 22.
[268] Midoro and Pitto, p. 33.
[269] Notteboom et al, p. 162.
[270] Geraldine Knatz, "How Competition is Driving Change in Port Governance, Strategic Decision-Making and Government Policy in The United States", **Research in Transportation Business & Management,** Vol: 22, 2017, p. 68.

Additionally, when the alliance members' individual efficiency and the alliance efficiency are compared, it will be resulted that being an alliance member is more effective than operating alone[271]. However, it is not easy to gain accomplish from an alliance. In order to establish an effective membership, firms shall determine the borders of alliance activities shall be aware of market uncertainty, shall test abilities of members whether they fit to act joint or not and shall establish a coordination among sale and marketing activities[272]. The liner alliances do not comprise price fixing[273] and do not give the right of ownership of ships. The property and management remain at the ship-owner[274].

1.3.3.3. Mergers and Acquisitions

After the collapse of conferences, mergers and acquisitions also became very popular among liner carriers. From 1991 to 1996 periods, only few M&A strategy has been introduced. M&A was on the crest of wave beginning from 1997 to 2000 and after the 2000's it felt from favor and alliances shined like a star[275]. Table 5 demonstrates the congestion of M&A in 1996-2000. The main reason of these alterations is level of competition. When the market became more competitive, liner companies prefer to collaborate through acquisition instead of alliances. Hence, the acquired firm has been protected from rivalry pressure by bidding firm[276]. Some of the liner mergers merged with other companies. For instance, P&O Container Liners and Nedlloyd established P&O Nedlloyd merger, which was taken over by Maersk Line. In addition, Sealand and Maersk signed an M&A[277].

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[271] Shih-Liang Chao and Chun-Wei Lai ,"Comparing the Efficiency of Alliance Members and Independent Lıner Carriers: a Metafrontier Analysis", **Maritime Economics and Logistics**, Vol: 20, Issue: 76, 2017, pp. 1-16.
[272] Midoro and Pitto, p. 32.
[273] Panayides and Wiedmer, p. 26.
[274] Stopford, p. 558.
[275] Mike Fusillo, "Structural Factors Underlying Mergers and Acquisitions in Liner Shipping" **Maritime Economy & Logistics** Vol: 11, 2009, (Structural Factors), pp. 209-226.
[276] Shobha S. Das "To partner or to acquire? A longitudinal study of alliances in the shipping industry", **Maritime Policy and Management**, Vol. 38, No. 2, 2011, pp. 111-113
[277] Notteboom, pp. 90-91.

Strategic alliances and M&A have some differences. According to alliance strategy every member has right to speak and thus decision making process lasts a long time. On the contrary, M&A has been managed by one chief executive[278]. The degree of relationship is different when the M&A and alliance strategies are investigated. M&A causes closer relations among the parties. On the other hand, alliance members stand on ceremony[279]. Therefore, synergy among the agreement companies becomes very important while creating and implementing the M&A[280]. In the alliance strategy, parties enter into a market collectively whereas in the M&A, acquiring firm gets into the market individually[281]. M&A is the expensive way of capacity expanded and commercial-logistic network development. Alliances offer these facts without investment. The cost of Maersk- P&O Nedlloyd merger was around 2.5 billion USD[282]. Like strategic alliance strategy, M&A is way of organizing activities, cutting the costs and generating notable economies of scale[283]. Target's shareholders enrich M&A value, which depends on the regions of members. In contrast to Asian firms, European shipping companies were reluctant to M&A. European firms do not prefer cash financing while Asian firms use this due to their regulatory regimes[284].

As it is seen from Table 5, Canadian Pacific (CP) Ships was collaborated with nine companies. Initially, CP Ships operated as a railway company due to the market conditions it also entered to the maritime business for passenger carriage from Canada to Europe and Asia. Its passenger carriage adventure was terminated by the cheap flight tickets. However, maritime history of CP had not been ended and it introduced a freight service between London, Rotterdam and Quebec City. When the CP Ships had entered

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[278] R. Midoro, E Musso and F.Parola "Maritime Liner Shipping and the Stevedoring Industry: Market Structure and Competition Strategies", **Maritime Policy and Management**, Vol:32 No:2 ,2005, pp. 104-105.
[279] Panayides and Wiedmer, p. 27.
[280] Das, pp. 114-115.
[281] Hee- Jung Yeo, "Geography of Mergers and Acquisitions in the Container Shipping Industry", **The Asian Journal of Shipping and Logistics**, Vol:29 No:3, 2013, p. 293.
[282] Pierre Cariou, "Liner shipping strategies: An overview", **International Journal of Ocean Systems Management**, Vol:1(1), 2008, p. 2.
[283] T. Heaver , H. Meersman , F. Moglia and E. Van De Voorde, "Do Mergers and Alliances Influence European Shipping and Port Competition?", **Maritime Policy and Management**, 2000, Vol. 27, No. 4, pp. 363-373.
[284] George Alexandrou, Dimitrios Gounopoulos and Hard M Thomas, "Mergers and Acquisitions in Shipping" **Transportation Research**, Part E:61, 2014, p. 232.

Montreal, competition was escalated. In order to strengthen its position, to extend market range, to realign designated fleet, CP Ships firstly collaborated with Lykes and then with CAST. After this strategy, CP Ships was able to reach Mediterranean, US Gulf Coast and US East Coast. When CP Ships had acquired with the Italian based company Contship, it established a network almost all over the word. As it seen from CP Ships case, acquisition can be much more beneficial, if the companies want to focus on a niche market[285].

To sum up, liner companies prefer M&A strategy in order to minimize operating costs and risks, to raise efficiency and productivity, to establish value added services, to enlarge geographical borders, to enter the niche markets, to obtain technology or assets for strategic decision and to control the market conditions[286].

[285] Yann Alix, Brian Slack, Claude Comtois, "Alliance or Acquisition? Strategies for Growth in the Container Shipping Industry, the Case of CP Ships", **Journal of Transport Geography**, Vol:7, 1999, p. 208.

[286] Mary R. Brooks and Pamela Ritchie, "Mergers and Acquisitions in The Maritime Transport Industry 1996—2000", **Transportation Journal**, Vol. 45, No. 2, 2006, p. 20.

Table 5: Main Acquisitions in the Liner Market[287]

Buyer	Taken-Over Company	Year	Buyer	Taken-Over Company	Year
Contship	Pro Line	1996	CSAV	Grupo Libra	1999
Hanjin	DSR-Senator	1997		Montemar	1999
NOL	APL	1997		Norasia	2000
MSC	Kenya Nat. Shipping Line	1997	Hamburg Sud	South Seas	1998
Petronas	MISC	1997		Alianca	1998
Evergreen	Lloyd Triestine	1998		Barbican Line	1999
D'Amico	Italia di Navigazione	1998		Transroll	1999
Safmarine	Barbican Line	1999		South Pacific	1999
CP Ships	Cast	1995		Crowley	1999
	Lykes	1997		Crowley American Transport	1999
	Contship	1997	AP Moeller	Safmarine	1999
	Ivaran Lines	1998		CMB-T	1999
	ANZDL	1998		Sealand	1999
	American Ships	2000	TMM	FMG	1996
	Christensen Canadian African Lines	2000		Compania Transatlantica Espanola	1997
	TMM Lines	2000	CMA	CGM	1996
	Italia di Navigazione	2002		ANL	1998
P&O Nedlloyd	ANL	1996	Preussag	Hapag Lloyd	1998
	Blue Star Line	1998	Delmas	OT Africa Line	1999
	Tasman Express Line	1999	Sea Consortium	Sea Med Link	1999
	Farrel Line	2000	Odiel Group	Compania Transatlantica Espanola	2000
	Harrison Line	2000			

[287] Midoro et al, p. 97.

1.3.3.4. Joint Ventures

Limited numbers of studies discuss the maritime joint ventures and most of them mainly discussed the terminal operators[288] due to the nature of the strategy. In the joint venture agreement, parties desire to establish a common and a separate firm to share the risks and incomes[289].

Port authorities are under the pressure of competition. In order to minimize the future anxiety, they make joint ventures with financially strong companies to guarantee the port calls[290]. Financial purposes are not only one factor of Joint Ventures. Shanghai Container Terminals, is a kind of joint venture firm established by Shanghai Port Container Co. Ltd and Hutchison Ports Shanghai, aim to promote research and development, marketing, distribution and customer service activities[291]. For the same purposes, Maersk Sealand and ECT International collaborated with Egyptian companies for container terminal at Port Said to improve and run the 30-year concession. Deurganck Dock, in Antwerp, was a witness to joint venture between MSC and Hesse-Nord. Among the joint venture agreement The Medcenter Container Terminal in Gioia Tauro, Italy, is a good example that shows the how a joint venture affects the industry[292]. With respect to the agreement, Maersk purchased the 10 percent share of Medcenter terminal from EUROGATE[293]. At the beginning the millennium, 2.65 million TEU's cargo were handled by the terminal and 140.000 TEU of them was handled by Maersk[294]. Maersk saw the market opportunity and increased its share to 30 percent[295]. These two companies has developed their relationships and signed another joint venture for North Sea Bremerhaven Container Terminal. EUROGATE and MSC was signed a

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[288] Thierry Vanelslander, "Expansion in Cargo Handling: Geographical and Functional Issues", **Maritime Policy and Management,** Vol: 35, NO:2, 2008, pp.194-196.
[289] Bruce Kogut, "Joint Ventures: Theoretical And Empirical Perspectives", **Strategic Management Journal,** Vol: 9, No: 4, 1988, p. 321.
[290] Heaver et al, pp. 363-373.
[291] Vanelslander, p. 194.
[292] Geraldo Araujo De Souza Junior, Anthony K C Beresford and Stephen J Pettit," Liner Shipping Companies and Terminal Operators: Internationalisation or Globalisation?", **Maritime Economics and Logistics**, Volume 5, Issue 4, 2003, pp 393–412.
[293] https://www.joc.com/maritime-news/carrier-run-terminal-gioia-tauro_19991004.html, (23.07.2018).
[294] De Souza Junior, pp. 393–412.
[295] http://investor.maersk.com/static-files/56ee8e6d-fac7-4e45-a906-09ffefd06592, (28.07.2018).

joint venture for South part of the terminal. After these contracts, north part of the terminal was designated to Maersk and south part of it was determined for MSC[296]. With respect to European Commission, even though Maersk has a high market share in the global container carriage, its market share is rather low in the Northern Europe. Consequently, the joint venture between EUROGATE and Maersk do not strongly affect the market at the Bremerhaven[297].

[296] http://www1.eurogate.de/en/About-us/Our-Group/Joint-Ventures, (28.07.2018).

[297] European Commission Press Relase Mergers: Commission clears joint venture between EUROGATE and A.P. Møller-Mærsk for the Container Terminal in Wilhelmshaven, Germany" "IP/08/895 Brussels, 6th June, 2008, http://europa.eu/rapid/press-release_IP-08-895_en.pdf, (28.07.2018).

CHAPTER TWO

COMPETITION REGULATIONS GOVERNING COLLABORATIONS

As a result of the globalization in the economy, the soul of competition has been changed negatively; market became more monopolistic due to the lack of government interference. Consequently, the new competition system had created social unrest. In order to regulate the restrictive market conditions, the governments have implemented competition regulations. Due to intervention of government, competition has become one of the important subjects of the public law. On the other hand, competition has also become a subject of private law because the competition taking place in the market among the firms. Taking into account of all these, competition law is a kind of mixed law which includes both public law and private law adjustments[298]. Whatever the competition is regulated under the public or private law, the main objectives of the competition regulations are to securitize the economic freedom, social welfare and the consumers. Based on its aims, competition act can be defined as the constitution of economy[299].

The competition act provisions can be divided into two group cartel regulations and abuse of dominant regulations. Under this title, the details of the U.S., E.U. competition regulations will be analyzed based on the cartel agreements, abuse of dominant position and horizontal merger regulations in order to show how the liner shipping collaborations are governed in the absence of block exemptions.

2.1. CARTEL REGULATIONS

Before discussing the cartel regulations, it must be discussed the protection of competition act generally. According to the legal doctrine, competition legislation is divided into two groups: unfair competition and protection of competition. As it was

[298] David P. Fidler, "Competition Law and International Relations", **The International and Comparative Law Quarterly**, Vol: 41, No: 3,1992, p. 563. and Pelin Güven, **Rekabet Hukuku**, 2nd ed, Yetkin Yayınları, Ankara, 2008, (Rekabet), pp. 34-35.
[299] İ. Yilmaz Arslan, **Rekabet Hukuku Dersleri**, 2nd ed, Ekin Basım Yayın Dağıtım, Bursa, 2008, pp. 3-7.

mentioned above, the main purpose of the competition regulations is to secure the welfare. Therefore, the competition game must be played fairly. At the beginning years of the competition regulations, only players of the game were protected against their rivals' unfair practices by the unfair competition acts. As time passed by, the game field has enlarged and all the parties who affected by the unfair game have been protected[300]. Today, unfair competition acts are aiming to protect not only one single company or a competitor by determining the rules of competition but also it provides fair practices among all players[301]. These two regulations serve the same purposes in different ways[302]. Both of them are aiming to protect the social and economic welfare[303]. While unfair competition guards the market against dishonesty behaviors by prohibiting the competition, protection of competition encores the competition by restraining the agreements, behaviors, dominant positions that restrain trade[304].

The modern industry went beyond the scope of unfair competition and resulted in establishment of new regulations, which are called protection of competition regulations or anti-trust law[305]. The main purpose of this study is to show how the liner shipping collaborations is regulated under the protection of competition regulations (here after it will be referred as competition regulation). Therefore, the unfair competition regulations are exempted from the scope of the study.

In order to have ethical, equal and controllable economic environment Sherman Act was came into force by American government[306]. In other words, Sherman Act, competition law, was introduced for economical purposes by Americans[307].

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[300] Sabih Arikan, **Ticari İşletme Hukuku,** 21st ed. Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 2015, p. 315.
[301] Hüseyin Ülgen, Mehmet Helvacı, Abuzer Kendigelen, Arslan Kaya and Füsun Nomer Ertan, **Ticari İşletme Hukuku,** 5th ed, XII Levha Yayıncılık, İstanbul, 2015, p. 520.
[302] Ülgen et al, p. 519.
[303] Hamdi Pinar and Elif Cemre Haziroğlu, "Roles of Unfair Competition and Protection of Competition Rules in The Attainment of Social Market Economy in Turkey", **Ticaret ve Fikri Mülkiyet Hukuku Dergisi ,** Vol:3(2), 2017, p. 97.
[304] Ülgen et al, p. 519.
[305] Arıkan, p. 316.
[306] Erden Kuntalp, "Rekabet Hukukunda Temel Yaklaşımlar: Chicago Ve Harvard Okullarinin Rekabet Kanunu Açisından Karşılaştirilması" Perşembe Konferansları, **Rekabet Kurumu**, Ankara, Ekim 2000, p. 36. and Bruce Wyman ,"Competition and the Law" , **Harvard Law Review**, Vol. 15, No. 6, 1902, p. 428.

European states established a mutual market, which called European Union, to promote economic activities among the members[308]. The borders, which are not enabling free trade, were removed and joint custom tariffs were created to have a wealthy and peaceful union. Members also established a system for protect the competition[309]. The E.U. competition legislation has removed the trade obstacles with the objective to have an integrated market, to enhance the consumers' welfare, to deploy the resources and to increase productivity[310]. Therefore, E.U. competition policy is not simply focusing on market conditions; it is also encouraging the economic welfare[311].

American and E.U. legislation have two different aims. The basis of American competition legislation is aiming to minimize anti-trust activities while E.U. competition regulations desire to control companies in the common market by considering citizens' social welfare[312]. On the other hand, in the U.S. big and small- medium size enterprises are facing with strict law system during the cooperation procedure while in the E.U., all enterprises are considered equal in trade activities as long as they do not harm the trade and protect the consumer rights[313].

With respect to Turkish Act on the Protection of Competition Act No. 4054, competition defines as *"The contest between undertakings in markets for goods and services, which enables them to take economic decisions freely"* [314]. In the first article of the act, the aim of the competition policies in Turkey is described more generally then the E.U. and the U.S. acts. With respect to article 1[315], like Sherman Act, any kind of agreement, decision and practices are considered legal unless they obstruct, distort and

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[307] Pelin Güven, **Türk Rekabet Hukuku ve Avrupa Birliği Rekabet Hukukunda Birleşme ve Devralmaların Denetlenmesi**, 2nd ed, Yetkin Yayınları, Ankara, 2003, (Birleşme), p 24.
[308] Treaty of Rome 25 March 1957, article 2 and Treaty on European Union, (Maastricht agreement) on 7 February 1992 article B and article G(2).
[309] Treaty of Rome 25 March 1957, article 2 and Treaty on European Union, (Maastricht agreement) on 7 February 1992 article G(3) and Treaty on the Functioning of the European Union 26 October 2012 article 2,3 and 4.
[310] Güven, Birleşme, p 27 and Güven, Rekabet, pp. 34-35.
[311] Stephanie Honnefelder and Roberto Silvestri, "Competition Policy", **Fact Sheets on the European Union** , 2018, http://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (30.10.2018).
[312] James S. Venit," EU Competition Law—Enforcement and Compliance: An Overvıew", **Antitrust Law Journal**, Vol: 65, No: 1,1996, pp. 103-104.
[313] Arif Esen,**Rekabet Hukuku**, ESC Yayınları, İstanbul, 1998, p 10
[314] The Act No. 4054 on The Protection Of Competition, 1994, Article 6
[315] The Act No. 4054 on The Protection Of Competition, 1994, Article 1

confine competition. In addition, that abuse of dominant position is prohibited by the same article[316]. It can be said that the main aim of the Turkish Competition legislation is to control market in the interest of public welfare, albeit it is not clearly mentioned in article 1[317].

The formation of The Protection of Competition Act is based on the Custom Union Agreement[318]. The section II of this agreement deals with the competition rules and the section comprises eleven articles, between article 32 and 43, and two sub-sections. Under the first section, article 101 and 102 of TEU has directly applied to agreement, as article 32 and 33, in order to the functioning the custom unions[319]. With respect to second section, Turkey was under obligation "*to adopt a law which shall prohibit behaviors of undertakings under the conditions laid down in Articles 85(now 101) and 86 (now 102) of the EC Treaty"* [320]. Turkey had fulfilled that obligation before the custom union establishment, in 1994 and published The Act on the Protection of Competition Act No: 4054 (thereafter it will be named as competition act). When articles of the competition act are investigated, it can be said that its provisions are similar to the TFEU[321]. Therefore instead of restudying these provisions, the E.U. legislation will be studied.

As it was seen that protection of competition act desires to protect the public welfare. Parallel with the globalization, some of the competitors have started to act collaboratively under the cartel agreements and they had a power to make pressure to market. Sometimes they determined the prices for their own purposes, or sometimes they shared the markets in order to have more control on it. The cartel agreement appears when the competing undertakings have same relevant market or which are

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[316] Even though the U.S.,E.U. and Turkish competition regulations prohibit the abuse of dominant position in a separate articles. Only Turkish Competition Act mentioned this topic a purpose of the act.
[317] Güven, Birleşme, p. 33.
[318] Decision No 1 /95 of The EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union , 96/142/EC, 1996, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21996D0213(01)&from=EN (13.04.2019) (Custom Union Agreement)
[319] Custom Union Agreement, article 32(1).
[320] Custom Union Agreement, article 39(2)(a).
[321] Ademuni-Odeke and Hakan Karan, "Competition Law in the Maritime Transport Sector", **Ankara Barosu Uluslararası Hukuk Kurultayı**, Ankara, 8-11 Ocak 2002, p. 208.

capable of having relevant market. Not only actual undertakings but also potential competitors are in the scope of cartels. Also in the *hub and spoke* cartel cases, the competing undertakings do not directly operate the cartel (the spokes). Instead of cartel agreement, a common trading partner, who acts on another market, indirectly ties the competing undertakings[322]. The legal wording of the cartel agreements was written by The Organization for Economic Cooperation and Development (OECD) as

> "*A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these"* [323].

The definition of the cartel agreement shows that there is a requirement to control and regulate these kinds of behaviors. Under this title, the U.S. and E.U. regulations governing cartel agreements will be studied through acts and cases.

2.1.1. United State Legislation

During the 1800's the *laissez faire* was gained acceptance by the American Government and consequently state interference on the market was at the very limited level[324]. When the Civil War ended, American market struggled with heavy competitive market in which smaller companies were eliminated by their financially strong competitors[325]. The monopolistic market disturbed the public welfare because they could easily determine the prices for their own purposes[326]. Therefore, the market was evaluated as unethical and unlawful[327]. In order to solve the problem, American government had showed a regulatory approach and introduced the *Sherman Antitrust Act*

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[322] Filip Tuytschaever, "Cartels and Proof of Cartels", **Horizontal Agreements and Cartels in EU Competition Law,** (Ed. Frank Wijckmans and Filip Tuyschaever), Oxford University Press, The U.S., 2015, pp. 9-10.
[323] OECD Webpage, https://stats.oecd.org/glossary/detail.asp?ID=3157, (14.09.2018).
[324] William T. Schantz, **Commercial Law for Business and Accounting Students**, West Publishing Co, U.S.,1980, p. 944.
[325] Michael B. Metzger, Jane P. Mallor, A. James Barnes, Thomas Bowers, Michael J. Philips and Arlwn W. Langvart, **Business Law and The Regulatory Environment,** 7th ed., Richard D. Irwin INC, The U.S., 1989, p. 1111.
[326] Scaletta and Cameron, p. 89.
[327] Ronald A. Anderson, **Government and Business**, 3rd ed., South Western Publishing Company, The U.S., 1966, p 131.

in 1890. However, scope and application of the Sherman Act did not comprise the whole market. The *Federal Trade Commission Act of 1914* did make up deficiency of the Sherman Act. According to the *Federal Trade Commission Act*, Federal Trade Commission (FTC) was authorized to inhibit anticompetitive activities. In the same year the *Clayton Antitrust Act of 1914* was entered into force by listing determined anticompetitive activities. After the great depression, smaller firms required more protection and *The Robinson-Patman Act* was introduced in 1936. After the effects of the depression went down, there was a requirement to revise the competition regulations. The *Celler-Kefauver Act of 1950* and the *McGuire Act of 1957* were introduced for fair trade[328]. In order to regulate the implementation of the anti-trust laws, *Anti-Trust Civil Process Act (1962), Hart-Scott-Rodino Antitrust Improvement Act (1976) and Anti-Trust Procedural Improvements Act (1980)* were applied[329]. With respect to The United States Department of Justice (DOJ), The Sherman Antitrust Act, The Clayton Act and The Federal Trade Commission Act[330] are three major competition acts[331] and therefore these three acts and The Robinson –Patman Act will be researched under the following sub-titles.

2.1.1.1. Sherman Act, 1890

Sherman Act prohibited cartel and monopolization activities and trade behaviors which intent to control the state markets or foreign nations markets[332]under Section 1 and Section 2. Section 1[333] declared that *"every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal*". In order to implement Section

[328] William R. Bandy, **Business Law**, 2nd ed, Allyn and Bacon INC, The U.S., 1970, pp. 802-803.
[329] Ergun Ozsunay, **Kartel Hukuku**, Fakülteler Matbaası, Istanbul, 1985, p. 24.
[330] Federal Trade Commission Act deals with stopping unfair practices and unfair methods of competition. As it was mentioned unfair competition and protection of competition have two different scopes. This Section aims to discuss the protection of competition therefore Federal Trade Commission Act is excluded.
[331]The U.S. Department of Justice official web page https://www.justice.gov/atr/antitrust-laws-and-you, (19.11.2018).
[332] Mark Lee Levine, **Business and The Law**, West Publishing Co, The U.S., 1976, p. 43.
[333] The Sherman Antitrust Act (1890), Section 1.

1, following three conditions must be provided. Initially, at least two parties must establish a contract or a combination or a conspiracy. That is to say, the Act considers the joint activities instead of individual behaviors. Secondly, parties of the joint activity must be involved in *trade or commerce*[334] *among the several states, or with foreign nations.* Thirdly, the joint commercial actions must restrain the trade[335]. However, due to the language of the act, it was not clearly understood that what kind of trade actions would be considered as unlawful with respect to the Sherman Act Section 1. Congress made pressure to the courts for clarifying what kind of behaviors *restrained the trade*[336] and what kind of trade movements were subject to joint activities. The problem of acting jointly was solved in the *Copperweld* case by Supreme Court (S.Ct.) Judges[337] who stated that if the companies are owned by the same person, trade activities among them will not subject to joint activity, hence they are controlled by the same person[338].

In 1911, other problem, what kind of behaviors *restrained the trade,* was solved in the *Standard Oil Case*[339]. Before this case, courts was followed the Sugar Trust[340] case decision which was the first case the Supreme Court interpreted the Sherman Act[341]. With respect to the Sugar Trust case, when the manufacturing takes place in a certain place, this trade movement will not be considered an interstate commercial activity and therefore the Sherman Act does not cover the manufacturing[342].

In the *Standard Oil Case,* the *rule of reason* was implemented by the majority of five judges[343]. In the case it was mentioned that the terms "*restrain of trades"* and "*attempts to monopolize"* were originally came from the common law. With regard to

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[334] The terms trade and commerce states all activities that an impact on market in the Section 1.
[335] Bandy, pp. 803-804.
[336]Edward J. Conry, Gerald R. Ferrera and Karla H. Fox, **The Legal Environment of Business**, 3rd ed., Allyn and Bacon, The U.S. 1993, p. 469.
[337] Metzger et al, pp. 1116-1117.
[338] Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752 U.S. S..Ct. 1984 , https://supreme.justia.com/cases/federal/us/467/752/ (7.08.2018) (Copperweld Case).
[339] The Standard Oil Co. of New Jersey v.United States 221 U.S. 1, 31 S.Ct. 502 (1911) , https://supreme.justia.com/cases/federal/us/221/1/, (7.08.2018), (Standart Oil).
[340] United States v. E.C. Knight Company, 156 U.S. 1, 1895., https://supreme.justia.com/cases/federal/us/156/1/ (7.08.2018), (EC Knight Case).
[341] Louis W. Stern and John R. Grabner, Jr., **Competition in the Marketplace**, Scott, Foresman and Company, The U.S., 1970, p. 71.
[342] EC Knight Case.
[343] Scaletta and Cameron, p. 91.

common law, individual freedom of contract rights was restricted by the cartel and monopolization activities and therefore these activities were considered as illegal. Moreover, when a contract was restraining trade, it was also considered as unlawful with respect to the common law[344]. Even though the court had changed this idea and ruled that such trade activities were *per se* illegal the Sherman Act had to be interpreted together with the reasons. Where a contract or monopolization restrained the trade unreasonably, the statue would be applied[345]. This decision came into the doctrine as the *rule of reasons*. Even if the agreements or any type of trade activity seems to restrain the trade, it will be considered legal as long as the outcomes of the agreements affect the market in a positive way[346]. Certain trade movements' returns (mainly cartels) explicitly violate the other player commercial activities. Therefore, these actions shall be considered *per se* unlawful without examining any factor[347].

The following behaviors are generally considered as hard-core cartels; price fixing, output restrictions, market allocation, bid rigging (the submission of collusive tenders)[348]. In the price fixing conspiracy cases, even if the competitors do not charge exactly same prices, the main of purposes of them are, directly or indirectly, to maintain, to fix and raise the prices for their own purposes. The price fixing behaviors can be classified as following; "*establish or adhere to price discounts, hold prices firm, eliminate or reduce discounts, adopt a standard formula for computing prices, maintain certain price differentials between different types, sizes, or quantities of products, adhere to a minimum fee or price schedule, fix credit terms, not advertise prices*[349]".

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[344] For the international level trade disputes, the *lex mercatoria* rule was implemented by the common law. For details F. Itır Bingöl, "The Lex Mercantoria and Its Role in Turkish Arbitration Law", **Dokuz Eylül Universitesi Hukuk Fakultesi Dergisi,** Vol: 19, 2017, p. 1953

[345] Standart Oil Case.

[346] Bruce D. Fisher and Michael J. Phillips, **The Legal Enviroment of Business**, West Publishing Company, The U.S., 1983, pp. 378-379.

[347] Kenneth W. Clarkson, Roger Leroy Miller, Gaylord A. Jentz and Frank B. Cross. **West's Business Law Alternate UCC Comprehensive Edition**, 2nd ed., West Publishing Company, The U.S. 1984, p 684.

[348] OECD Webpage, http://www.oecd.org/competition/cartels/, (19.07.2018).

[349] The U.S. Departmant of Justice Webpage, https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes, (12.06.2018).

The application of the *per se rule* and the *rule of reason* is the controversial problem for competition cases. Ehrlich and Posner wrote a script about how these rules could be implemented by the lawmakers.

> *"If we want to prevent driving at excessive speeds, one approach is to post specific speed limits and to declare it unlawful per se to exceed those limits; another is to eschew specific speed limits and simply declare that driving at unreasonable speeds is unlawful. Any choice along the specificity-generality continuum will generate a unique set of costs and benefits"*[350].

As mentioned in the *Standard Oil Case,* the Sherman Act shall be applied with reasons and therefore the *rule of reason* shall be implemented to the all of the protection of the competition cases. However, in the *United States v. Trenton Potteries Co*[351]case, the Court re-highlighted the *per se* rule and stated that the main purpose of the price fixing agreements is to restrain the trade according to the common law since these kinds of agreements are powerful enough to determine arbitrary and unreasonable prices. The reasons behind the price fixing can be changeable as time pass; "*the reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed*[352]*".* Therefore, according to the related case, the *rule of reason* could not be applied to price fixing agreements since price-fixing agreement was in itself an unreasonable restraint. In other words, there was no necessity to investigate reasons of price fixing cases[353].

In the leading price fixing case *Socony-Vacuum Oil Company*[354], the Gasoline refiners produced only limited *"distress"* gasoline without aiming to fix and to increase prices during the depression. Due to the insufficient storage facilities of producers, the

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[350] Isaac Ehrlich and Richard A. Posner, "An Economic Analysis of Legal Rulemaking"**, The Journal of Legal Studies,** Vol. 3, No. 1, 1974, p. 258.
[351] United States v. Trenton Potteries Co., 273 U.S. 392 (1927), http://cdn.loc.gov/service/ll/usrep/usrep273/usrep273392/usrep273392.pdf, (19.08.2018) (Trenton Case).
[352] Trenton Case, p. 397.
[353] John C. Peppin, "Price-Fixing Agreements under the Sherman AntiTrust Law", **California Law Review**, Volume 28, Issue 3 Article 3, 1940, p. 301.
[354] United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), https://supreme.justia.com/cases/federal/us/310/150/ (14.09.2018), (Socony-Vacuum Case).

"distress" gasoline were sold at substantially reduced prices on the spot market[355]. However, the Court stated that the behavior of the refiners was *per se* illegal and held that even if the companies did not directly follow price fixing strategies, they were capable enough to fix prices because of their market power[356]. With regard to the case, the market power became the main determinant, instead of conduct, while assessing the legality of the cartels[357]. The decision was criticized by the economists who stated that the price fixing strategy should involve the restriction of the total quantity of the good available to consumers over the long run. The refiners trade of gasoline, include storage, did not have remarkable effects on the prices. Therefore, the economist stated that the decision of the court was *"worth nothing[358]"*.

In 1979, United States Supreme Court [359] discussed Certiorari of The United States Court of Appeals for The Second Circuit about whether price fixing behaviors involves the blanket licenses[360] among the broadcast companies or not. The Court held that the blanket license is not be classified as a price fixing strategy. Therefore, instead of applying *per se* rule, the illegality of blanket license must be discussed under *rule of reason*[361]. According to the Court,

> "*In characterizing the conduct of issuing blanket licenses under the per se rule, this Court's inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of a predominantly free-market economy. The blanket license is not a "naked restrain[t] of trade with no purpose except stifling of competition but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use, which would be difficult and expensive problems if left to individual users and*

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[355] Roger D. Blair and David L.Kaserman, **Antitrust Economics**, Richard D. Irwin INC, The U.S., 1985, p. 156.
[356] Earl W. Kinter, **An Antitrust Primer**, 2nd ed., The Macmillan Company, The U.S., 1973, p. 31.
[357] Irwin M. Stelzer, **Selected Antitrust Cases**, 5th ed., Richard D. Irwin, Inc, The U.S., 1976, p 63.
[358] D. Bruce Johnsen, "Property Rights to Cartel Rents: The Socony-Vacuum Story", **The Journal of Law and Economics**, Vol. 34, No. 1, 1991, p. 202.
[359] Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors and Publishers, 562 F.2d 130 (2d Cir. 1977), revised, Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), http://cdn.loc.gov/service/ll/usrep/usrep441/usrep441001/usrep441001.pdf, (14.09.2018), (Columbia Broadcasting Case)
[360] *"A type of license allowing a music user, typically a TV network, or radio station, to play or perform all compositions covered under the license without a limit on use for one (usually annual) payment. PROs and Production Libraries often use blanket licenses with television, Film, and radio stations"* Association of Independent Music Publishers Web page., https://www.aimp.org/forums/1,2/Blanket_license, (19.06.2019).
[361] Columbia Broadcasting Case, p. 25.

copyright owners…. The blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, it cannot automatically be declared illegal in all of its many manifestations. Rather, it should be subjected to a more discriminating examination under the rule of reason"[362].

The Supreme Court clearly mentioned that even though the price fixing strategies were considered *per se* illegal, in reality it had some exceptions. Therefore, before implementing the *per se* rule, the judges had to have *considerable experience* about the business practice in question. So it can be said that before implementing the *per se* rule, the *rule of reason* shall be applied properly[363].

In summary, early the U.S. judgments had adopted the common law perspective, which is *per se* rule, to cartel cases. Parallel with the globalization, the purposes of the actions had been investigated and the *rule of reason* was introduced. However, the price fixing case has its own characteristics; in some cases, price fixing was investigated with common law perspective, but in some cases judges applied modern approach[364]. Actually, there were three different types of price fixing cases in the U.S. judicial locality. In the first type of cases, the price fixing cartel agreements were very explicit. For this kind of cases, the *per se* rule must be implemented. In the second of type of cases, the agreement would indirectly prompt the cartel behavior even if the agreement did not have an aim for price fixing. In the third type of cases, the court evaluated the legality of the price fixing without developing a cartel theory or other explanation about how the price-fixing determined as an anticompetitive behavior. For the last two cases, the application of the *per se* rule can be improper[365]. Therefore, it can be said that if the price fixing strategy is exactly clearly, it will be *per se* illegal. However, if the court has reasonable doubt that the price fixing strategy skulks, the court shall implement the *rule of reason.* Also in some cases, may be the most fair ones, even if the *price fixing* can be

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[362] Columbia Broadcasting Case p. 2.

[363] Randall E. Hobbs, "Price Fixing and the Per Se Rule: a Redefinition — Broadcast Music, Inc. Columbia Broadcasting System, Inc.", **Delaware Journal of Corporate Law**, Vol:5, Number 1, 1980, p. 89.

[364] W. H. "Monopolies. Price-Fixing Agreements and the Sherman Act. Appalachian Coals, Incorporated." **Virginia Law Review,** Vol. 19, No. 8, 1933, pp. 854-856.

[365] The Yale Law Journal Company, Inc. "Fixing the Price Fixing Confusion: A Rule of Reason Approach" **The Yale Law Journal** Vol. 92, No. 4 , 1983, pp. 715-720.

clear as crystal, the judges will applied to *rule of reason* based on their experience and professions. While detecting the conspiracy of the price fixing, the court can investigate *"records of changes or prices, including price lists, price-change notices and company memoranda relating to price analysis*". In addition, meetings or communications among the rivals could be good evidence for proofing the price fixing cases[366].However, it does not mean that the cartel behaviors are not *per se* illegal. When the court has strong doubts and evidences about the cartel behavior, without any further investigation, cartel behavior shall be deemed *per se* illegal.

Another important cartel behavior is the market division that can be more harmful than price fixing. The main purpose of this strategy is to divide the markets into different geographic areas and each firm has its own determined territory. Additionally, companies can focus on the selected consumers in the market; one can prefer to purchase with commercial users and other can have close relations with regular consumers. By applying this strategy, cartels can easily avoid the difficulties of fixing and monitoring prices. The cartel is capable to pursue its rivals' strategies in the selected market. In response to the competitors' strategies, the cartel can change its prices, quality and services which are detrimental to its rivals[367].

Boycotts and refusals to deal strategies are also the other important strategies of the cartels. An individual producer has a right to refuse the wholesaler when the wholesaler does not accept the producer prices; so far, this kind of trade activity is considered legitimate since it is in the scope of economic freedom. However, if the producer forces the wholesaler for not selling to retailers who do not accept producer price, the boycott will be deemed as an illegal behavior[368]. In the *United States v General Motor Corp*[369] case, Chevrolet cars were sold by the "discount houses to the dealers in the Los Angeles market. The Looser Chevrolet Dealer Association applied to

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[366] The Departmant of Justice Webpage, https://www.justice.gov/jm/antitrust-resource-manual-2-antitrust-division-field-offices, (22.06.2018).

[367] Einer Elhauge and Damien Geradin, **Global Competition Law and Economics**, Hart Publishing, Oxford and Portland, 2007, p 114.

[368] Kinter, p. 37.

[369] United States v. General Motors Corp., 384 U.S. 127 (1966), http://cdn.loc.gov/service/ll/usrep/usrep384/usrep384127/usrep384127.pdf ,(19.09.2018), (General Motors Case).

the General Motor to have privileges for Chevrolet trade and in response to the dealers application, General Motor forbidden the trade between the dealers and discount houses. This trade took attention of the Government. The court held that "*elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act*[370]*"*and the behavior of the General Motor, which was aiming to block the discounters' market access, was considered as "*a classic conspiracy*[371]*"*.

2.1.1.2. Clayton Act, 1914

As it was mentioned, Sherman Act was insufficient to prohibit competition at early stages because it was not clear what kind of activities were considered unlawful[372]. Even if it was not written clearly in the act, courts were held that labor unions were subject to antitrust law. Congress and public clearly came out against this decision. Therefore, in 1914 Clayton Act was introduced by the congress[373]. Generally, price discriminations, exclusive dealings agreements, competitive mergers and joint actions among competitors were considered as unlawful by the Clayton Act. Also, labor unions were excluded from the competition legislation[374].

Price discrimination was considered as illegal behavior with respect to Section 2 of the Clayton Act by stating, *"it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality…*[375]*"*. This Section is the most important provision of the Clayton Act[376]. Where seller intents to discriminate prices *by the grade and quality* of buyers of selected goods, the market

[370] General Motors Case, p. 127.
[371] Larry L. Williams, "Distribution and the Sherman Act: The Effects of General Motors, Schwinn and Sealy", **Duke Law Journal**, Vol. 1967, No. 4, 1967, p. 733.
[372] Fisher and. Phillips, p. 404.
[373] Schantz, p. 946.
[374] Conry et al, p. 470.
[375] Section 2 of the Clayton Act 1914
[376] Arthur Townsend Dietz, **An Introduction to the Antitrust Laws**, Bookman Associates, The U.S., 1951, p 24.

can be less competitive and price discrimination can create monopolies[377]. Fisher and Philips[378] clarified the aim of Section 2 with an example. In the absence of the Section 2, a financially strong seller such as Kroger is able to sell products lower than market prices with the aim of driving its rivals out of the pitch. When the objective of Kroger is accomplished, Kroger can raise the prices to the highest level. Subsequently, all competitors go out of play and Kroger becomes a monopoly in the market.

Exclusive dealing contracts and tying agreements are considered as illegitimate, only if they restrain the trade, by Section 3 of the Clayton act. Hence, both of them may lessen competition that causes monopolies[379]. In this case, the following problem may occur. How these events restrict competition and create monopoly. It will be useful to explain these unlawful exercises with an example. A press operator desires to purchase 1,000 fountain pens from Ajax Pen Company who gives a great deal only if the press operator will buy the inks of pens from the Ajax. If Ajax applies this strategy to each client, it will inevitably be monopoly[380]. It should be not forgotten that when exclusive dealing contracts and tying agreements contain commodities, the Clayton Act will be implemented. Services, real estate or intangibles are also subject to Sherman Act[381].

2.1.1.3. Robinson-Patman Act, 1936

Although The Clayton Act was completed the deficiencies of the Sherman Act, it did not cure all problems[382]. In 1936, to strengthen Section 2 of the Clayton Act, Congress passed the Robinson-Patman Act[383]. Before the Robinson Patman Act, the large chain stores had more bargaining power against their suppliers since they were able to purchase larger quantities of products. They started to get more discounts from

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[377] Robert N. Corley and Robert L. Black, **The Legal Environment of Business**, 3rd ed., McGRAW-Hill Book Company, The U.S., 1973, p. 346.
[378]Fisher and. Phillips, p. 404.
[379] John W. Wyatt and Madie B. Wyatt, **Business Law Principles and Cases**, 5th ed., McGRAW-Hill Book Company, The U.S.,1975, p 643.
[380] Joseph L. Frascona, **Business Law The Legal Environment Text and Cases**, 3rd ed., Wm C. Brown Publishers, The U.S., 1987, p. 656.
[381] Metzger et al, p. 1146.
[382] Conry et al, p 470.
[383] Dietz, p. 24.

the suppliers with this power. As a result of discounts, large companies were able to sell goods at a cheaper price. Subsequently, small independent firms were pushed out of the market by the chain stores[384]. Big chain stores became a threat for financially weak companies. In 1936, The Robison Patman Act was introduced to protect small firms against big chain stores' price discrimination[385]. Therefore, it is also called as "*Chain Store Act*"[386].

As discussed in the previous title, price discrimination was mentioned in the Clayton Act that addressed the price problem in only one paragraph. On the other hand, Robinson Patman Act discussed the problem in six paragraphs in the Section 2[387]. Sellers discount strategies are forbidden by the Section 2 (a). The law applies when a seller sells a product to two or more buyers at different prices[388]. With this prohibition, the question of what kinds of discounts are prohibited may come to mind. Robison Patman Act does not prohibit all discounts or price differences. If the discounts given to a seller do not affect the market conditions, it will be considered legal with respect to Robinson-Patman Act[389]. In the *Texaco, Inc. v. Hasbrouck* case retailer, Texaco, gave privileges (discounts) to two different distributors, Gull and Dompier. Soon after, unlike Gull, Dompier received further discounts, which became a subject to litigation. Companies were accused of violating Section 2(a) of the Robinson-Patman Act. According to Texaco's defense, the privileges given to Dompier and Gull must be considered as nature of wholesale, which is not illegal under the Section 2(a). However, Court stated that if the particular wholesalers have much more discounts, the others' competition position would decrease, in turn; the privileges given to designated wholesaler will be considered as unlawful behavior[390]. Therefore, it is not easy to say that all price discriminations are considered illegal with respect to the Robinson-Patman

[384] Wyatt and Wyatt, p. 644.
[385] Luchs, Ryan, Geylani, Tansev, Dukes, Anthony and Srinivasan, Kannan "The End of the Robinson-Patman Act? Evidence from Legal Case Data", **Management Science,** Vol 56., 2010, p. 2123.
[386] Wyatt and Wyatt, p. 644.
[387] Conry et al, p 470.
[388] Metzger et al, p. 1162.
[389] Frascona, p. 660.
[390] Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), https://supreme.justia.com/cases/federal/us/496/543/, (20.11.2018), (Texaco Case).

Act. Where the following four tests are accomplished, Robinson-Patman Act will be applied. First, like Clayton Act, Robinson-Patman Act is only applied to commodities. Secondly, the commodities must be the equally same in the grade and quality. Thirdly, price discrimination likely disrupts the competition. Finally, interstate commerce activities are subject to Robinson-Patman Act[391].

2.1.2. European Union Legislation

Because of strong economic system, Americans had a voice in the European zone during the World Wars and the Cold War. European countries were concerned about this intervention[392]. In addition, the consequences of the Second World War, 55 million people lost his lives, was became a problem for European Countries. With intent of overcoming the problems, French Foreign Minister Robert Schuman floated an idea; bind European countries together. In 1952, the European Coal and Steel Community was constituted with the objective to have strong economy by European Countries[393]. Soon after the Community, in 1957 Treaty of Rome was introduced. The aim of the Treaty was to abolish the borders with the intent of free movement of people, goods and capital[394]. This free movement is called The European Single Market, which is the most important achievement of European countries. Under favor of single market strategy, competition and trade has been progressing. As consequence of the improvement, price reduces and quality rises[395]. In order to control free movement, to enhance welfare of citizens, to increase efficiency and to protect the consumers and weak firms against financially strong companies in the single market, competition regulations were

[391] Federal Trade Commission Offical web page, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman, (21.11.2018).
[392] Damian Chalmers , Gareth Davies and Giorgio Monti, **European Union Law Text and Materials**, Cambridge University Press, New York , 2006, p. 5.
[393] E.U Publications "60 good reasons for the EU Why we need the European Union" https://publications.europa.eu/en/web/general-publications/60-good-reasons-for-the-eu (12.11.2018).
[394] https://europa.eu/european-union/about-eu/countries_en (12.11.2018).
[395] https://ec.europa.eu/growth/single-market_en, (12.11.2018).

introduced in the Treaty of Rome[396]. Parallel with the social, political and economic developments, E.U. agreements have been revised.

Competition regulations are involved in the 2002 European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing the European Community (TEC) and 2012 Consolidated Version of The Treaty on The Functioning of The European Union (TFEU). Competition was regulated under article 85-86 of Treaty of Rome, article 81-82 of TEC and recently it has been regulated under article 101-102 of the TFEU. There are no differences among the each Treaty in the framework of competition regulations[397]. Therefore, Treaty of Rome article 85-86 and TEC article 81-82 will be referred TFEU article 101-102 hereafter, due to the current position of the law.

With respect to article 2 of the Treaty, the main purpose of the E.U. is to increase economic activities among the members for raising the social welfare of the E.U. citizens. In order to achieve this goal, a common market strategy was accepted[398]. Article 3 is listed that how the members could create and control the common market. Protection of the competition took place under article 3 (b)[399] which stated that members shall set a system to protect the competition among the players of the common market[400]. The members consider establishing a legal environment for protection of competition and the competition is regulated by articles between 101 and 106 very deeply. Anticompetitive agreements are forbidden in article 101 and the abuse of dominant position is inhibited in article 102[401]. It can be said that article 101 resembles the Section 1 of the Sherman Act and article 102 resembles the Section 2 of the Sherman Act. Nevertheless, there is a big and important difference; on the contrary, the U.S.

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[396] Paul Craig and Grainne de Burca, **EU Law Text, Cases, and Materials**, 5th ed., Oxford University Press, The U.S., 2011, p 959-960.
[397] There is only one difference that in the TFEU instead of using common market, E.U. prefers to use internal market.
[398] TFEU, 26.10.2002, Article 2
[399] Ex 3(f)
[400] TFEU, 26.10.2002, Article 3
[401] Anestis S. Papadopoulos, **The International Dimension of EU Competition Law and Policy**, Cambridge University Press, The U.S., 2010, p 14

regulations, E.U. competition act do not involve criminal sanctions[402]. In the U.S., competition regulations are also implemented for political reasons since they play important roles during the elections[403]. Due to the heading of this chapter, article 101 is the subject of this part.

Cartels are the most common restrictive agreements applied by the rivals. In the E.U. legislation, the term of cartel is defined as "*A cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them. Action against cartels is a specific type of antitrust enforcement*[404]*".* In *the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*[405], the cartel agreement is defined more generally as

> *"Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors*[406]*".*

The cartel agreement appears when the competing undertakings have same relevant market or which are capable of having it. Not only actual undertaking but also potential competitors are in the scope of cartels. Also in the *hub and spoke* cartel cases, the competing undertakings do not directly operate the cartel (the spokes), instead a common trading partner, which act on another market, indirectly ties the competing undertakings[407].

With respect to the Kolasky[408], European Jurisdiction did not sufficiently apply the cartel regulations until 2001. But whether the Commission and the member states did

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[402] Venit, pp. 103-104.
[403] Wernhard Möschel, "US versus EU Antitrust Law", **Zeitschrift für Wettbewerbsrecht**, Volume 5, Issue 3, 2007, p. 262.
[404] http://ec.europa.eu/competition/cartels/overview/index_en.html, (18.03.2019).
[405] Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29, (14.03.2019), (E.U. Cartel Immunity).
[406] E.U. Cartel Immunity, paragraph 1.
[407] Tuytschaever, pp. 9-10.
[408] William J. Kolasky, "What is competition? A comparison of U.S. and European perspectives", **The Antitrust Bulletin**, Spring-Summer 2004, p. 50.

not applied properly the rules, the Cartel agreements are formed by article 101 TFEU as following;

> "*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
> *(b) limit or control production, markets, technical development, or investment;*
> *(c) share markets or sources of supply;*
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*[409]*".*

When the language of the act is carefully examined, it is realized that article includes some limitations.

The term *"undertaking*" was not defined in the Treaty, courts considered the term extensively[410]. In general, undertaking involves any legal or natural person engaged in some kind of trade activity that may be supply activity, cultural and sporting activity, banking, insurance and transport. Beside these activities, commercial activities of the governments are also considered as an undertaking by E.U[411]. Hence, it can be said that the navy, state authorities like port authority, charities and unions shall not be evaluated as an undertaking[412].

In article 101, the term of *"agreement"* stands for collaboration between parties who have a common attitude. There is no requirement of written form for this kind of agreements[413]. Not only legally applicable engagements but also less formal consensus[414]is considered as an agreement with respect to article 101[415].

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[409] Article 101(1) TFEU
[410] Elspeth Berry and Sylvia Hargreaves ,**European Union Law**, 2nd ed., Oxford University Press, New York, 2007. p. 259.
[411] Josephine Steiner and Lorna Woods , **E.U. Law**, 10th ed., Oxford University Press, New York, 2009. p 655.
[412] Ademuni-Odeke and Karan, p. 160.
[413] Chalmers et al, p. 987.
[414] Less formal agreements are also called Gentleman's agreement

The detection of the "*concerted practices"* is problematic question in the E.U. legislation because the TFEU does not define the meaning of it. Therefore, the Commission and the court had tried to identify "*the concerted practices"*[416]. During the first days of the implementation of article, the intent of the parties determined the legality of the agreement[417]. With respect to the Commission, when an agreement restrained competition in the common market via its clauses and the intention of the parties supported the agreement, the agreement breached article 101[418]. Later on, the intention of the parties were tested together with the concept of concerted practices which were defined by the court in the *Dyestuffs*[419] case as

> "*Agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".*

Considering the judgment of the case, it can be said that a concerted practice requires a deliberate, a nominative and a joint action, which serves for same purpose[420]. Like the American legal system, conduct plays crucial role in the concerted practices. Any related or unrelated conduct negatively affects competition in the common market; they shall be subject to article 101(1). A knowledge sharing during a meeting can also be considered as an illegal conduct[421]. Whether there is a concerted plan or not, information sharing among parties about their intent is sufficient condition for determining the concerted practices[422]. While determining the "*all agreements between undertakings,*

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[415] Berry and Hargreaves, p. 260.
[416] Ademuni-Odeke and Karan, p. 161.
[417] ACF Chemiefarma NV v Commission of the European Communities. Case 41-69. ECLI identifier: ECLI:EU:C:1970:71 https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX%3A61969CJ0041, (18.02.2019), (Chemiefarma Case).
[418] Craig and Burca, p. 963.
[419] Imperial Chemical Industries Ltd. v Commission of the European Communities, Case 48-69. ECLI:EU:C:1972:70, p. 655. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61969CJ0048&from=EN, (19.02.2019), (Dyestuffs Case).
[420] F. A Mann, "The Dyestuffs Case in the Court of Justice of the European Communities." **The International and Comparative Law Quarterly**, Vol. 22, no. 1, 1973, pp. 41-49.
[421] Shell International Chemical Company Ltd v Commission of the European Communities Case T-11/89, http://curia.europa.eu/juris/showPdf.jsf?docid=102748&doclang=EN, (18.02.2019), (Shell Case).
[422] Steiner and Woods, p. 667.

decisions by associations of undertakings and concerted practices", article 101(1) aims to unearth the secret trade activities among the competitors[423].

Like the Sherman Act, not all trade activities are subject to article 101. With respect to first paragraph of article 101, the *collective activity* must restrain competition in the common market. In general, the restriction occurs when a trade activity aims to fix prices, to limit production, to allocate markets, to discriminate against particular rivals and to force others for tying agreements[424], which are considered as cartel behaviors.

Article 101(1) categorizes the various types of cartel agreements; the list is not exhaustive, in its sub-provisions[425]. Therefore, instead of discussing the each type of cartel agreement, article 101(1) will be examined as a whole.

While implementing article 101, same as the Sherman Act, the language of article caused some problems and the *Consten and Grunding* case[426], the case was the first breach of article 101(1) the term of "*may affect"* mentioned therein, was subject to discussion. A French company Consten and a German electronics company Grunding signed an exclusive distributorship agreement. With respect to the agreement, Consten did not sell goods competing with Grundig on condition that being exclusive sales representative of Grunding in France. This agreement was sued as result of exclusive dealings for Grunding products. The Commission of the European Economic Community considered the agreement illegal because it affected the trade and breached article 101(1)[427]. Plaintiffs went for an appeal. On trial, the Advocate-General, K. Roemer, highlighted the differences between "may affect" and "effect" and he asked for examination for determining the results of effect[428]. With respect to the Grunding and

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[423] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, **EU Competition Law and Economics**, Oxford University Press, Great Britain, 2012, p. 391.
[424] Venit, p. 82-83.
[425] Geradin et al, p. 398.
[426] Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community. ECLI:EU:C:1966:41 Official Website of European Union https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0056, (11.01.2019), (Grunding Case).
[427] Charles H. Koch Jr. "Application of Article 85 Paragraph 1, of the Treaty of Rome to Intrastate Exclusive Distributorship Agreements", **College of William & Mary Law School Faculty Publications**, 1968, p. 256.
[428] Stuart S. Malawer, "The Rule of Reason Under Article 85(1) of the Treaty of Rome and Vertical Distributorship Agreements in European Economic Community Antitrust Case Law" , **Maryland Law Review,** Vol :33 265, 1973, p. 272.

Consten defense, instead of considering the all products in the market, Commission only focused on the distribution of the Grunding products. Therefore, they supported that the evaluation of the Commission about effect and may affect required reinvestigation.[429] Also, plaintiffs asserted that article 101(3) was too depthless and it involves difficulties while burden proof. Therefore, if article 101 was considered in a body, article 101(1) would be forced in a "*reasonable manner*"[430]. The Court of Justice, as a court of appeal, confirmed the decision of Commission and stated that the important factor was to protect the single market objectives and thus whether an agreement directly or indirectly, actually or potentially established a treat for this objective, the agreement subsequently "may affect" the trade between the states. In the related case, as a result of the agreement other sellers were eliminated and consequently this take down could affect the trade between the Member states[431]. In the framework of the decision of the Court of Justice, it can be said that the *per se* rule, instead of rule of reason, was applied by the European Courts during the early stages of European Union history. During that time, it was believed the *rule of reason* of was considering with article 101(3), which includes exemptions[432]. According to article 101(3) if a trade movement consequently improves the customers' welfare, article 101(1) will not be applicable. However, this trade movement *"shall not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question"*[433]. While the rule of reasons were investigated under article 101(3), the European Commission and Court generally refused to apply article 101 (3) exemptions. Fortunately, this philosophy did not last too far, recently, article 101 (3) is interpreted more broadly and cautiously[434]. Nevertheless, it shall be not forgotten that

[429] Esen, p. 61.
[430] David M. Cohen ,"The Application of Article 85 of the Treaty Establishing the European Economic Community to Exclusive Dealing Agreements", **Case Western Reserve Law Review**, Volume 18 Issue 3, 1967, p. 836.
[431] Grunding Case, p. 341.
[432] David M. Cohen, p. 836.
[433] TFEU, 26.10.2002, Article 101 (3)
[434] Edwin H. Clock and John Jin Lee, "Article 85 and European Antirtrust Litigation: A Search for Economic Balancing", **Stanford Law Review**, Vol:27, No:5, 1975, p. 1279.

Americans generally focuses on the intent of the agreements, while, E.U. authorities considers the economic aspect of the agreement[435] while implementing the rule of reason.

Three years after the *Consten and Grunding* case, the opportunity of identify the objective standard was introduced by the court[436]. In *Völk*[437] case it was stated that the restriction in article 101(1) will be enforceable only if the agreement initially aims to prevent, to restrict or to distort the competition within the Common Market[438]. In addition, the court focused on the financially weak firms and held that "… an agreement….*having regard to the weak position … on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 101(1)"* [439]. The decision of the court was based upon *de minimis non curat*[440]principle. With respect to the general protection of competition rule, if an agreement concretely prevents, restricts or distorts the competition in the single market, the competition rules will come into force[441]. However, when *de minimis* principle is applied to an agreement, article 101 will not be implemented[442]since the provisions of the *de minimis principle* deals with financially weak firms who have little importance and have minor impact on the market[443]. In other saying, if an agreement does not change the market conditions importantly, it will not consider as anticompetitive[444].

The *de minimis principle* requires two conditions. With regard to the first condition, the undertakings shall not exceed the market share thresholds, which are

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[435] Valentine Korah, "The Rise and Fall of Provisional Validity -- The Need for a Rule of Reason in EEC Antitrust", **Northwestern Journal of International Law and Business**, Vol:3,320, 198, pp. 345-355.
[436] Malawer, pp. 270-271.
[437] Franz Völk v S.P.R.L. Ets J. Vervaecke. ECLI:EU:C:1969:35 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61969CJ0005&from=EN (12.01.2019), (Franz Völk Case) pp. 295-302.
[438] Franz Völk Case , p. 302.
[439] Franz Völk Case, p. 295.
[440] In Latin Language de minimis non curat lex 'the law is not concerned with trivial matters', https://en.oxforddictionaries.com/definition/de_minimis , (12.11.2018)
[441] Zekeriyya Ari, "Rekabet Hukukunda De Minimis Kuralı (Hissedilebilir Etki)", **21. Banka Huk. Dergisi**, Vol: 69, 2001-2002, p. 69.
[442] Steiner and Woods, p. 674.
[443] http://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy, (02.08.2018).
[444] Ademuni-Odeke and Karan, p. 163.

determined by the Commissions[445]. The minimum standards of the exemptions changed from notice to notice. With respect to 1997 notice, the agreements were considered in the safer harbor on condition that their turnover was not exceeding European Currency Unit (ECU) 300 million. For this condition, commission added one more sub-condition that market shares of the agreement parties in the relevant goods or services did not exceed jointly more than 5%[446]. In 2014, the current notice was implemented. With respect to the notice, the limit of a %5 market share threshold remained same but the turnover limits were taken down from ECU 300 million to EUR 40 million[447]. It means that E.U. allocates a safe harbor for financially weak companies which can anchor at the safe harbor only if they are not above the market share limits[448]. The second condition of the *de minimis* principle is that the undertakings do not have any purpose to restrain the competition[449]. Therefore, the cartel behaviors were considered certain particular restrictions and they were excluded from the scope of safe harbor[450]. However, when the *Völk* case, in which it was held that the hardcore cartels could have little impact on the market, the application of the exclusions became very indeterminate problem and some authors suggested that the Commission should be more flexible while applying the *de*

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[445] Commission Staff Workıng Document "Guidance On Restrictions Of Competition "By Object" For The Purpose of Defining Which Agreements May Benefit From The De Minimis Notice" Brussels, Revised Version of 03/06/2015, first page, (De Minimis Guidance) http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex_en.pdf, (19.02.2019).

[446] Stefan Rating, **"Commission Proposes New De Minimis Notice",** 1.04.1997 http://ec.europa.eu/competition/speeches/text/sp1997_017_en.html (18.12.2018).

[447] 2014 *De Minimis* Notice article 4, Information and Notices , "Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)" Official Journal C 291 of the European Union, Volume 57, 30 August 2014 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:291:FULL&from=EN, (19.02.2019).

[448] De Minimis Guidance, p. 1.

[449] 2001, de minimis notice, article 11, Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (1) (2001/C 368/07), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF, (17.08.2019).

[450] Director-General for Competition, European Commission Alexander Italianer, "Competitor Agreements under EU Competition Law", **40th Annual Conference on International Antitrust Law and Policy**, Fordham Competition Law Institute New York, 26 September 2013, http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf (19.09.2019).

minimis principle to cartel cases[451]. This criticism was answered in the affirmative by the Commission and a guidance was published *about on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*[452]. Even if the Guideline, restated that the hardcore cartel cases are considered *per se* illegal for that reason the *de minimis principle* cannot be applied to cartels[453], it also mentioned that while assessing the harmful effect of the agreement on the market, it should be investigated the intent, legal-economic consequences and provisions of agreement[454] . By combining the *de minimis principl*e and cartel behaviors, the Guideline listed the certain cartel behaviors, which can benefit from the *De Minimis* Notice[455].

The *De Minimis Notice* applied the *rule of reason* for cartels who do not exceed the thresholds, in *Groupement des cartes bancaires (CB) v European Commission*[456] case, the Court explicitly applied the *per se* rule by stating that *"certain collusive behavior, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying article 101(1) EC, to prove that they have actual effects on the market. Experience shows that such behavior leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers"*[457].

The Commission discussed the implementation of article 101 in the *Star Alliance*[458]case. In 1997, an alliance, called Star Alliance, was established by the three big airline companies Air Canada, United Airlines and Deutsche Lufthansa. In 2013 the alliance included over the 25 members who carried over 650 million passengers and had

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[451] Alison Jones, "The Journey Toward an Effects-Based Approach Under Article 101 TFEU. The case of Hardcore Restraints", **The Antitrust Bulletin:** Vol. 55, No. 4, 2010, pp. 791-792.
[452] De Minimis Guidance, pp. 4-5.
[453] De Minimis Guidance, p. 5.
[454] De Minimis Guidance, p. 4.
[455] De Minimis Guidance, pp. 6-17.
[456]Groupement des cartes bancaires (CB) v European Commission ECLI:EU:C:2014:2204, http://curia.europa.eu/juris/liste.jsf?num=C-67/13&language=EN, (16.09.2018), (Groupement Case).
[457] Groupement Case paragraph 51.
[458] Continental/United/Lufthansa/Air Canada CASE COMP/AT.39595, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf, (16.09.2018), (Star Alliance Case).

a total revenue of USD 180 million in 2011[459]. Initially, the Commission investigated the relevant market and found that the Frankfurt-New York route for premium passengers were in the scope of the judgment[460]. After the relevant market determination, the Commission stated that the Star Alliance deliberately restricted the competition[461] since they were able to

> "*develop strategic network plans including capacity requirements, potential schedule patterns, new projects and production shares; pursue joint revenue management activities; combine their pricing functions and align their, pricing - policy; coordinate on inventory management on transatlantic markets while maintaining separate inventory management systems; coordinate their marketing activities; and align their frequent flyer programmers"*[462].

The intent of the Star Alliance was also tested with regard to article 101(3). While implementing article 101(3), the Commission *considered the efficiency gains, indispensability of the restrictions and fair share to consumers* and stated that the Alliance had more negative effects than positive effects[463]. By considering all of these, the Commission held that the "*agreement infringed Article 101 of the Treaty in relation to the Frankfurt-New York route for premium passengers*[464]*".* When the Commission decision about the *Star Alliance* is considered, it can be said that the Commission exercised article 101 as a whole for determining the legality of the horizontal corporation and when the Commission detected the anticompetitive behavior, it did not implement further investigations and the collaboration was considered *per se* unlawful.

Applying article 101 as a whole took place in the Regulation 17. With respect to article 103 of the Treaty, Council has a duty to enact any regulations or directives to support Article 101 and 102[465]. This duty was accomplished in 1962 when the first Regulation 17was introduced. Articles of the Treaty dealt with to protect welfare of the customers by describing the unlawful trade movements whereas the Regulation 17

[459] Star Alliance Case, paragraph 8.
[460] Star Alliance Case, paragraphs 31-33.
[461] Star Alliance Case , paragraph 37.
[462] Star Alliance Case, paragraph 36.
[463] Star Alliance Case, paragraph 79.
[464] Star Alliance Case, paragraph 80.
[465] TFEU, 26.10.2002, Article 101 (1)

established an executive mechanism to act against anticompetitive behaviors[466]. Generally, Regulation 17 involved provisions about a system of registration of trade activities listed in article 101[467] of the Treaty[468]. In addition, the regulation gave more responsibilities to the European Commission. After the regulation, the Commission gained power to gather information, to investigate inside company and to fine the firm because of its unlawful behaviors[469]. *Per se* rule was accepted in the first article of the Regulation 17: "…. *agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty…shall be prohibited…*[470]". When the exemptions in article 85 (3) (now article 101-3) considered, the scenario changed. When an agreement described in article 101 (1) does not meet the conditions of article 101(3), without any investigation, it shall be precluded[471]. On the other hand, when the conditions of article 101(3) have been met, parties of the agreements shall notify the Commission[472]. The main purpose of this notification is to test whether the agreement violated article 101 (1) and met the criteria of article 101 (3)[473]. The notification rule also had some exemptions. The agreements listed in article 4(2) do not require a notification for gain exemptions from article 101 (3)[474]. The *rule of reason* requires two stages in the E.U. As a first stage, compatibility of the agreement with article 101 (1) shall be tested. Where an agreement involves provisions that hinder competition in the common market, article 101 (3) exemptions shall be examined[475]. In the *Métropole télévision (M6) and others v*

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[466] Martin Carree, Andrea Günster and Maarten Pieter Schinkel, "European Antitrust Policy 1957-2004: An Analysis of Commission Decisions", **Review of Industrial Organization**, Vol. 36, No. 2, 2010, p. 101.
[467] In this paragraph article 85 and article 86 are used since they were applicable during the Regulation 17.
[468] Louis B. Schwartz, "Implementing The Anti-Trust Sections of The Rome Treaty", **Proceedings of the American Society of International Law at Its Annual Meeting(1921-1969),** Vol. 56, April 26-28, 1962, p. 39.
[469] J. Groenewegen and P. R. Beije, "The European Answer to the Dilemmas of Competition, Cooperation, and Mergers**". Journal of Economic Issues**, Vol. 26, No. 2, 1992, p. 499.
[470] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Article 1., https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML (14.02.2019), (Regulation No: 17)
[471] Craig and Burca, p. 1006.
[472] Regulation No: 17, article 4 and article 5.
[473] Grant W. Kelleher, "How Competition Is Regulated In The Community", **The Business Lawyer**, Vol. 19, No. 1 ,1963, pp. 160-163.
[474] Korah, p. 322.
[475] Steiner and Woods, p. 680.

Commission of the European Communities[476]case, the court discussed the application of *rule of reason*. With regard to the court, the application of article 101 (3) as a rule of reason shall satisfy following conditions, "*agreements are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*".

After a while, due to the enlargement of the Union, Regulation 17 hindered the implementation of the Community competition rules by the courts. Additionally, notification system of Regulation 17 was causing misuse of resources. For these reasons, the Commission has changed the name and scope of the Regulation 17[477]. In 2002, Council Regulation (EC) No 1/2003[478] on the Implementation of The Rules on Competition Laid Down in Articles 81 and 82 of The Treaty was brought into force[479]. Even though, the wording of the first article of the Regulation 17 has not been changed in the Regulation 1/2003(1)[480], article 1(2) states that "*agreements, decisions and concerted practices caught by Article 101(1) of the Treaty which satisfy the conditions of Article 101(3) of the Treaty shall not be prohibited, no prior decision to that effect being required".*

The implementation of article 101(3) is changed after 2010 when the Commission introduced a regulation about on "*the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements*[481]*".* With respect to article 4 of the regulation[482], the cartels are excluded

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[476] Métropole télévision (M6) and Others v Commission of the European Communities (T-112/99), http://publications.europa.eu/resource/cellar/232cf71a-4223-486c-91ba-667135bc5ae0.0002.02/DOC_1, (16.02.2019), (M6 Case).

[477] Chalmers et al, p. 940.

[478] Hereafter it will be used as Regulation 1/2003

[479] Council Regulation (EC) No 1/2003 on the Implementation of The Rules on Competition Laid Down in Articles 81 and 82 of The Treaty, paragraph.2 and paragraph.3. http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf, (22.02.2019).

[480] Regulation 1/2003- article 1. "*Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required."*

[481] Commission Regulatıon (Eu) No 1218/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialization Agreements, Official Journal of the European Union, L 335/43, 18.12.2010, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1218&from=EN, (22.02.2019), (Commission Regulatıon (Eu) No 1218/2010).

from the exemptions of article 101(3). Because of this provision and article 101(1), the cartels are considered *per se* illegal in the E.U. jurisdiction. All of the regulations and the guidelines strongly mention that cartel behaviors cannot enjoy any exemptions since their main purpose is to restrict the competition. Therefore, the cartels are *per se* illegal in the E.U. jurisdiction.

In addition, it is beneficial to discuss the second paragraph of Article 101, which states that all kind of agreements or decisions which are mentioned in the first paragraph are null and void[483]. Commission of the European Economic Community held that if an agreement involves clauses that are forbidden by article 101, only related clauses would be invalid, not entire agreement. However, if the forbidden clauses constitute the backbone of the agreement, the whole agreement will be considered void[484].

When the American and E.U. legislation are considered, it can be said that both of them desire to implement *per se* rule instead of *rule of reason* for cartels. While discussing this chapter, it was mentioned that in some cases *rule of reason* was applied in the both E.U. and USA jurisdiction for cartel cases. Indeed, the main reason for implementing *the rule of reason provision* is to determine whether a cartel is actually occurs or not. Since, the proofs of cartel behaviors cannot be easily detected some time. When the cartel behavior is detected, it is not correct to conduct a research on the reasons of these behaviors and they shall be considered *per se* illegal.

2.2. ABUSE OF DOMINANT POSITION

As it was mentioned before, the main purpose of the competition legislation is to protect consumers and the market from the predatory activities. From this aim,

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[482] "*The exemption….shall not apply to specialisation agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following: (a) the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution; (b) the limitation of output or sales with the exception of: (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and (ii) the setting of sales targets in the context of joint distribution; (c) the allocation of markets or customers.",* Commission Regulatıon (Eu) No 1218/2010, article 4.
[483] David M. Cohen, p. 835.
[484] Grunding Case.

legislators introduced abuse of dominant position rules, for Americans monopolization rules, to protect the market against financially strong companies.

Both the U.S. and E.U. competition legislation govern the abuse of dominant position or monopolization separately and both of them focus on the following four key topics: necessity of establishing administrable standards, the thresholds for determining dominance, conduct of the firm and dominant firm price cutting behavior[485]. In this chapter, these four key factors will be studied from the U.S. and E.U. legal perspective.

2.2.1. The United State Legislation

Under the Section 1 and 2, the Sherman act focuses on how the firms must not act instead of how they must act. However, they have some differences between the sections. Individual trade activities were not included in the scope of Section 1. On the other hand, Section 2 comprised both personal and joint actions by stating "*every person".* Section 1 prevents the price fixing agreements that are aiming to restrain the trade. Section 2 protects the market from the missuses of monopolization power[486] by stating that "*every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"*[487]. It could be said that Section 1 is the basis of the Sherman Act and Section 2 is considered as supplementary to Section 1 by doctrine[488].

Like Section 1, language of the Section 2 became a highly controversial topic. What kind of activities were considered monopolization or attempted to monopolization were not clearly identified by the Sherman Act. Therefore, courts tried to enlighten this problem. In the *Chicago Board of Trade v. United States* case, the actions of board of trade were questioned by the court in the framework of monopolization. Chicago Board

[485] Kolasky, p. 40.
[486] Clarkson et al, p. 682.
[487] Sherman Act, Section 2.
[488] Hugh B Cox, "Competition and Section 2 of The Sherman Act", **ABA Section of Antitrust Law** , Vol: 27, 1965, pp. 73-75.

of Trade was the trade center of the grain. In 1906, the Board introduced the "*Call rule"* which prevented the price fluctuations during a certain time from the close of the Call to the next business day. The Call was generally ended by two o'clock. The product prices were affected due to the Call rule. Before the rule, members were able to set a price throughout the day but after the enforcement of the rule, prices had to be pegged at the Call time until the next day. Court held that even if the Board of Trade *prima facie* used its monopolization power via a policy, which determined the prices, the policy did not affect the amount of grain handling to Chicago and did not raise the prices of the grain. Therefore, the Call rule was not considered illegal under the Sherman Act[489]. This case shows that not all activities are subject to Section 2 of the Sherman act. In order to determine monopolization actions, the courts try to answer two following question; whether the company uses monopoly power in the relevant market or not and whether this monopoly power has anticompetitive conduct or not[490]. Therefore, it is necessary to determine relevant market and the conduct of company.

2.2.1.1. Relevant Market

With respect to the Kaplow, it is impossible to measure the markets and if it does, it will cause harmful results. Therefore, the relevant market tests must be abandonment[491]. Without market tests, competition doctrine would *"set sail on a sea of doubt and ramble through the wilds of economy"*[492]. Therefore, market investigations are the most important factor to determine the competitive positions of the firms.

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[489] Chicago Board of Trade v. United States, 246 U.S. 231 (1918) as cited in Eleanor M. Fox and Lawrence A. Sullivan, **Cases and Material on Antitrust**, West Publishing Co. U.S., 1989, p. 265.

[490] The U.S. Dep't Of Justice, Competition And Monopoly: Single-Firm Conduct Under Section 2 of The Sherman Act (2008). The United States Departmant of Justice Webpage, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_4_ (13.12.2018), (Conduct Sherman Act)

[491]Louis Kaplow, "Market Definition: Impossible and Counterproductive", **Antitrust Law Journal**, Vol. 79, No. 1 ,2013, p. 379.

[492] Gregory J. Werden, "Why (Ever) Define Markets? An Answer to Professor Kaplow," **Antitrust Law Journal**, Vol. 78, No. 3, 2013, p. 746.

Market share became a subject to litigation in the *United States v. E. I. du Pont de Nemours & Co.*[493]. This case must be studied very deeply since the terms market power, relevant market, and monopolizing conduct were discussed in this case[494]. Before focusing on the case, it is beneficial to mention what relevant market and the market power means. The term of relevant market is associated with the features of products, its substitutes and its geographic market[495]. Without determining the products' market, it is not possible to measure the companies' ability to restrict competition[496]. A way of relevant market test is explained with an example by Blecher[497]. In a town, homes are heated by natural gas, electricity, oil and liquefied petroleum gas (LPG). The companies A and B are responsible to sell the LPG and both of them totally shares about 50 percent in the LPG market. On the other hand, LPG has only 5 percent in general heating market. B is financially stronger than A and starting to implement a price reduction policy on the strength of financial power. A charges B with attempting monopolization and A states that the price reduction is not reasonable in the market. B defends himself by stating that other type of heating prices are lower than LPG and therefore LPG market had been tighten. After price reduction, customers can prefer to use LPG for heating. In that case, it shall be tested whether A has gained any advantage from the price reduction of B or the intent of B is deliberately excluding A from the market. The court can accept B defense since players of the LPG market are being more competitive than other heating types after the B policy. Therefore, there is mutual gain in the LPG market. As it is understood from the example, substitute products are important factor to determine the market power of the company. Substitute products have indistinguishably same features with the related product. It should be not forgotten that the production

[493] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956), https://supreme.justia.com/cases/federal/us/351/377/, (07.08.2018), (du Pont Case).
[494] Conry et al, p. 475.
[495] Clarkson et al, p. 695.
[496] Walker Process Eqpt., Inc. v. Food Machinery Corp., 382 U.S. 172 (1965), https://supreme.justia.com/cases/federal/us/382/172/ (07.08.2018), (Food Machinery Case).
[497] Maxwell M. Blecher, "Attempt to Monopolize Under Section 2 of the Sherman Act: Dangerous Probability of Monopolization Within the Relevant Market", **Georgia Washington Law Review**, Vol:38, 1969, pp. 220-221.

costs of the goods must be same or almost equal to each other[498]. In addition, goods are subject to test of market power when their selling prices influence the defendant's product[499].

Moreover, relevant market tests have geographical borders. When the above example is taken into account again, firm B competes at national and international level. Company A competes in towns' market. Therefore competition dispute between A and B is restricted in a single town. Therefore, each market power must be measured in the geographic marketplace[500].

In the national cellophane market, *du Pont* had very significant power that reached almost 75 %.[501] The company was charged with being a monopoly by United States government. *Du Pont* defended itself by stating that the "*flexible packaging materials*" are the substitutes of cellophanes and cellophane has a market share less than 20 % in the "*flexible packaging materials*"[502]. In order to determine the market power, Justice Reed delivered an opinion to the court. With respect to opinion, *prima facie* the cellophane was a unique market in which *Du Pont* was able to set the prices or exclude competition[503]. However, when the other *"flexible packaging materials*" were considered, *Du Pont* price control power was very low. Therefore, Du Pont was not powerful enough to prevent competition from other packaging materials[504]. There was a positive cross elasticity of demand between cellophane and other packaging materials.

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[498] "*The cross price elasticity of demand is a way to measure the substitute products via determining how responsive consumption of one product is to a change in the price of another product. Margarine market and butter market are good examples to explain the topic clearly. Where the price of Margarine (product B) rises by 10 % and the butter trade increases by 5 %, the cross price elasticity of demand for is measured 0.5. If the measurement is positive, it means that these products are substitutes. In contrast, if the measurement is negative, the products are complements like bread and butter*". Henry N. Butler, **Legal Environment of Business**, South-Western Publishing Co., The U.S., 1987, p. 614.

[499] Terry M. Schade, "Proposed Objective Relevant Product Market Criteria Under Section2 of The Sherman Act and Section 7 of The Clayton Act", **University of Cincinnati Law Review**, Vol: 35, 1966, p. 379.

[500] Conry et al, p. 474.

[501] In the United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) case *per se* rule applied for determining the monopoly power and was mentioned that 60 or 64 percentage of market control would be enough for saying there is a monopoly. William A. Koivisto , **Principles and Problems of Modern Economics**, John Wiley & Sons Inc, The U.S. 1957, pp 519-520.

[502] Fisher and. Phillips, pp. 394-395.

[503] Even if the intent is against law, the relevant market facts are admissible. Blecher, p. 222.

[504] Anderson, p. 131.

Therefore, substitutes are important when determining the relevant market[505]. Grounding on these reasons, Court held that *Du Pont* did not breach the Section 2[506].

2.2.1.2. Conduct-Abuse

In the doctrine, it was accepted that monopolies are not against the law, however using the monopoly power as a harmful way has been considered as illegal[507]. Even a company can be large enough to control the market; it cannot use that power against the other players of the market in the purpose of controlling or regulating them[508]. This rule is implemented by the courts in several cases. In the *United States v. E.C. Knight Company*[509] case, The American Sugar Refining Company was controlling about 98 percent of the U.S. sugar production and therefore the company was sued for being monopoly. However, court decisions was very remarkable, it was held that only commercial activities caused monopolization and manufacturing was not considered as a commerce and therefore manufacturing was not defined under the Sherman Act. Fortunately, this idea was not followed in other cases and was overruled in the *Standard Oil Case*[510]. In *the Standard Oil Case*, it was asserted that there should be determinants before the legality of the monopolization was exercised. In this perspective, monopolizing conduct and monopoly power are two important elements of determining monopolization[511]. In order to test these elements, following steps must be done. Firstly, conduct of the company must be tested. If the company follows a strategy, which deliberately aims to eliminate rivals from the market, the company will breach competition regulations. Secondly, market, in which the company operates, must be defined in order to test market power of company. Market definition requires

[505] Schade, p. 376-422.
[506] Scaletta and Cameron, p. 93.
[507] Metzger et al, p. 1135.
[508] Bandy, pp. 803-804.
[509] EC Knight Case.
[510] Scaletta and Cameron, p. 89.
[511] Conry et al, p. 473.

determining the product of the company and its geographical borders. In addition, market shares of its rivals are measured in this step[512].

Tests were applied to the cases in different ways. As it was mentioned above, the *rule of reason* was used to determine legality of the conduct instead of *per se rule* in the *Standard Oil case*[513]. The Standard Oil Company, who was engaged in petroleum trade, was accused of being a monopoly through price fixing, limiting productions, and controlling the shipping of goods[514]and the company restrained oil trade unreasonably and unduly through controlling the stocks[515]. The court held that the antitrust regulations had to be evaluated in the light of reason. In other words, when the contracts and combinations unreasonably or unduly restrained the trade, they were forbidden by competition regulations. The intent and conduct of the company are two components in determining the unreasonableness[516]. Generally, these two elements occur in the conspiracy monopolization attempts[517]. Therefore, courts must carefully determine whether the purposes and conducts of the companies are anticompetitive or not[518]. Sometimes monopoly occurs as a result of the market conditions and firm's skill, efficiency and foresight. In such cases, antitrust regulations must not be applied immediately since the company could not have any conduct to injury competition or competitors[519]. On the other hand, if the social life gains benefits from the results of conduct, the antitrust law also will not be applied to protect the social welfare[520].

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[512] David J. Gerber, "Competition Law" **The American Journal of Comparative Law**, Vol: 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law, 2002, pp. 285-286.
[513] In the Continental T.V., Inc. V. Gte Sylvania Inc. U.S. Supreme Court 433 U.S. 36 (1977) case court clearly stated that the *per se* rule was out-of-date. Therefore restrictions had to be judged under the rule of reason. https://supreme.justia.com/cases/federal/us/433/36/ (28.11.2018).
[514] Corley and Black,3rd ed., p. 346.
[515] Standart Oil Case.
[516] Elmer E. Smead**, Governmental Promotion and Regulation of Business,** Meredith Corporation, The U.S.,1969, p. 70.
[517] Cox, p. 73.
[518] Blecher, p. 218.
[519] Conry et al, p. 475.
[520] Gregory J. Werden, "Identifying Exclusionary Conduct under Section 2: The No Economic Sense Test", **Antitrust Law Journal,** Vol: 73, 2006, p. 413.

Even though *per se* rule and *rule of reason* were applied to measure the conduct these two ways lost its fashion nowadays for monopolization cases[521]. In order to determine the conduct of the single firm, anticompetitive behaviors can be divided into two groups "exclusionary" or "predatory"[522]. Unfortunately, this distinction also encounters problems. Some of the scholars asserted that even honest businessmen can have an exclusionary intent[523]. In the exclusionary intents, the following five standards can be used to determine the legality of the intent: *the effects-balancing test, the profit-sacrifice test, the no-economic-sense test, the equally efficient competitor test, and the disproportionality test*[524]. Each test has its unique features and discussing all of them is not appropriate with the aim of this study. Briefly, it can be said that exclusionary intent occurs when a company illegally acts to gain a share from other firms[525].

Predatory intent is generally followed by companies as a price policy. Where the price of a good is lower than its average total cost and marginal cost, this kind of price policy is called predatory price. Predatory price policy is generally followed by financially strong companies in order to prevent market from newcomers[526]. It can be said that even though predatory price policy affects the newcomers negatively, customers can gain more advantageous from the low costs. In that case, competition law is not protecting the customers via inhibiting predatory pricing. It should not be forgotten that a company will be able to set prices for his own purposes if there is no competitors. It is highly possible that low price is going to turn high price, which is not beneficial to customers[527]. Not all price-cutting policies are considered as unlawful. For instance, a company is free to follow low price policy when it has lesser production costs than competitors do and it maximizes short-run profits. Predatory intent occur when long-term strategy of a company is aiming to eliminate rivals or deterring new

[521] Eugene V. Rostow, "Monopoly Under the Sherman Act: Power or Purpose", **Illinois Law Review**, Vol 43 No:6, 1949, pp. 751-752.
[522] Conduct Sherman Act.
[523] Blecher, p. 217.
[524] Conduct Sherman Act.
[525] Blecher, p. 217.
[526] F.M. Scherer, "Predatory Pricing and The Sherman Act: A Comment", **Harward Law Review**, Vo:. 89:868, 1976, pp. 874-875.
[527]Dustin Sharpes, "Reintroducing Intent into Predatory Pricing Law", **Emory Law Journal**, Vol: 61-903 ,2012, p. 903.

entries[528]. In addition to predatory pricing, predatory innovation, predatory investment in capacity and predatory advertising are the other predatory intent behaviors. In all cases, the intent of the company is to earn larger long run profits in order to eliminate its rivals[529].

2.2.2. European Union Legislation

The concept of abuse of dominant position is regulated in article 102 as following;

> *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*[530].

Even so the definition of the abuse of dominant position is extensive with regard to article, it contains two elements; (i) a company must be dominant on one or more E.U. markets and (ii) the dominant power alone is not against the law, it must misuse its dominant position[531]. In other words, these two determinants simultaneously designate the legality of the abuse of dominant position; one of them is to evaluate the dominance for understanding whether the firm is dominating the market or not. The other one is to assess whether the firm abuses its dominant power or not. The determination of the legality of the abuse of dominant position is done step by step. As a starting point, the relevant market of the firm must be designated. In order to specify the relevant market three following variables are being used; the product market, the geographical market

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[528] Steven R. Beck, "Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act" **Cornell Law Review**, Vol: 76, Issue 6, 1991, p. 1255.
[529] Sanford V. Berg and Richard E. Romano, "Predatory Intent Under Uncertainty ", **Review of Industrial Organization**, Vol :3. No.1, 1986, p. 4.
[530] TFEU, article 102.
[531] Geradin et al, p. 175.

and the temporal factor. Determination of the relevant market unveils the market share of the company in the particular market. In order to establish the dominance, firms' market share, financial and technological resources, access to raw materials, conduct, barriers to entry must be considered. After these, it shall be identified whether the firm abuses its dominant position or not. For this measurement article 102 gives some examples of abuse. However, this list is not exhaustive. In this title, relevant market and the term of intent will be studied in order to clear up how the abuse of dominant position is regulated in the E.U. legislation.

2.2.2.1. Relevant Market

Relevant market is the first determination of the dominance. In the literature, every author defined it from their own perspective[532]. Chalmers and others[533] identified the relevant market with the following example. The main actor of the example is the farmer who is the only cultivator and seller of organic cherry tomatoes in the X village. If the market defined narrowly as a town, he will be a monopoly in his town. Therefore, other determinants need specification to understand whether he really has dominant position or not. Firstly, the substitutes of organic cherry tomatoes, like non-organic tomatoes, position in the market must be tested. Then, the market sphere of the product must be determined geographically. If there is another organic cherry tomatoes seller in another village, only few minutes away from the X village, the farmer will not have dominant position since he competes against other farmer. Finally, the temporal factors must be evaluated. If the organic cherry tomatoes are available for only specific seasons, the market power of the farmer will change during these seasons. The example depicts

[532] The market definition was firstly mentioned in the *Continental Can* case as following; "*The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products. In order to be regarded as constituting a distinct market, the products in question must be individualized not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose".*
Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. Case 6-72. ECLI identifier: ECLI:EU:C:1973:22 p 217 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0006&from=EN, (11.02.2019), (Continental Can Case).
[533]Chalmers et al, p. 1026.

that there are three main assessments explaining the determination of relevant market: the product market, the geographical market and the temporal factors. Without defining them, the undertaking can find itself in a dominant position even if it does not enough power to change the market conditions essentially[534].

In 1997, Commission introduced to *Relevant Market Notice* (RMN) to display how the Commission implements the concept of relevant product market and geographic market. With respect to RMN article 7, relevant product market defined as follows; "*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*[535]*".* In the light of this definition, it can be said that interchangeability of the products under scrutiny with other products is the first area of investigation for the Commission and the Court for relevant market test[536]. At that stage, it will be better to identify the interchangeability. For instance, a child wants to eat choc ices but he cannot find in the store. Instead of choc ices, he buys strawberry ice cream. In that case strawberry ice cream and choc ices are substitutes of each other and this means that both of them are in the same product market[537]. However, the determination of the interchangeability is not simple as ice-cream example. In order to verify the demand side interchangeability, the cross elasticity of demand is used[538]. It measures how the demand change of the one product affects another product price[539]. The test for measuring the cross price elasticity of demand of certain types of goods is called *Small but Significant Non-transitory Increase in Price* (SSNIP)[540] which requires three-stages. As a starting point, the products of geographical area shall be determined. After the determination of the boundaries, as a second stage, it

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[534] Porter Elliott, "More than an Ocean Separates Us: What You Might Not Know about EU Competition Law, **Business Law Today**, Vol:16, No: 6, 2007, pp. 55-56.

[535]Commission Notıce On The Definition Of Relevant Market For The Purposes Of Community Competition Law(97/C372/03), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:-31997Y1209(01)&from=EN, (18.02.2019), (Relevant Market Notice)

[536] Craig and Burca, p. 1012.

[537] Berry and Hargreaves, p. 289.

[538] Craig and Burca, p. 1012.

[539] Patrick Massey, "Market Definition and Market Power in Competition Analysis: Some Practical Issues" **The Economic and Social Review**, Vol: 31, No: 4, 2000, p. 314.

[540] Same test is also using in the U.S.

shall be tested whether a *hypothetical profit-maximizing* monopolist, who control over all the products in the boundaries, would be able to raise prices profitably by 5–10 per cent for a period of time of around a year. Final stage depends on the second stage; if the test results are negative, an extra set of products and regions shall be examined and the SSNIP must be repeated[541]. It must be pointed out that the SSNIP test is applicable only when the price of the product should dominate the market price[542]. Beside these tests, there is also one easy way to determine the substitutes. In this way, the judges shall put themselves in customer's place and examine whether the customer uses certain products as substitutes for one another[543].

The *United Brand*[544] case is the most famous case on the subject of abuse of dominance and it determines the relevant product market[545]. United Brands Company was the biggest group in the world banana market in 1970's. In the Europe market, it had a subsidiary called Unite Brands Continental B.V. who was responsible to sell bananas in all member states[546]. In 1975 European Commission[547] held that the United Brand Continental infringed article 102(ex 86) on the ground that four reasons: (i) the company forced to its distributors to not to sell bananas while they were still green, (ii) the company charged its distributors in the various member state different prices for the same conditions of the bananas (iii) the company imposed unfair prices for customers (iv) the company refused to supply bananas from a distributor on the ground that the distributor took place in an advertising campaign for bananas of a competing brand[548]. The United Brand Company went to appeal. The Court of Justice firstly started to

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[541] Helen Jenkıns and Beatriz Yemaıl Oxera,"Economics at The Heart of Competition Policy", **Introduction to EU Competition Law**, (Ed Peter WILLIS), Informa Law, the U.S., 2014. p. 27.
[542] Echo Huo Bo, "The Definition of Relevant Market: Comparative Analysis and Practice in China", **Hong Kong Journal of Law Studies**, Vol:7-151, 2013, p. 153.
[543] Pierre Larouch, "Relevant Market Definition in Network Industries: Air Transport and Telecommunications", **Journal of Network Industries,** Vol: 1, 2000, p. 432.
[544] United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas. , Case 27/76, ECLI identifier: ECLI:EU:C:1978:22, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027#CO, (22.01.2019), (United Brands Case).
[545] John Temple Lang, "Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law", **Fordham International Law Forum,** Vol: 3 Number 1, 1979- 80, pp. 6-7.
[546] Not United Kingdom and Italy
[547] The court of justice affirmed the Commission
[548] United Brands Case, pp. 210-211.

investigate the relevant product market of the bananas. The defendant defined the market broadly and stated that bananas are in the fresh fruit cluster. In the absence of the banana, customers prefer to consume other fresh fruits like apples, oranges etc. since all of them take place on the same shelves[549]. However, the court held that the features of the all fresh fruits differ from each other. Banana is very important meal for the old, the sick and the very young people due to its appearance, taste, softness, seedlessness and easy handling[550]. Also, it was stated that there is no long cross elasticity[551] between the banana and the other fruits[552]. Taking into account of the court tests, because of its unique features for designated customers, the banana has a very special relevant market in which only other type of bananas can be considered as substitutes.

The drawing the borders of the market is the another important step for relevant market measurements. In generally, the relevant geographical market is defined as the region in which all undertakings have same conditions for competition of the relevant products[553]. When the language of article 102 is considered, it is mentioned that *"any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited"*. When determining the geographical market in early cases Commission and Court struggled with to evaluate the notion of *substantial part of the common market*[554] and in order to overcome these problem two approaches, *the territorial approach and the economic relativism approach,* were combined[555]. With respect to *London European – Sabena* decision, the word substantial involves the large and medium sized member states[556]. It can be deduced that the small size countries excluded from the *substantial part of the common market*[557]. In the

[549] United Brands Case, p. 224.
[550] United Brands Case, p. 226.
[551] There is any seasonal subsitutability in general between banana and all the seasonal fruits
[552] United Brands Case, p. 227.
[553] Craig and Burca, p. 1015.
[554] Thomas E. Kauper, "The Problem of Market Definition Under EC Competition Law", **Fordham International Law Journal:** Vol:20, Issue 5, 1996 , p. 1714.
[555] Leigh M. Davison, "EU Competition Policy: Article 82 EC and the Notion of Substantial Part of the Common Market", **Intereconomics,** 2009, p. 245.
[556] Commission Decision of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/32318, London European — Sabena), (88/589/EEC), paragraph 16 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31988D0589&from=EN, (26.01.2019) (Sabena Case).
[557] Davinson, pp 238-245.

competition cases, the size are not interpreted as geographically, the size shall be evaluated economically. For the economic measurement, the pattern and scale of the output and consumption figures of the product, future opportunities and consumption patterns must be considered[558].

The transportation conditions of the products are one of another key assessment of geographical market. The geographical relevant market might be large, if the transportation of the products is cheap and easy[559]. In the *Hilti* case, Liechtenstein based company Hilti was a large producer and distributor of fastening systems like nails guns. In Belgium, France, Ireland, Germany, Spain and the UK market nail guns and consumables of Hilti were sold by its wholly-owned subsidiaries. In Denmark, Italy, the Netherlands, Greece and Portugal Hilti had the medium of independent distributors. Commission held, when the any artificial barriers eliminated, Hilti could not have any difficulties to transport its nail guns. Therefore, the whole market of the European Union was the relevant geographic market for nail guns[560].

Moreover, member states trade policies also affect the extent of the geographical market. In the *United Brand*[561]case, Federal Republic of Germany, Denmark, Ireland, the Netherlands and the BLEU were mentioned as the geographic market of the bananas and France, United Kingdom and Italy were not considered within the boundaries of the geographical market[562].

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[558] Judgment of the Court of 16 December 1975 ,Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities. Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73. ECLI identifier: ECLI:EU:C:1975:174 paragraph 371, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61973CJ0040 (26.02.2019), (Suiker Unie Case).

[559] Steiner and Woods, p. 694.

[560] Commission Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty IV/30.787 and 31.488 — Eurofix-Bauco v Hilti, Official Journal 1988 L 65, p. 19, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31988D0138&from=EN, (22.02.2019) and Judgment of the Court of 2 March 1994. Hilti AG v Commission of the European Communities Case C-53/92 http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98327&-pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4877215, (22.02.2019) (Hilti Case).

[561] United Brands, Case.

[562] United Brands Case, p. 227. "*in the case of France, because of State measures reserving the banana market for the production of those countries which have special relations with France; in the case of the United Kingdom, because it benefits from "Commonwealth preferences", in the case of Italy, because the state monopoly which regulated the market was abolished in the midsixties and replaced by import quotas*

In addition, an important guidance was introduced in 2009 by the commissions to show how article 102 is enforced. With respect to article 12 of the guidance, the following factors are taken into account while assessing the dominance;

> "*Constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors), constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry), constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power)*[563]".

In the light of the guidance, the fluctuations and the trends of the market become another two important variables in evaluating the dominant position[564].

Article 102 does not mention any market share limits for dominance[565], in general, if the market share of the undertaking exceeds over 70%, it is regarded as a dominant position without any further investigation. The market share between 40%-60% generally is considered a dominant position after the detailed analysis. On the other hand, between 30% and 40% market power are evaluated as dominance but again these percentages requires additional supporting factors. Market share under 30% is the safe harbors for dominance[566]. To measure the market power there are some econometric tests which show an approximate of the price elasticity of the residual demand curve of the individual company[567].

Another important variable for determining the dominance is the concept of *ease of entry*. The main logic behind this concept bases on the entries of the outsiders to the

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on bananas coming from countries which are not members of the EEC; however bananas of the "Cavendish" variety as well as the "Chiquita" brand are sold on this market ."

[563] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN, (23.02.2019)

[564] Geradin et al, pp. 188-189.

[565] Russell Zimmerer, "Antitrust Issues in the European Union: Intel", **The International Lawyer**, Vol: 42, No. 3 , 2008, pp. 1200-1201.

[566] Brian A. Facey and Dany H. Assaf, "Monopolization and Abuse of Dominance In Canada, The United States, and The European Union: A Survey", **Antitrust Law Journal,** Vol: 70, No. 2, 2002, p. 534-536.

[567] Simran K. Kahai, David L. Kaserman and John W. Mayo, "Is the "Dominant Firm" Dominant? An Empirical Analysis of AT&T's Market Power", **The Journal of Law and Economics,** Vol: 39, No. 2 ,1996, p. 501.

market without any barrier[568]. These barriers can be geographical, financial, technical and temporal[569]. Additionally, the barrier of entry is identified as *impressionistically* in the Commission Guidance document on Article 102 which becomes effective if expansion or entry is likely[570], timely[571] and sufficient[572].

2.2.2.2. Abuse-Conduct

After the designation of the dominant position of the undertaking in the relevant market, it must be investigated whether the dominant position is fair or not. Since, a special responsibility is given to the dominant position undertaking who must take due precautions in order to not diminish competition in the common market[573]and must not harm the customers by using its market power[574].

In article 102, "*abuse*"[575] is not defined however; the some important examples of it are listed[576]. However, the list is not exhaustive. Before discussing the term of

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[568] Richard Schmalensee, "Ease of Entry: Has The Concept Been Applied Too Readily?", **Antitrust Law Journal**, Vol: 56, No. 1, 35th Annual Spring Meeting, 1987, p 42.

[569] Steiner and Woods, p. 696.

[570] *"For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure".* Guidance document on Article 102, article 16.

[571] *"For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power".,* Guidance document on Article 102, article 16

[572] "*For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market" ,* Guidance document on Article 102, article 16.

[573] NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, Judgment of the Court of 9 November 1983, Case 322/81. Paragraph 10, , https://eur-lex.europa.eu/legal content/EN/TXT/HTML/?uri=CELEX:61981CJ0322&from=EN, (24.02.2019).

[574] Moritz Lorenz, **An Introduction to EU Competition Law**, Cambridge University Press, Cambridge, 2013, p 215

[575] In the *Hoffmann-la Roche* the abuse was defined as "*an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , as a result of the very presence of the undertaking in question , the degree of competition is weakened and which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".* Hoffmann-La Roche & Co. AG v Commission of the European Communities. , Case 85/76, ECLI identifier: ECLI:EU:C:1979:36, paragraph 6, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0085, (24.02.2019), (Hoffmann-La Roche case).

abuse deeply, it shall be noted that the abuse may be divided in two categories; exploitative and exclusionary[577]. In the exploitative abuse cases action of the dominant undertaking directly harms consumers. But if the dominant undertaking indirectly desires to harm the competitive position of its rivals or to exclude them from the market, this behavior will be subject to exclusionary conduct[578]. In the literature, the discrimination of the abuse causes disagreements. Some authors studied the abuse behaviors under the exploitative headings[579] and some of them considered identically same behaviors as exclusionary[580]. Some scholars believed that the Commission abstained from focusing exploitative abuse because this kind of abuse has difficulties in measurement[581]. On the other hand, some of them mentioned that the drafters of article 102 were aiming to forbidden only exploitative abuses[582]. Additionally some of the authors stressed that Commission did not put emphasis on the classification[583]. The Commission putted an end to this dispute through the Commission Guidance on article 102 and stated that the Commission will focus on exclusionary conducts[584] those harm the customers[585]. Afterwards, the Commission has been using customer welfare balancing test[586]to determine the legality of abuse[587]. Therefore, it can be said that there

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[576] TFEU, 26.10.2002, Article 102 , *"(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"* .

[577] Nicolas Petit and Norman Neyrinck, "Behavioral Economics and Abuse of Dominance: A Proposed Alternative Reading of the Article 102 TFEU Case-Law" **The Global Competition Law Centre Working Papers Series,** 02/10, College of Europe, Belgium, p.8.

[578] Pınar Akman, "Exploitative Abuse in Article 82EC: Back to Basics?" **ESRC Centre for Competition Policy CCP,** Working Paper No. 09-1; 2008, SSRN: https://ssrn.com/abstract=1328316, (10.01.2019) (Exploitative), Abstract.

[579]Berry and Hargreaves, pp. 300-307.

[580] Geradin et al, pp. 208-269.

[581] Craig and Burca, p. 963.

[582] Akman, Exploitative, Abstract.

[583] D.G. Goyder, **EC Competition Law**, 4th ed., Oxford University Press, New York, 2003, p. 283.

[584] Since exclusion is often at the basis of later exploitation of customers. Pınar Akman, **The Concept of Abuse in EU Competition Law: Law and Economic Approaches,** Hart Publishing, Oxford, 2012, (Abuse), p. 135.

[585] Guidance document on Article 102, article 5.

[586] A test measures balances over- and under- enforcement by preserving customers from conduct that, on balance, will damage them.

will be no more classification and all abuses are considered as exclusionary by the Commission. Instead of above discrimination, abuse behaviors must be categorized as follows[588];

- Abuse of price: excessive-predatory pricing, discriminatory-cross-subsidized pricing, and rebate and discount schemes with anti-competitive features.
- Refusal to deal by dominant company: refusing goods or services, offer unreasonable terms.
- Refuse either by a personnel proprietor or joint societies to grant licenses of intellectual property rights.
- Refuse the accessibility to essential facilities.
- and others; involving abuse of legal proceedings etc..

All abusive actions require a separate evaluation. Therefore, the abuse behaviors that are appropriate for the purpose of this study will be investigated in following paragraphs. As a starting point predatory pricing is studied since it is the simplest form of abuse behaviors. With respect to this behavior, the dominant firm follows below-cost pricing policy to eliminate competitors from the game and consequently generates monopoly power for itself[589]. This argument was discussed in the *Akzo* case. *Akzo* sold its products under its total average costs but above its average variable costs and harmed its rival[590]. Court held that if the dominant undertaking seeks to eliminate a competitor via decreasing prices under average variable costs of the products (fixed cost plus variable costs), the undertaking will be regarded as abuse. If the above average variable costs are determined as part of plan for eliminating competitors, then it will be considered as abusive[591]. Testing the predatory pricing requires sufficiently confidential

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[587] Pınar Akman, "The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso?*", **The Modern Law Review**, Vol: 73(4), 2010, (Guidance), p. 607.
[588] Goyder, p. 283.
[589] John Vickers, "Some Economics of Abuse of Dominance" **University of Oxford,** Department of Economics Discussion Paper Series, December 2007, p. 6. https://www.economics.ox.ac.uk/materials/working_papers/paper376.pdf (12.01.2019).
[590] AKZO Chemie BV v Commission of the European Communities, Judgment of the Court (Fifth Chamber) of 3 July 1991, Case C-62/86 *European Court Reports 1991 I-03359* ECLI identifier: ECLI:EU:C:1991:286, paragraph 79, , https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0062, (01.03.2019), (Akzo Decision).
[591] Akzo Decision, paragraph 7.

data of costs of the dominant undertaking. If there is no information about the dominant undertaking, data of competitors or other comparable trustworthy data may be used[592]. That is to say, when the dominant position undertaking sells it products below the cost of its competitors, this price decreasing effect may be considered an abuse. However, it shall not be simple as its reading. For measuring the prices, the margin squeeze method is generally used and the benchmark of this method is long-run average incremental costs[593].

Excessive pricing is one of the highly disputed issues among in the E.U. competition doctrine. In this case, the dominant undertaking launches a product with excessively above the competitive level price for exploiting its consumers[594]. Unfortunately, measuring the excessive pricing is not simple as its definition. Director General Philip LOWE stated that they had difficulties in determining the content of an excessive price. In order to overcome this problem, the U.S. exclusionary abuses[595] examples were assimilated by the E.U. legal authorities[596]. In addition to the measurement difficulties, courts do not desire to deal with the excessive prices cases since the forbidden of excessive prices might *chill down* encouragement and investments of companies. Also it was believed that the market can solve this problem by itself therefore prohibiting the excessive pricing policies is redundant[597]. In the *United Brand* excessive price is defined as following

> *"it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. In this case charging a price which is excessive*

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592 Guidance document on Article 102, article 25.

593 Akman, Guidance, p 625.

594 Liyang Hou, "Excessive Prices Within EU Competition Law", **European Competition Journal**,Vol:7:1 2011, p. 48.

595 Those which seek to harm consumers indirectly by changing the competitive structure or process of the market.

596 Director General Competition, Phılıp Lowe, "How Different Is EU Anti-Trust ? A Route Map for Advısors An Overvıew of EU Competition Law and Policy on Commercial Practices" **Ba 2003 Fall Meetıng Brussels**, 16 October 2003, p. 4.
Http://Ec.Europa.Eu/Competition/Speeches/Text/Sp2003_038_En.Pdf (1.03.2019).

597 Ariel Ezrachi and David Gilo, "Are Excessive Prices Really Self-Correcting?", **Journal of Competition Law and Economics**, Vol: 5(2), 2008, pp. 249–268.

because it has no reasonable relation to the economic value of the product supplied would be such an abuse"[598].

According to this decision, it may be regarded that unfair price becomes excessive when it is higher than the effective competitive level or the economic value of the good[599]. Additionally the case introduced three methods for formulation the excessive prices.

"This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin (ii) The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, it the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products (iii) there can be Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair"[600].

The *United Brand* method includes two-steps; as beginning it shall be tested whether the differences in costs really occurred and the prices were essentially excessive. If the answers of these two questions are yes, then the unfair position of the price of the product shall be tested via comparing with competitor's data. While comparing the prices, following issues shall be investigated by considering the undertaking and its rival; last prices of the product, current prices of it and its substitutes, prices in the other geographical markets, prices of related products in other markets, prices of comparable products in other markets[601]. In all price abuses, the price of the product is not only subject to investigation. Additionally, prices of other products mainly its substitutes require further analysis and these two prices shall be compared each other to answer a question, whether the dominant undertaking abuses the market by following an unfair price policy or not.

Another important abuse behavior is the refusal to supply that occurs when the dominant undertaking does not supply the products to its customers with the intent of

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[598] United Brands Case, paragraphs 249-250.
[599] Massimo Motta and Alexandre de Streel," Excessive Pricing in Competition Law: Never say Never ? in The Pros and Cons of High Prices". **Swedish Competition Authority**, Kalmar, 2007 p. 32.
[600] United Brands Case, paragraphs 251-252-253.
[601] Hou, pp 55-58.

restricting free trade[602]. *Commercial Solvent*[603] is the leading case in the refusal to supply cases. In this case, the Commercial Solvent Company was worldwide monopoly in the production of a raw material used to produce a chemical and by using that power the Commercial Solvent refused to supply the raw materials to its downstream competitor named Laboratorio Chemico Farmaceutico Giorgio Zoja SpA (Zoja) with the aim of eliminating Zoja in the market. The court held that if a dominant undertaking refuses to supply the raw materials and eliminates other producers just because it desires to produce these derivatives, it will abuse its dominant power within the scope of article 102[604]. The dominant undertaking has a responsibility for supplying and it should not stop supplying in order to promote competition. In other words, if the dominant undertaking plans to enter its downstream market, it shall not refuse to supply its products to downstream market players. The intent of the dominant company shall be *reasonable and proportionate to the threat* but this rule cannot be applied when the other competitors and customers enter the game[605].

As it was mentioned above, the term of abuse shall not be limited and the examples of it have been changing day by day. The doctrine of refusal to access to essential facilities is the newest version of abuse of conduct and it involves a combination of refusal to deal and discriminatory dealing. In this case, an undertaking refuses his competitor who desires to use the facilities or infrastructures of the undertaking. Essential facilities change from the case to case but it can be exampled ports, harbors, airports, electronic systems, gas, and etc.[606]. *Sea Containers v Stena Sealink*[607] is one of the important cases about the essential facilities. Sea Containers

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[602] Renato Nazzini, **The Foundations of European Union Competition Law: The Objective and Principle of Article 102,** Oxford University Press, New York, 2011, p 193.

[603] Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities, European Court Reports 1974 -00223 ECLI identifier: ECLI:EU:C:1974:18, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61973CJ0006&from=EN, (12.03.2019),(Commercial Solvent Case).

[604] Commercial Solvent Case pp 250-251.

[605] John Temple Lang, "Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities," **Fordham International Law Journal**. Vol 18: 437, 1994, pp 439-522.

[606] Goyder, pp. 316-317.

[607] Sea Containers v Stena Sealink (1994), OJ L15/8, European Official Journal L 015 , 18/01/1994 P. 0008 – 0019, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0019&from=EN, (12.03.2019, (Sea Container Case).

were United Kingdom based company and dealt with selling and leasing of specialized forms of marine cargo containers. Additionally, the company owned ports and harbors. Stena Sealink Line registered in United Kingdom and its main business area was ferry services between the United Kingdom, Ireland and France. The owner and operator of the port of Holyhead in Anglesey was the Stena Sealink Ports who was the sister company of Stena Sealink Line. The dispute arose from unsatisfactory conditions of the existing facilities at Holyhead where was prone to congestions since some berths and piers had insufficient ramps. Sea Containers operated one of its ships, named SeaCat, for fast ferry services and Holyhead was the only suitable port from which to operate such a service on the central corridor. Sealink stated that it had difficulties when the SeaCat was maneuvering in the port since there were constructions in some berths and the port physical conditions were not suitable for SeaCat. Sea Containers asserted that there were not any insurmountable technical difficulties regarding to SeaCat maneuvering. Sealink requested a confirmation from Sea Container for Sea Cat schedule and re-mentioned their concerns. Sea Container did not reply the request and stated that SeaLink followed delaying tactics in order to protect its own ferry business by using its dominant position as the port authority at Holyhead. In addition, Sea Containers accused the SeaLink for refusing Sea Containers claims about having more slots and for reducing the Sea Containers' capacity during the constructions. Court held that

> "*the owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes article 102"* [608].

Even though today mergers are regulated in the E.U. Merger Control regulation, they were evaluated with regard to article 102 like *Continental Can*[609] before the regulation[610]. This case also is an important one for testing the abuse behavior.[611]. With respect to the plaintiff, a merger did not cause an abuse of a dominant position.

[608] Sea Container Case, paragpah 66.
[609] Continental Can Case.
[610] Berry and Hargreaves, p. 307.
[611] Craig and Burca, p.1026.

Additionally, it was argued that there should be at least one casual connection between the abuse and dominant position by plaintiff. The Court focused on the degree of the market power after the merger and stated that powerful dominance mergers could cause abuses. Therefore, it can be said that instead of initial market power of the companies, the final effect on competition of the merger was subject to investigation. Moreover, court held that not only customers but also the competitive process and other market players were preserved by article 102[612].

Determining the abuse of a dominant position of an undertaking involves two steps that shall be climbed up one by one. In the first stage, it shall be determined that whether the company has dominant position or not. In order to test the dominance, the relevant market variables, which are the relevant product market and the geographical market, are evaluated. If the test shows that the undertaking has dominant position, as a second step, it shall be identified that whether the dominant position is abused or not by the undertaking. If the behavior of the dominant undertaking is evaluated as an abuse behavior, the provisions of article 102 will be practiced. As it was mentioned at the previous paragraph event though the merger cases were discussed with respect to article 102 in early times, they have different perspective today. Therefore, in the next title mergers position in the competition legislation will be studied.

2.3. HORIZONTAL MERGERS

As it was mentioned above, collaboration strategies can be in many different forms; outsourcing, information sharing, joint marketing, joint research and development, joint ventures, partnerships, alliances, mergers acquisitions and etc[613]. Whatever it is called, not surprisingly, collaboration strategies among the competitors are the one of the focus of the competition regulations. Because, when the identically same companies establish a collaboration strategy, they will be able to determine market

[612] P. Vogelenzang, "Abuse of Dominant Position in Article 86, the Problem of Causality and Some Applications," **Common Market Law Review**. Vol: 13/1, 1976, pp. 63-64.
[613] David ,13th ed, p. 156.

conditions on their own purposes that cause competition disruption. However, not all collaborations are unlawful if they pass the certain conditions.

The U.S. Department of Justice and the Federal Trade Commission have been establishing Horizontal Merger Guidelines in order to determine the legality of a merger. Another important Guideline is the Antitrust Guidelines for Collaborations Among Competitors (AGCAC)[614] that analyzes special antitrust cases caused by collaboration among rivals.

Council Regulation (EC) No 139/2004 (the E.U. Merger Regulation) is a basis to merger control regulations in European Union market[615]. In addition to merger regulation, the Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements was introduced in 2010 in order to provide an analytical framework for the most common types of horizontal co-operation agreements[616].

In this section, in order to determine the legal grounds of the horizontal collaborations, the general provisions of the U.S. and E.U. regulations that were mentioned above will be studied. Indeed, the main purpose of this chapter is to give the adequate information about the general provisions of the collaborations before studying the place of liner shipping collaborations in the competition act.

2.3.1. The United State Legislation

Certain mergers are prohibited by Section 7 of the Clayton Act. The Section 7 has 4 paragraphs, for purpose of this study; the fundamental part of the Section 7 is the first paragraph which reads as follow[617]

> *"No corporation engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share*

[614] The U.S. Antitrust Guidelines for Collaborations Among Competitors, 2010, https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (15.11.2018).
[615] http://ec.europa.eu/competition/mergers/procedures_en.html, (14.01.2019).
[616] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf,(14.01.2019) (Horizontal Cooperation Guideliness)
[617] Fisher and. Phillips, p. 424.

capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly".

As it is seen from the language of the first paragraph of the Section 7, the term of merger must be identified in order to determine what kinds of activities are considered as a merger. In the strategic management literature, the merger strategy occurs when two or more companies associate their operations to generate a new organization[618]. In the U.S. legal definition of the merger is wider than strategic management one. A merger occurs when two or more firms collaborate, but one of the agreement company stay in existence and the others become a part of it or merger also occurs when the all companies of the agreement continue to exist while one of parent company is able to control other companies via buying their stocks[619]. As it was mentioned above asset mergers were not regulated by the Clayton Act until 1950. After the Celler-Kefauver Amendment or Act, this legal gap was fulfilled and this act was regulated that Sherman Act would not be used for determining the legality of mergers anymore[620].

Moreover, in addition to conglomerate and vertical mergers, horizontal mergers became a subject of competition law after the Celler-Kefauver Amendment. Horizontal mergers occur when identically same firms collaborate. In this mergers strategy, the products are substitutes of each other, thus there is a high cross elasticity of demand[621]. When companies in a distribution channel desire to acquire, this collaboration is called as a vertical mergers. In conglomerate mergers, agreement companies have different features and they are unrelated[622]. Horizontal mergers will be discussed in this study since horizontal collaboration strategies among liner shipping companies are the main focus of this study. Beside, antitrust generally deals with horizontal mergers because this

[618] Mcglashan and Singleton, p. 113.
[619] Fisher and. Phillips, p. 664.
[620] Sherman Act did not come into force for mergers unless the agreement firms had a total monopoly control. Butler, p. 653.
[621] Stern and Grabner, pp. 88-89.
[622] Wright et al, pp. 74-75.

kind of strategy generally restricts the competition[623]via eliminating current rivals and potential competitors[624].

Some of the horizontal mergers may not substantially lessen competition. Therefore, evaluation the impact of horizontal mergers on the market is the key factor of the courts. Mergers will not consider as unlawful, if two determinants are fulfilled. Firstly, consumer welfare is subsequently enhanced after the merger. Secondly, they do not lessen competition in the market[625]. The determination of the unlawful mergers requires two-step process. Identification of the relevant market is the first step. This step is same as the analysis of Sherman Act Section 2. The effect of the mergers on competition in the relevant market is the second step of determination[626]. In addition to these two determinations, the Department of Justice has established Merger Guidelines which leads the scholars against challenges of horizontal mergers[627]. Due to their importance, each of them will be studied under the subtitles.

Although the concept of relevant market had been discussed under this title, the relevant market will be studied in the framework of horizontal mergers. In the horizontal mergers cases, the importance of measuring the relevant market plays crucial role because each of the agreement firms are also the competitors in the market. Chief Justice Warren has stated that measuring of the relevant market is a key factor to determine the legality of a merger under the Clayton Act because a merger will be unlawful if it significantly lessens competition with in the area of effective competition[628]. By considering this, it can be said that members of merging agreement have to examine what they sell and where the products will be sold[629]. In addition, they have to consider the number and power of the competitors in the relevant market[630]. However, the determination of these components is not easy. Since there was not any particular test for

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[623] Butler,p. 653.
[624] Stern and Grabner, p. 91.
[625] Clarkson et al, p. 699.
[626] Butler,p. 653.
[627]Conry et al, p. 485.
[628] Brown Shoe Co. v. U.S. 370 U.S. 294 (1962), (Brown Shoe Case), cited in Butler,p. 654.
[629] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets, (20.12.2018).
[630] Bandy, pp. 821-822.

determining the relevant market, courts generally tested the product market and geographic market of the firms and they adopted a strict attitude against collaborations[631]. Even though the courts tried their best, there was a requirement for standardization to test a merger. In 1968 the first horizontal merger guidelines was established and then five other Horizontal Merger Guidelines were introduced by the Department of Justice and Federal Trade Commission. These two authorities have overhauled the standards of mergers over the course of six versions[632].

Brown Shoe case is the one of the well-known relevant market cases in the literature. In the case two shoe companies had established a merger which tended to lessen competition and therefore they were accused for violation of Clayton Act Section 7. In order to determine the relevant market, court identified the product market and geographic market. The District Court was held that the relevant market of a shoe company involves men's, women's, and children's shoes. With respect to the defendant, manufactures of medium-priced and low-priced shoes operate in different market. The defendant asserted that the definition of the District Court was illegitimate, since there was no distinction in like price/quality and age/sex of shoes. The Supreme Court mentioned that the language of the Clayton Act Section 7 was the main guide for determining the relevant market. With respect to the section, any kind of merger which tends to lessen competition in any line of commerce was prohibited. The term of any line of commerce requires a broader examination. In this frame work, the relevant market for shoe companies was determined as men's, women's, and children's shoes by the District Court was correct and any kind of division would be "unrealistic". In order to determine the geographic market, the Supreme Court again accepted the District Court determination. According to the District Court, even if the Section 7 of the Clayton Act implied that the relevant geographic market is the entire Nation, it could not be applied for this case. Since the stores of members of merger agreements were located in the cities with 10.000 or more population. By considering all of these information, the

[631] Robert N. Corley and Robert L. Black and O. Lee REED, **The Legal Environment of Business,** 5th ed. McGRAW-Hill Book Company, The U.S. 1973.p. 259.

[632] Kenneth G. Elzinga and Vandy M. Howell "Geographic Market Definition in the Merger Guidelines: A Retrospective Analysis," **Rev Ind Organ.** Vol:53(3), 2018, pp. 453–475., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6208606/, (25.12.2018).

relevant geographic markets were defined by the District Court as cities with a population exceeding 10,000 and their environment in which agreement companies retailed shoes through their own shops. The limitation also involved both the downtown shops and suburban shopping centers where strongly affected the competition in the cities market[633].

As it was mentioned above, the Supreme Court affirmed the District Court decision by stating that the term of any line of commerce requires a broader examination. Submarkets of the product, features and purpose of the product, production facilities, the loyalty of customers to the product, the price of the good and market attitude against price changes and existence of specialized vendors play crucial role for determination of product market[634]. Boundaries of the submarket were questioned by the courts. Some courts argued that submarket of the goods had unique features and they shall not be considered in the relevant market. However, most of the courts of that time used the view of Brown Shoe case, which indicated that the submarket comprised of competitive products and suppliers[635].

The confusion emerged after the *DuPont –General Motor*[636] decision. One year later the *Cellophane* case, same parties appeared in court for another dispute. DuPont was the main finishes and fabric supplier to General Motor and he desired to buy 23% of the common stock of General Motors. Defining the relevant market played crucial role in that case. Defendants alleged that when the all sales of *finishes and fabrics* to industrial users in 1947 were considered, DuPont-General Motor *finishes* trade had 3.5% share and their fabric trade had 1.6% of the total market. Therefore, the boundary of the relevant market was considered as all *finishes* and fabrics. When the automotive finishes and fabric were taken into account, all picture changed. Almost 50% of the total automotive finishes and fabrics were consumed by General Motors and 67% of the

[633] Brown Shoe Syllabus, https://supreme.justia.com/cases/federal/us/370/294/ (19.12.2018).
[634] William MacLeod, "The Relevant Product Market After Brown Shoe: A Framework of Analysis for Clayton and Sherman Act Cases", **Loyola University Chicago Law Journal**, Volume 12 Issue 3 Spring 1981 Antitrust Symposium: Mergers, pp. 325-326.
[635] Bryce J. Jones,"New Thrust of the Antimerger Act: The Brown Shoe Decision", **Notre Dame Law** Review, Volume 38, Issue 3, 1963, p.230.
[636] Du Pont Case,Syllabus, https://supreme.justia.com/cases/federal/us/366/316/ (03.01.2019).

finishes 53% of the fabrics of General Motors' requirements were produced by DuPont in 1946. Based on these figures, Du Pont controlled approximately 34% of the automotive finishes market and approximately 19% of the automotive fabric market[637]. Without testing reasonable interchangeability, the court stated that relevant market did not consist of all finishes and fabric industry, automotive finishes and fabric had unique features in terms of areas of usage. Subsequently, it was held that the collaboration was against the Clayton Act[638].

It cannot be ignored that the *General Motor* case contended with a vertical integration. Judgment of the *General Motor* case is unenforceable to horizontal mergers[639]. Each merger type has different impact over the market. Therefore, courts consider the each merger from a different angle. In the vertical mergers, they operate in the different levels of the supply chain. Therefore, this kind of agreement may foreclose other manufacturers, other horizontal market competitors and other suppliers. In the horizontal merger, agreements can only harm the horizontal market[640].

It can be said that there was confusion about what kind of factors would applied for horizontal mergers relevant market determination. Six years later from the *Brown Shoe,* DOJ introduced the first Horizontal Merger Guidelines (HMG) with the intention of guiding the interested groups about the standards of legal mergers with regard to Section 7 of the Clayton Act[641]. Six HMG were introduced and the latest HMG has been still applicable since 2010. The 2010 HMG defines foremost analytic practices to test whether a horizontal merger may distort competition conditions in the market. Briefly if a merger enhances members' market power, it will be prohibited. Market power is

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[637] Robert W. Werth, "Determination of the Relevant Product Market", **Ohio State Law Journal**, Vol: 26, No. 2, 1965, pp. 243-244.
[638] Robert W. Harbeson, "The Clayton Act: Sleeping Giant of Antitrust?", **The American Economic Review**, Vol. 48, No. 1, 1958, pp 93-95.
[639] Bruce Bromley, "Mergers And Acquisitions: 'A Private Practitioner's Views'", **Section of Antitrust Law,** Vol. 11, Proceedings At The Annual Meeting, New York And London, July 13 And 25, 1957 pp. 13-15.
[640] Stephen Mann and Thomas M. Lewyn, "The Relevant Market under Section 7 of the Clayton Act: Two New Cases. Two Different Views" **Virginia Law Review,** Vol. 47, No. 6, 1961, pp. 1027-1029.
[641] 2010 Horizontal Merger Guidelines, https://www.justice.gov/archives/atr/1968-merger-guidelines (12.12.2018).

enhanced when firms (rivals and member of merger agreement) increase prices, reduce production, and subtract innovation because of the merger[642].

Under the heading of *"Evidence of Adverse Competitive Effects*", HMG is listed possible actions that may substantially lessen competition. Merging parties, customers and other industry participants and observers are the main sources of the merger analysis. Parties must evaluate the current impact and future impact of a merger. Before signing a merger agreement, the parties must investigate how the market conditions will be changed after the merger. With testing the future conditions, they will be aware the possible influences of the merger over the competition before the signature stage. Previous and other industry examples are also other important evidences for members to determine the legality of agreement[643].

As it was mentioned above, determination of legality of a merger requires certain analysis. The HMG provides possible ways of tests that start with describing market definition[644]. With respect to HMG, market definition has two crucial roles. Firstly, line of commerce and the section of the country are identified by market definition. Secondly, agencies are able to define market participants and to evaluate market shares and market concentration via market definition. As courts did, the HMG uses product market and geographic market criterions for identifying market definition. However, in contrast to courts, 2010 HMG introduced analytic tests for market definition[645]. The Hypothetical Monopolist Test (HMT) is one of them. This test was firstly introduced in 1982 Guidelines and it examines the effects of possible price increases of products[646]. HMT defines the relevant market by using the price increases of the substitute products. The increase of the price must be a *small but significant and non-transitory.* The determination of *small but significant and non-transitory* is not easy. Therefore, generally, 5% of price acceleration is enough for agencies to designate the relevant

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[642] 2010 Horizontal Merger Guidelines, p. 1-2.
[643] 2010 Horizontal Merger Guidelines, p. 2-6.
[644] Dennis W. Carlton, "Revising The Horizontal Merger Guidelines" **Journal of Competition Law and Economics**, Vol: 6(3), 2010, p. 2.
[645] 2010 Horizontal Merger Guidelines, p. 7-8.
[646] Christine A. Varney, "The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution", **Antitrust Law Journal**, Vol:77, No:2, 2011, p. 651.

market. If the prices of testing substitutes products will increase more than 5% after the merger, these products group will be considered relevant market of the merger firms' products[647]. The HMT was strongly criticized by an economist Kaplow who stressed that the test does not comprise the whole market determinants. For the economist perspective he believes that half of the glass is empty or half is full. Courts must consider the all determinants while defining the relevant market[648].

In addition to relevant product market, geographical market plays an important role for merging firms. The attitudes of customers and suppliers against substitutes of testing products are the key factors for agencies. The geographical features of the customers and suppliers can affect their choices. The geographical boundaries of a product comprise the region in which the sales are made[649]. Therefore, as a starting point of the geographical test, customers' location must be defined and then the geographical scopes of the suppliers demarcate the boundaries of the analysis[650].

Even though market determination is an important step, the agencies cannot evaluate competitive effects of merging agreement without testing market participants, market shares and market concentration. These three parameters test whether a merger substantially diminishes the competition or not. Market participants are broader than relevant market players. Not only all firms operates in the relevant market but also near future entries into the market are accepted as market participants. Market shares are calculated based on the market participants' annual data, which generally consist of revenues. Since revenues are the good evidences of how the attractiveness of customer had changed[651].

In the horizontal merger cases, market concentration is generally calculated by using Herfindahl-Hirschman Index (HHI)[652]. HHI was firstly introduced in 1982 HMG. With respect to 1982 HMG, HHI is measured by squaring the market shares of all firms

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[647] 2010 Horizontal Merger Guidelines, p. 8-13.
[648] Kaplow, p. 369.
[649] 2010 Horizontal Merger Guidelines, p.13-15.
[650] Carlton, pp. 630-640.
[651] 2010 Horizontal Merger Guidelines, p. 15-17.
[652] Akio Matsumotoa, Ugo Merloneb, and Ferenc Szıdarovszkyc" Some notes on applying the Herfindahl–Hirschman Index" **Applied Economics Letters,** 2012, 19, pp. 181–184.

in a market and then summing the squares. When a single firm controls the market it means that this firms possesses 100 percent of the market and the HHI index reaches maximum 10,000 in this case. In the cases the post-merger, HHI result calculated between1.000 and 1.800, the merger was considered moderately concentrated. If the Index was measured more than 1.800, it means that the market concentration would not reach competitive level[653].

For instance, there are four banks named A,B,C,D and each of them shares in the market respectively, 40, 30, 20 and 10 percent. The calculation of HHI for premerger is formulated as following; $(40)^2 + (30)^2 + (20)^2 + (10)^2$=1,600 + 900 + 400 + 100 = 3,000. If the C and D banks desire to merge, the HHI for after merger is calculated as following; $(40)^2 + (30)^2 + (20+10)^2$= 1,600 + 900 + 900 = 3,400.When premerger level subtracts from post-merger level, it gives the changes of HHI which is 400[654].

In the 2010 HMG, the classifications of the markets have changed. Un-concentrated Markets becomes HHI below 1500, Moderately Concentrated Markets becomes HHI between 1500 and 2500 and Highly Concentrated Markets becomes HHI above 2500. Also general standards for the relevant markets have redefined. The HMG mentions that if the increase is less than 100, there will be no competitive effect in the market. However, if the increase is more than 100, the agencies will employ further analysis to determine the changes in the market. If the increase is more than 200, the merger will enhance market power[655].

HHI results are not enough to determine the legality of a merger which requires six steps analysis; market definition, indexing, categorization, standards, mitigating and exacerbating factors, affirmative defenses. Market definition step tests both product and geographic market in order to identify merging companies and their rivals. At the index step, market share of each company determines in order to measure HHI level. As a third step, HHI benchmarks have categorized the markets as unconcentrated, moderately,

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[653] Carl J. Schramm and Steven C. Renn,. "Hospital Mergers, Market Concentration and the Herfindahl-Hirschman Index," **Emory Law Journal,** Vol. 33, No. 4, 1984, pp. 870-875.

[654]Stephen A Rhoades, "The Herfindahl-Hirschman Index," **Federal Reserve Bulletin**, Vol:79, No:3 1993, pp. 188-189.

[655] https://www.justice.gov/atr/herfindahl-hirschman-index (28.01.2018) and 2010 Horizontal Merger Guidelines p 10.

highly concentrated. Even though the results of the HHI measurement show that there is an increase in concentration, the Justice Department makes further investigations to determine whether stricter or more lenient standards should govern or not. After climbing all steps, finally Justice Department listens to failing firm defense[656] before determining the legality of merger[657].

2.3.2. European Union Legislation

During the early times of E.U., in the Treaty of Rome, there were not regulations for mergers. Over time, because of the changes in the commercial needs, companies have tended to implement merger strategies. The reflection of this tendency to the court was dated 1973[658]. With respect to the Court decision, the most important determinant for evaluating the mergers legality was the dominance effect of the merger in the market. Five months after this judgment, the Commission offered to establish a merger regulation. However, this attempt was not matched to member states policies. Because due to the economic concerns each member state desired to regulate mergers for their own purposes with respect to their domestic laws. While evaluating the unlawfulness of a merger, the member states also discussed that other economic factor should be considered or the merger should be evaluated separately. Unfortunately, the discussion did not yield a sequel. In 1987 in the *BAT and Reynolds*[659] case it was held that mergers should be judged with respect to article 101 and this decision led that Commission could use its power to develop a merger policy without considering the ideas of member states. As a result of this development, member states came together to minimize the effect of the Commission while establishing the merger regulation. In 1989, EC Merger

[656] Failing firm defenses cannot be seen in the 2010 HMG.
[657] Neil B Cohen, Charles A. Sullivan,"Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration", **Texas Law Review,** Vol. 62, No. 3, 1983, pp. 455-458.
[658] Continental Can case.
[659] See for more details British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities. European Court Reports 1987 -04487 ECLI identifier: ECLI:EU:C:1987:490 https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61984CJ0142 (16.01.2019)

Regulation 4064/89 was introduced after the *"arduous negotiations"* [660]. The legal basis of the Regulation was article 235 EEC (now article 352), article 87(now article103), article 85 (now article101) and article 86. (now article102)[661]. The 1989 Merger Regulation showed weakness in some areas. For instance it did not involve a market share criterion[662]. As a result of inadequacy of the first merger regulation, in 2002 and 2004 two other regulations were introduced. Today, the 2004 EC Merger Regulation (hereafter it will be used as the Merger Regulation) is still in force[663].

The main logic behind the merger regulation is to protect the customers against harmful effect of merger. If the annual turnover of the merger exceeds determined thresholds, it will be notified to European Commission for investigate that whether the merger significantly impedes effective competition in the EU or not[664]. The thresholds are determined by the E.U. as following; when the all margining firms' worldwide combined turnover is over €5 billion, the first threshold condition are met. For the second threshold, at least two of the merging firms' E.U. wide turnover must exceed €250 million. Also, turnover of at least two of the firms of the merger must be over €25 million in each of at least three Member States. Finally, EU-wide turnover of each of at least two firms must be more than €100 million. With regard to thresholds, it can be said that E.U. legal authorities do not focus on smaller mergers which are judged by the member states' competition authorities[665]. The thresholds are calculated with reference to turnovers and the numbers of thresholds of the 2004 Merger Regulation is same as the 1987 Merger Regulation. Even though, Vice President of the Commission of the European Communities Sir Leon Brittan, who was responsible for Competition Policy

[660] Chalmers et al, pp. 1069-1071.
[661] Leon Brittan, "The Law and Policy of Merger Control in the EEC", **J. Reprints Antitrust L. & Econ**. Vol:22, 1993 p. 242.
[662] Groenewegen and Beije, p. 503.
[663] Some articles of 2004 EC Merger Regulation were amended in 2008 and 2013.For all applied merger regulations see http://ec.europa.eu/competition/mergers/legislation/regulations.html (19.01.2019).
[664] http://ec.europa.eu/competition/mergers/overview_en.html l (18.01.2019).
[665] Councıl Regulatıon (Ec) No 139/2004 (The EC Merger Regulation) Article 1 and see also European Commission webpage http://ec.europa.eu/competition/mergers/procedures_en.html (18.01.2019).

and Financial Institutions, mentioned that these figures were too high and they would be came down in four years[666], his prediction has not been materialized yet.

Article 3 of the merger regulation defines the concentration from the merger perspective as following; if the control of two or more independent undertakings (or parts of undertakings) changes as a result of merger, the merger will be deemed as a concentration[667]. With regard to this provision, the description of the concentration in the Merger Regulation is based on qualitative a criterion which concentrates on the notion of control[668]. Additionally, concentrative joint ventures are included in the scope of the Merger Regulation. However, the regulation does not touch on cooperative ventures which are covered by article 102. This discrimination leaded complexity in the application[669]and thus the Commission was introduced a notice which was named "a*s on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings*"[670].

As it is seen from article, the most important determinant for assessing the concentrations is the changes of control. With respect to regulation, "*the ownership or the right of to use whole assets (or part of it) of an undertaking or the rights or contracts which confer distinctive effect on the establishing, voting of the organs of an undertaking are referred as contro*l"[671]. However, the regulation does not mention the degree of the control, there is no guidance related with the control[672]. In the *Arjomari-Prioux/Wiggins Teape* case, the 39% shares of the acquiree transferred to acquirer and

[666] Brittan, p. 242.
[667] 2004 The EC Merger Regulation article 3(1)(a).
[668] Craig and Burca, p. 1049.
[669] Joseph P. Griffin and Leeanne T. Sharp, "Efficiency Issues In Competition Analysis In Australia, The European Union,and The United States", **Antitrust Law Journal**, Vol. 64, No. 3,Spring 1996, p. 666.
[670] Commission Notice On The Concept Of Full-Function Joint Ventures Under Council Regulation (EEC) No 4064/89 On The Control Of Concentrations Between Undertakings (98/C 66/01), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:066:0001:0004:EN:PDF, (17.01.2019).
[671] The Merger Regulation article 3 (2), "*control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking" (a) ownership or the right to use all or part of the assets of an undertaking"*
[672] Barry E. Hawk," European Economic Community Merger Regulation,"**Antitrust Law Journal**, Vol 59, 1991, p. 460.

the court held that 39% of the share was enough to give a control to acquirer[673]. While assigning the change of control, it shall be bear in mind that the acquirer must have decisive influence after the collaboration[674].

In the Merger Regulations, there is no article about how the relevant product market and the relevant geographic market are determined. In the Commission's Notice on the definition of relevant market, article 1 states that the Notice is also applicable to Merger cases[675]. In order to avoid reputation, this subject is not studied under this section.

In the 1989 Merger Regulation, the legality of a merger was regulated by article 2(3), which stated that "*a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market*" [676]. The 2004 Merger Regulation is changed this rule by stating, *"a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*[677]*"*. These two articles were deliberately quoted since *prima facia*, it can be said that there is no any differences among them. However, there is an important change in assessing the dominance. The 1989 Merger Regulation used a Market Dominance test but the 2004 Merger Regulation prefers to apply SIEC test. Dominance was a necessary and sufficient factor while assessing the legality of a merger in the 1989 Merger Regulation. As a consequence, Commission dealt with the impact of the merger on market structure instead of on competitive effect. However, the new test argued against

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[673] Case No IV/M.0025 - ARJOMARI-PRIOUX SA / WIGGINS TEAPE APPLETON, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1990.321.01.0016.01.ENG, (17.02.2019).
[674] Case T-282/02 Cementbouw Handel & Industrie BV v Commission of the European Communities, ECLI identifier: ECLI:EU:T:2006:64, 1. paragraph https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002TJ0282 (17.02.2019 and see also Case T-411/07. Aer Lingus Group plc v European Commission. ECLI identifier: ECLI:EU:T:2010:281 2. Paragraph https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007TJ0411&from=GA, (17.02.2019).
[675] Relevant Market Notice, article 1.
[676] 1989 Merger Regulation art2(3), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML, (18.02.2019
[677] Councıl Regulatıon (Ec) No 139/2004 (The EC Merger Regulation article 2(3).

the key determinant position of the dominance[678]. Therefore, in the new Merger Regulation the position of a merger does not solely depend on the dominance; dominance is using for an economic analysis of the cost and benefits of a merger. The most important factor for SIEC test is the economic consequences of an anticompetitive merger (for instance increase in price). Additionally, the test can assign pro-competitive effects (for instance cost reductions) of a prospective merger[679]. This means that the SIEC test provides more effective results to the Commission because the anticompetitive and pro-competitive effects of a merger with regard to its cost and benefits are easily evaluated by the SIEC test[680]. Briefly, it can be summarized that for evaluating the legitimacy of a merger the market definition plays important role. However, in the most merger cases, the markets could not be defined or could be defined restrictively. In order to fulfill this gap, the new test combined the dominance and effective competition[681]. In reality, the main reason for the application of this test in the E.U. is the desire to have the same criteria as the U.S. measurement, determining that whether the merger substantially lessens competition or not[682]. In 2014, a White Paper Towards more effective E.U. merger control was established by the Commission. The main purpose of this paper is to show how the SIEC test applies and provides a road map for integration of Commission and Member states' regulations. In paragraph 12 of the paper, it was mentioned that the Commission was introduced two sets of guidelines to improve the transparency and predictability of the merger analysis under the SIEC test. These guidelines have economic perspective while assessing horizontal and non-horizontal mergers[683].

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[678] Lars-Hendrik Roller and Miguel De La Mano "The Impact of the New Substantive Test in European Merger Control", **European Competition Journal**,Vol 2:1, 2006, pp. 9-12.

[679] Jules Theeuwes, "Economic Analysis of the New Regulation 139/2004" **Legal Issues of Economic Integration**, Vol:32(2), 2005, pp. 209-210.

[680] Borja Martinez Fernandez, Iraj Hashi and Marc Jegers, "The Implementatıon Of The European Commission's Merger Regulatıon 2004: An Empırıcal Analysıs" , **Journal of Competition Law and Economics, 4(3),** 2008, p. 793.

[681] Wolf Sauter, **Coherence in EU Competition Law**, Oxford University Press, U.S., 2016, p. 200.

[682] Andre Fiebig, "Modernization of European Competition Law as a Form of Convergence",**Temp. Int'l & Comp. L.J.** Vol: 19.1., 2005 p. 68.

[683] WHITE PAPER **Towards more effective EU merger control**, Brussels, 9.7.2014 COM(2014) 449 final, paragraph 12 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449-&from=EN, (18.03.2019) .

In 2004, Commission introduced guidelines on the assessment of horizontal mergers[684] (hereafter it will be called as the EU Horizontal Merger Guidelines) in which the Commission regulates the analytical framework of horizontal mergers analysis. The EU Horizontal Merger Guidelines clarify the approach of Commission about concentration levels in details. For instance, the Guideline provides the different conditions under what kind of horizontal mergers can diminish market[685]. Also, the EU Horizontal Merger Guidelines clarifies the dominant position in two ways; non coordinated effects and coordinated effects which were clarified as a new category of cases beyond the concepts of traditional collective dominance to which the Merger Regulation is intended to apply[686].

According to EU Horizontal Merger Guidelines, in the non-coordinated effect cases a horizontal merger terminates via fixing the other market player rivalry conditions. As a result of this, the horizontal merger increased its market share without any coordinated behavior[687]. A horizontal merger may enable the merged firm to increase it prices via eliminating the competitive constrains between parties without considering the remaining rivals.[688]. In the most cases, non-coordinated effects inhibit effective competition in the market by creating or strengthening the dominant position of a single firm who has more market share than other members of the merger before the merger[689]. With regard to the Guidelines, six scenarios may affect the determination of non-coordinated effects. These are not exhaustive scenarios and not all of these scenarios need to be present for such effects. These scenarios are listed as; "*merging firms have large market shares, merging firms are close competitors, customers have limited possibilities of switching supplier, competitors are unlikely to increase supply if*

[684] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN (12.03.2019). (EU Guidelines on the assessment of horizontal mergers).
[685]Andreas Weitbrecht, "EU Merger Control in 2004", **European Commission Law Review**, Vol: Issue 2, 2005, p. 68.
[686] Neil Horner, "Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too", **Hanse Law Review**, Vol. 2 No. 1, 2006, p. 35.
[687] EU Guidelines on the assessment of horizontal mergers, paragprah 22(a).
[688] Joannis Kokkoris and Howard Shelanski, **EU Merger Control A Legal and Economic Analysis**, Oxford University Press, U.S., 2014, p. 84.
[689] EU Guidelines on the assessment of horizontal mergers, paragraph 25.

prices increase merged entity able to hinder expansion by competitors, merger eliminates an important competitive force"[690]. Like other cases, the market share assessment[691] is considered the first stage for determining the non-coordinated effect. The Commission tests whether a merger will lead to very high market power and whether the member parties of the merger will strengthen dominant position as a result of merger[692]. This approach is adopted in the Horizontal Merger Guidelines paragraph 14 by stating that market shares and concentration levels provide useful first indications of the market structure and the competitive importance of both the merging parties and their competitors[693]. As it was mentioned, European Union Merger Regulation (EUMR) uses SIEC for merger assessment. In the EU Horizontal Merger Regulation, the Commission added different test to measure concentration level. This test is called the Herfindahl-Hirschman Index (HHI)[694]. Although, the E.U. legal system applied the same calculation of American HHI, the levels are different. The paragraph 19 and 20 of Guidelines state that

> "*The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present: (a) a merger involves a potential entrant or a recent entrant with a small market share; (b) one or more merging parties are important innovators in ways not reflected in market shares; (c) there are significant cross-shareholdings among the market participants (25); (d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;) indications of past or ongoing coordination, or facilitating practices, are present; (f) one of the merging parties has a pre-merger market share of 50 % of more"*.

[690] Guidelines on the assessment of horizontal mergers, paragraph 26-38.
[691] According to the Horizontal Merger Guidelines paragraph 17, "according to well-established case law, very large market shares — 50 % or more — may in themselves be evidence of the existence of a dominant market position"
[692] Jonathan Faull and Ali Nikpay, **The EC Law of Competition**, 2nd ed. Oxford University Press, The U.S. 2007. p.. 482.
[693] EU Guidelines on the assessment of horizontal mergers, paragprah 14.
[694] Kokkoris and Shelanski,,p.85.

Anticompetitive non-coordinated effects can be raised by a merger in some oligopolistic[695] markets in which the market shares of the members of the merger do not reach a level normally considered to constitute single dominance and the financially same companies remain on the market. The non-coordinated effect in oligopolies generally occurs in the different product market and the merger parties are close competitors[696]. The SIEC test is the only one way to assess whether a horizontal merger creates or strengthens a collectively dominant position in the case of non-coordinated effects that mostly results from branded goods' markets. The characteristic of this market is that it contains too many close substitute products[697]. Customer behaviors are an important determinant in that stage. The commission assumes that the customers of the merging companies would not easily alter their suppliers if the numbers of suppliers were limited and or switching costs were cost too much[698].

In the *Volvo/Scania*[699] case, two truck producers' merger was inhibited since it would create dominant positions in the market for heavy trucks[700]. While determining the dominant position the Commission focused on the substitutes of the Volvo and Scania and it held that even though they did not have strong market share, they were close substitutes[701]. Additionally, when the Commission investigated the Volvo, it found that the company has actually been able to price discriminate between sales to different customer groups[702]. As a result of these two factors, if the merger would raise the price of Volvo in an attempted to increase revenues after the merger, customers bought the substitutes of Volvo which was Scania. What it means that, the merger would not suffer

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[695] Before discussing the non- coordinated effects in oligopoly markets, the difference between the oligopoly and monopoly shall be identified. The main distinction is the interdependence among market players. In the monopolistic market, the company plays game independently from other market players. The consumer demand is the main determinant of the firms' behavior. While in the oligopolistic market, each market player plays in the same team; one action of the one player affects the other players in the market. Chalmers et al, p. 1095.

[696] EU Guidelines on the assessment of horizontal mergers and Faull and Nikpay, pp. 482-483.

[697] Chalmers et al, p. 1100.

[698] Faull and Nikpay, p. 481, and EU Guidelines on the assessment of horizontal mergers, paragraphs 28-31.

[699] Volvo/Scania Case M. 1672
http://ec.europa.eu/competition/mergers/cases/decisions/m1672_en.pdf, (17.02.2019)

[700] Volvo/Scania Case paragraph 363

[701] Volvo/Scania Case paragraphs 76-84

[702] Volvo/Scania Case paragraph 93

any losses as a result of price increase[703]. This case illustrated that non-coordinated effects in the oligopolistic markets may not cause because of a dominant position, instead preferences of customers in the market plays crucial role. Since their ability to choose are inhibited by the merger that involves close substitutes.

There are also three scenarios left for determining the non-coordinated effects. In the scenario of *the competitors are unlikely to increase supply if prices increase,* merging parties may have an encouragement to reduce output below the combined pre-merger levels, thereby raising market prices[704]. Some mergers significantly inhibit effective competition via making the expansion of smaller firms and potential rivals more difficult. Consequently, the ability of rivals firms to compete is restricted and other market players do not have voice in the market when the merger entity increases prices[705]. In some markets, innovation becomes an important competitive force. In this kind of market, the pressure on rivals to become more innovative can be limited by a merger which desires to gain more innovative advantages in the absence of any rival[706].

In the second alternative, called coordinated effect, irrelevant companies coordinate their behaviors for raising prices to harm effective competition and mergers can lead this kind of behaviors via tacit collusions or collective dominance[707]. In the *Airtours*[708] case, the Commission asserted that three conditions must meet while determining whether a collective dominant position significantly impeding effective competition in the common market. Firstly, market shall be transparent enough for each company to know quickly others conduct. Secondly, the long-term strategies of undertakings shall be sustainable and each undertaking acts respectfully. It means that parties of dominant oligopoly do not provoke other undertakings via using dominant position. Thirdly, the collective dominance shall not threat current and future competitors or customers[709]. By listed these three conditions, the Commission expressly

[703] Volvo/Scania Case paragraphs 91-93
[704] Horizontal Merger Guidelines, paragraphs 32-35 Horizontal Merger Guidelines
[705] Horizontal Merger Guidelines, paragraph 36
[706] Horizontal Merger Guidelines , paragraph 38
[707] Horizontal Merger Guidelines paragraph 22(b)
[708] Airtours plc v Commission of the European Communities, Case T-342/99, 2002, http://curia.europa.eu/juris/liste.jsf?language=en&num=T-342/99 (17.02.2019) (Airtours Case).
[709] Airtours Case paragraph 62.

recognized that the members of the oligopoly could be aware of the fact that they may gain from interdependent action on the market. However, this benefit is not enough for collective dominance. The members of the oligopoly must be able to aware whether other firms will follow and maintain the same strategy. Therefore, the degree of transparency can be measured via determining whether the companies know each other strategy or not. Maintaining the same strategy is not enough for the creation of a collective dominant position. The parallel behavior of a member shall be beneficial to all member of oligopoly. Moreover, the current and potential competitors as well as consumers are not in danger from the members of the oligopoly[710]. The authorities can easily predict the position of collective dominance via using this three-stage test, which is applied when a number of undertakings are able to act as a single entity and, treated as a single entity[711].

The *Airtours* case gave important perspective for measuring the collective dominance but there was a still big gap about how tacit coordination is initially achieved[712]. In order to solve this problem, the EU Horizontal Merger Guidelines provides additional conditions to *Airtours*[713]. With respect to the Guidelines, the following four conditions are necessary to demonstrate the existence of a collective dominant position: *understanding, detection, retaliation and lack of protest*[714]. Although, the Guidelines mainly focused on the how the collective dominant position can appear, it misses to introduce a systematic approach for determination of collective dominant position[715].

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[710] Geradin et al, pp. 512- 513.
[711] Odudu Okeoghene, "Collective Dominance Clarified?", **The Cambridge Law Journa**l, Vol. 63, No. 1 2004, p 46.
[712] Bruce Lyons " An Economic Assessment of European Commission Merger Control" from the book "**Competition Policy in the EU: Fifty Years on from the Treaty of Rome"** (ed. Xavier VIVES), Oxford Scholarship Online: 2009, p 135-175, https://ueaeprints.uea.ac.uk/28803/1/Lyons-06-XavierVives-Chap-06.pdf, (15.03.2019).
[713] EU Guidelines on the assessment of horizontal mergers, paragraph 41.
[714] Geradin et al, p. 513.
[715] Nicolas Petit and David Henry, "Why the EU Merger Regulation should not Enjoy a Monopoly over Tacit Collusion," "**Changes in Competition Policy Over the Last Two Decades**" ed. by Dr Małgorzata Krasnodębska-Tomkiel, 2010, Warsaw, Office of Competition and Consumer Protection pp. 181-197, https://www.uokik.gov.pl/download.php?plik=8562 (15.03.2019)

Three cases between 2004 and 2008 became a corner stone for EU collective dominance cases. In 2004, the Commission announced the decision of the *Sony* case[716], and then *Impala*[717] went for appeal against the Commission decision to the European Union Court of First Instance (CFI) ,which cancelled the commission judgment on the ground that the Commission assessment for collective dominance involved manifest errors. In 2008, the CFI decision was also appealed by the European Court of Justice (ECJ)[718], which mainly focused on the mechanism of a hypothetical tacit coordination[719].

A Joint venture between two music companies Sony and BMG was approved by the Commission in the *Sony* case. While assessing the case, the market for recorded music was the area of the Commission and it deduced that in all European Economic Area (EEA) countries, there were five worldwide global record companies (Sony, BMG, Universal, Warner and EMI) which were called the Majors. Therefore, the ability of creating dominance position of the Majors after the merger was strongly discussed by the Commission, which considered that no such strengthening of collective dominance was likely for the following reasons. Firstly, it was mentioned that there had been no coordinated price policy among the Majors throughout the last three to four years period. Second, even if there was standardization for album prices, the Commission emphasized that the CD content was different from CD to CD and therefore the heterogeneity reduced transparency and made tacit collusion more difficult. Thirdly, the Commission mentioned that there was no enough evidence that the transparency deficit could easily overcome by the Majors via monitoring retail prices. Finally, it was stated that there was

[716]Sony/ BMG, Case No COMP/M.3333, 2007, http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20071003_590_en.pdf, (18.03.2019).

[717] Independent Music Publishers and Labels Association (Impala, international association) v Commission 2006, — CASE T-464/04, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56489&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7698318 (14.03.2019) (Impala, Case).

[718] Impala, Case.

[719] Gotz Drauz, Thomas Chellingsworth and Hertta Hyrkas, "Recent Developments in EC Merger Control" **Journal of European Competition Law & Practice,** 2010, Vol. 1, No. 1, p. 23.

no indication for retaliatory behavior from the Majors when one of the Major desire to leave from a common policy[720].

Until the *Impala case*, there was no clear test for measuring the tacit collusion The Court of Instance enlightened that the analysis of the collective dominance could change case by case and shall be based on the concrete evidence[721]. Even though, the Court believed that the collective dominance is case-specific, it also stated that three conditions of the *Airtours* are necessary and "*they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position[722]"*. This means that, *Airtours* conditions are strong evidences for assessment of collective dominance and soon after the *Impala* the conditions shall be applied indirectly[723]. Moreover, the Court mentioned that the collective dominance test shall not stick to the past market behaviors. The existence of the collective dominance after the merger period becomes the focal point of the Court[724]. Beside the above factors, contrary to the Commission decision[725], the degree of the transparency was discussed more generally by the Court[726] and held that the alignment was in fact very marked[727]. The high level of transparency in the market was based on the three conditions. Firstly, Majors could easily monitor the hit albums that enables to Majors to release new albums for their own purposes. Secondly, the competitors could not easily follow the Majors' *Published Price of Dealers* (PPDs). Thirdly, while assessing the rivals' sales, not wholes sales of the company, only a

[720] Jonathan D Parker, "Impala v. Commission: An Assessment of the Court's Annulment of the Commission's Unconditional Clearance of Sony/BMG", **Competition Law International** . Vol:3, 2007, p. 42.
[721] Impala case, paragraph 248.
[722] Impala case, paragraph 251.
[723] Petit and Henry, pp. 181-197.
[724] Gisela Aigner, Oliver Budzinski, Arndt Christiansen, "The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand After *Sony/Bmg* and *Impala?"*, **European Competition Journal**, Vol: 2:2, 2006, p. 326.
[725] As it was mentioned above, according to the Commission the market was not transparency.
[726] It should be noted that in order to measure the transparency, Published Price of Dealers (PPD) was used. Impala, paragraph 132.
[727] Impala, paragraph 299.

limited number of albums were included the investigation[728]. In addition, the CFI associated transparency to alignment of prices and stated that the alignment of the prices above a competition level over a long period was the main determination of the collective behavior, when there was no direct evidence of strong market transparency[729].

With respect to the judgment of the ECJ, tacit collusion mainly occurs when the parties mutually agree upon how the coordination shall be operated. In addition, each participant of a tacit coordination has a tendency to depart from the common policy of E.U. in order to increase its short-term profit. In this framework, it is necessary to determine whether such coordination is sustainable. In order to keep the coordination sustainable, the undertaking must audit whether the terms of the coordination are consistent. The controlling process requires a transparent market in which other undertakings intent can be easily measured. The reactions of outsiders, such as current or future competitors, and also the reactions of customers, shall not put in danger from consequences of the coordination[730].

2.4. HORIZONTAL COLLABORATION GUIDELINES

In addition to the Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission introduced Antitrust Guidelines for Collaborations Among Competitors (AGCAC) in 2000. As it is understood from the heading, AGCAC leads the Agencies for analyzing special antitrust cases caused by collaboration among rivals. In generally speaking, competitors collaborate for engaging their economic activities in research and development, production, marketing, distribution, sales or purchasing which are shaped in joint venture agreements, licensing agreements or strategic alliances[731]. *Prima facie*, it can be said that collaboration among competitors and horizontal mergers have the same function that competitors are following a joint acting strategy in the each strategy. Indeed, they are completely different. Mergers generally harm the competition in the market. Conversely, collaboration among competitors

[728] Parker, p. 44.
[729] Impala, paragraph 252.
[730]Impala**,** paragraph 123.
[731] The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 2.

preserves competition among parties. Mergers are permanent, collaboration among competitors are temporary. Therefore agencies must know when the HMG and AGCAC will be used. The HMG will be applicable to merger cases in the following conditions; when the parties of the collaboration are competitors in the relevant market, the formation of collaboration includes an efficiency enhancing collaboration of trade activity in the relevant market, the collaboration harms all competition among the companies in the relevant market and the collaboration does not end within a sufficiently determined time by its own unique and express terms[732]. AGCAC applies both *Per se* and *Rule of Reason.* As a consequence of the agreement, if the intent of agreement companies is to diminish competition in the market via fixing prices or sharing markets, the collaboration will be held *per se* illegal[733]. However, it should be not forgotten that even if the collaboration is considered *per se* illegal, the agreement might have pro-competitive benefits for the market players. Therefore, agencies generally consider the agreement under *rule of reason* via asking the purpose of the agreement to test whether agreement has caused anticompetitive harm[734]. After determining the intent of the agreement, agencies must determine relevant markets and must measure the market shares of agreement companies and the collaboration. Relevant market consists of good markets, technology markets and research and development (R&D) markets. Good markets determination procedure is the same as HMG. Intellectual property, technologies for production and licenses ascertain the technology market. The innovation market involves R&D activities for new or improved products. Market share and market concentration are evaluated similarly to HMG [735].

The *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (soon after it will be named as EU horizontal guidelines*)* was published by the EU Commission in 2011[736]. In this Guideline, the Commission aims to provide an analytical framework for the most common types of horizontal co-operation agreements that are "*research and*

[732] The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 5.
[733] The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 8.
[734] The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 10.
[735] The U.S. Antitrust Guidelines for Collaborations Among Competitors, pp. 14-18.
[736] Horizontal Co-Operation Agreement Guideliness.

development agreements, production agreements including subcontracting and specialization agreements, purchasing agreements, commercialization agreements, standardization agreements including standard contracts, and information exchange"[737].

For defining the term of *undertakings*, the guideline considers the nature of horizontal agreements in which parties are the competitors of each other. Therefore, the guideline states that sharing the same relevant market is one of important determinants for undertakings in the horizontal cooperation cases[738]. It means that if the parties do not share the same relevant market (product and geographic), they will be allowed to enter into a horizontal collaboration[739]. In order to determination of the relevant market and market share, the guidelines focus on the nature of the collaboration agreement and provide different guidelines for each collaboration practices[740]. Among them, for the liner shipping collaborations, the assessment of information exchange plays crucial role. Because as it was mentioned, the main of the alliances is to create a sharing environment. The guidelines states that there are different kind of information exchanges and most of information exchange among the members of the horizontal collaboration agreements are beneficial for both market and public[741]. However, from the cartel cases it was experienced that the price exchange information shall be considered *per se* illegal[742]. Based on its experience, the commission ruled that the price exchange information strategy is considered as long as it does not involve any restrictive features[743]. In order to determine whether an information exchange harms the competition, the commission focuses to the legal and economic conditions in which the information exchange occurs[744].

[737] EU Horizontal Guidelines, paragraph 5.
[738] EU Horizontal Guidelines, paragraph 10.
[739] Tuytschaever, p. 10.
[740] EU Horizontal Guidelines, Contents.
[741] EU Horizontal Guidelines, paragraphs 55-57.
[742] EU Horizontal Guidelines, paragraphs 58-59.
[743] EU Horizontal Guidelines, paragraphs 95-111.
[744] EU Horizontal Guidelines, paragraph 72.

Additionally it shall be stated that for cartel horizontal corporation cases, although, the guideline includes certain references to them, the Commission and the Courts are not compulsory apply the guidelines for their judgments[745].

[745] EU Horizontal Guidelines paragraph 9, "*Although these guidelines contain certain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel as defined by the decisional practice of the Commission and the case-law of the Court of Justice of the European Union".*

CHAPTER THREE
THE PLACE OF LINER SHIPPING COLLABORATIONS IN THE COMPETITION REGULATIONS

The coffee house chats was the first form of collaboration strategies between the ship owners who shared trade information with each other while they were drinking their coffees[746]. The informal collaborations had been evaluated and the liner shipping companies established the conference system that was the one of the important form of the collaboration strategies applied by the liner shipping companies. The first liner shipping conference was the Calcutta Conference. The main objective of this conference was to establish a binding system of deferred rebates for shippers that were implemented by other ship-owners all over the World[747]. The popularity of the conference system also took attention of the governments[748] . Even though, countries have general regulations about cartel cases, they have preferred to regulate liner cartels with specific regulations due to nature of the liner shipping industry. The exemptions from the antitrust rules were given to liner shipping industry hence; there was a common attitude that liner shipping structure was different from the other kind of industries since they struggled with high fixed costs and very expensive start-up costs[749]. Additionally, liner shipping industry involves many international players for one carriage; it is more international than other type of industries[750].

The U.S. legal authorities took the first step and introduced the Shipping Act of 1916 to grant exemptions to the liner conferences. The U.S. Government maintains its perspective about exemptions today. Similarly, because of the developing countries pressure, the United Nations Conference on Trade and Development (UNCTAD) was

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[746] Saban Kayıhan and Omer Bagcı**, Türk Özel Sigorta Hukuku Dersleri**, 4th, Umuttepe Yayınları, ed., 2019, Izmit, p. 31.
[747] Ademuni-Odeke and Karan, p. 166.
[748]Luis Ortiz Blanco and Ben Van Houtte, **EC Competition Law in the Transport Sector**, Oxford University Press, 2002, New York, p. 104.
[749]Anila Premti, **Liner Shippıng: Is There A Way For More Competition?**, United Nations Conference on Trade and Development, Discussion Paper No: 224, March 2016, UNCTAD/OSG/DP/2016/1, p 2, https://unctad.org/en/PublicationsLibrary/osgdp2016d1_en.pdf (15.02.2018).
[750] Ademuni-Odeke and Karan, pp. 155-156.

established code of conducts for the liner conferences. The main purposes of the codes are to develop the liner conference system and establish a globally appropriate code of conduct for liner conferences[751]. Like the U.S., the European Countries preferred to exclude liner conferences in the Council Regulation 954/79 and Council Regulation 4056/86. However, in 2006, E.U. has changed its policy and repealed the exemptions in the Regulation 1419/2006. Due to the restrictive policies of the European Union, liner shipping companies have established different kind of collaboration strategies mainly alliances, M&A, joint ventures which are not inhibited by the competition authorities because the authorities believe that the competition is still exist after these kind of collaboration strategies[752]. In this chapter, differences and similarities between the U.S. and E.U. regulations about liner shipping collaboration strategies will be studied in order to determine most appropriate regulation for Turkey. This chapter gives wide coverage to liner conferences and container alliances since their influence upon the competition authorizes was much more significant than the other type of strategies[753].

At this stage, it must be highlighted that the exemptions given to liner shipping collaborations from the competition regulations are not only one-way to promote the industry. However, the other type of policies to encourage the liner shipping companies may fall into the competition regulations[754]. It is believed that the other type of policies will not be implemented effectively if they fall into competition provisions. Therefore, instead of discussing the each policy separately, the exemption from the competition provisions will be discussed under this title and the guideline for Turkey will be drawn in the framework of this limitation. Additionally, the exemptions for liner shipping collaborations will be discussed only for international cargo movements, the cabotage trade shall not be a subject of exemptions. The purpose of the cabotage is to encourage

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[751] United Nations Conference of Plenipotentiaries on A Code of Conduct for Liner Conferences, Objectives and Principles, 1974, p. 4. , https://unctad.org/en/PublicationsLibrary/tdcode13add.1_en.pdf (14.05.2018), (Code of Conduct).
[752] Anila Premti, p. 2.
[753] OECD Directorate For Science, Technology and Industry Division of Transport, **Regulatory Issues In International Maritime Transpor**t, Document No: Dsti/Dot(2001)3, 2002, pp16-17, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/DOT(2001)3&docLanguage=En, (12.06.2018).
[754] Ademuni-Odeke and Karan, pp. 168-169.

the national fleets by preserving them against anticompetitive behaviors of foreign nation's fleets[755]. Consequently, each Turkish liner shipping company shall have equal rights to access the cabotage market. If the collaboration among the liner shipping companies affects the cabotage trade, the competition provisions shall be implemented to protect the other market players.

3.1. THE UNITED STATE REGULATIONS

In 1912, the U.S. Government created the Alexander Committee (as a Congressional Committee). The main purpose of the committee was to investigate the scope of shipping conferences. After deeply investigations, *the Alexander Committee* drew conclusion that the conferences had harmful effects over the U.S. shipping industry. Hence, it was necessary to establish antitrust rule to regulate the shipping conferences. Consequently, the Shipping Act of 1916 was introduced by the U.S. in the aim of to control and to regulate the liner conferences in 1916[756]. Although, only closed conferences[757] were prohibited by the Shipping Act of 1916[758], the other types of conferences exempted from the antitrust law[759]. After the World War II, in the *Isbrandtsen*[760] case, it was recognized that even if the Shipping Act of 1916 involved antitrust provisions, the conferences would be evaluated in negative way and the Congress authorized the *Bonner Committee* and the *Celler Committee* for investigation into liner shipping industry. The Committees enacted the *Bonner Act or the 1961 reform* (as an amendment to 1916 Shipping Act) which was replaced the Federal Maritime Board with the FMC[761]. In 1984, United States government introduced The Shipping

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[755] Ademuni-Odeke and Karan, p. 171.
[756] Liu Hongyan, **Liner Conferencess in Competition Law A Comparative Analysis of European and Chinese Law,** Springer-Verlag Berlin Heidelberg, 2010, London-New York, pp. 4-5.
[757] Close conference does not accept any shipping company applying to become a member.
[758] Blanco and Houtte, p. 104.
[759] Luis Ortiz Blanco, **Shipping Conferences under EC Antitrust Law, Criticism of a Legal Paradox,** Translated by Andrew Read, Hart Publishing, 2007, The U.S., p. 30., (Paradox).
[760]Maritime Board v. Isbrandtsen Co. 481, http://cdn.loc.gov/service/ll/usrep/usrep356/usrep356481/usrep356481.pdf, (15.02.2019), (Isbrandtsen Case) .
[761] Luis Ortiz Blanco, "Personal Reflection on the Development of EC Maritime Competition Policy: Past and Future" , **Competition Law and Shipping The EMLO Guide to EU Competition Law in the**

Act of 1984, which was considered a cornerstone event for regulating the conferences[762], because the limits of the exemptions were widened. Not only agreements but also activities could enjoy the exemptions as long as the FMC gave the approval. In 1998, Ocean Shipping Reform Act (OSRA), the current law, was adopted as an amendment to The Shipping Act of 1984, which allowed to the negotiations about the service contracts between the individual member of the conference and the shippers and the act inhibited any retaliatory actions against them[763]. The historical evaluation of the Shipping Acts shows that the American Government attitude about the liner collaborations has not changed until today and the *laissez faire* approach has been applying since 1916. The *Frank LoBiondo Coast Guard Authorization Act of 2018,* which was signed by the U.S. President Donald Trump, is the current evidence of this stability. Under this title The Shipping Act of 1916, The Shipping Act of 1984 and OSRA will be discussed under this title in order to show the U.S. perspective about the liner shipping collaborations.

3.1.1. The Shipping Act of 1916

With respect to the U.S. Constitution, Section 8 of Article 1, "*The Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*[764]*".* Similarly, article 3 of the Constitution states that the judicial power can be given to other kind of governmental bodies[765]. With the power of the Constitution, the Congress entrusted the *Alexander Committee* to investigate the results of the liner conferences. The results of the *Alexander Committee* showed that there were disadvantages and advantages of the liner conferences. All ship owners

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Shipping and Port Industries, (Ed. Philip Wareham and Vincent Power), Cameron May International Law & Policy Publishing, London, 2010, (EC Maritime Competition Policy), pp 4-5.

[762] Mary R. Brooks, **Sea Change in Liner Shipping, Regulation and Managerial Decision-Making In a Global Industry**, Elsevier Science Ltd., 2000, Netherlands, p. 12.

[763] OECD Directorate for Financial and Enterprise Affairs Competition Committee, **Competition Issues In Liner Shipping United States,** Working Party No. 2 on Competition and Regulation, 2015, p 3 https://www.justice.gov/atr/file/823411/download, (15.02.2019), (OECD Report Competition Issues, The U.S.).

[764]The Constitution of The United States of America, 2007, Section 8 of Article 1, https://www.govinfo.gov/content/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf (12.02.2019).

[765] Sırrı Duger, **Anglosakson Hukuk Sisteminde İdarenin Yargısal Denetimi,** Yetkin Yayınları, 2019, Ankara, p 64.

consequently affected very harmful as a result of the uncontrolled freight rates which made impossible to have free competition in the liner shipping industry. Therefore, if the conference prices were controlled, the ship owner would gain more advantageous from the market[766]. Beside its disadvantages, both the ship owners and the shippers gained mutual benefit from the conference system. From the ship owner perspective, the conferences rates were the most insured way to return of investments that provided opportunities for construction of further investments. From the shippers' side, they were able to monitor freight rates and secret agreements between the ship owners[767].

From the results of the Committee, it was believed that conferences should be permitted and should be controlled. A public authority should investigate the conferences and cancelled them when the conferences were evaluated discriminatory or unfair or detrimental[768]. The Shipping Act of 1916 gave the investigation duty to the United State Shipping Board (USSB). In order to enjoy the exemptions, the anticompetitive agreements had to be registered for authorization that was given by the USSB[769]. The main purpose of the authorization was to *ex ante* protect the public welfare against the harmful effects of the conferences. During its investigation, if the USSB recognized that the collaboration had restrictive consequences for competition or violated the Shipping Act or damaged of the United States, it would invalidate the collaboration. By using this power, USSB gave much more protection to public than the Sherman Act. However, the more protection did not mean that the USSB had more prohibited policies than Sherman Act, contrary; the exceptions were given to the liner conferences[770]. In other words, the liner conferences were considered as a cartel agreement and they were *per se* illegal with respect to Sherman Act Section 1. However, the Shipping Act of 1916 in the aim of exempted the liner conferences from the Sherman

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[766] Blanco, Paradox, pp 27-28.
[767] F. Conger Fawcett and David C. Nolan, "United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption", **Northwestern Journal of International Law & Business,** Vol: 1:537, 1979, pp 542-543.
[768] Blanco, Paradox, pp 27-28.
[769]The U.S. Shipping Act of 1916, Chapter 451, https://www.loc.gov/law/help/statutes-at-large/64th-congress/session-1/c64s1ch451.pdf, (17.01.2019).
[770] Claude A. Thompson, "Shipping Act of 1916: The Effect of Section 15 on the Sherman Anti-Trust Law", **Michigan Law Review**, Vol. 22, No. 2, 1923, pp 114 and 117.

Act to support the liner shipping industry. The American Government accomplished the task of the protecting community welfare through the USSB, not through the courts, which supervised the liner shipping collaborations and decided *ex ante* whether it was legal prior to the implementation. If the USSB decided that there were no legal obstacles, without further investigation, the liner conferences would enjoy the exemptions of antitrust legislation[771].

The Shipping Act of 1916 section 14 *per se* banned the following four situations[772]; *establishing a deferred rebate system to any shipper*[773], *using a fighting ship*[774], *retaliating against shippers*[775] *and making discriminatory shipping contracts*[776]. Additionally, section 16 and 17 involved prohibitory provisions. According to the section 16, "*That it shall be unlawful for any common carrier… to make or give any undue or unreasonable preference or advantage to any particular person*[777]*".* The section 17 banned the discriminatory practices by stating; "*no common carrier… shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports*[778]*".*

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[771] The U.S. Shipping Act of 1916, Section 15.
[772] The U.S. Shipping Act of 1916, Section 14.
[773] "*The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement",* The U.S. Shipping Act of 1916, Section 14 paragraph 1.
[774] "*The term "Fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, pre- venting, or reducing competition by driving another carrier out of said trade*". The U.S. Shipping Act of 1916, Section 14 paragraph 3.
[775] *"Retaliate against any shipper by refusing, or threatening. to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason*". The U.S. Shipping Act of 1916, Section 14 paragraph 3.
[776] "*Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat tracts-. or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims"* The U.S. Shipping Act of 1916, Section 14 paragraph 4.
[777] The U.S. Shipping Act of 1916, Section 16 paragraph 1.
[778] The U.S. Shipping Act of 1916, Section 17 paragraph 1.

Because of the mentioned prohibitions, the conferences had followed dual-rate strategy (a kind of loyalty contract)[779]. With respect to the system, the liner conferences followed two different kind of pricing strategy. In the first way, the conferences offered discounts to shippers who concluded an agreement with the conference to use only conference ships. In the second way, if shippers did not prefer to sign a consistent agreement with the conference, they would be charged ten percent higher than the usual price. *Prima facie,* the second way was more beneficial than the first one because the second way gave shippers more freedom of action and nonconference carriers offered chipset rates. However, the conference system had more vessels on the seas and they offered frequent schedule. If the shipper preferred the second alternative and desired to use conference ships, he would pay ten percent higher than the shipper who accepted the first alternative. Therefore, the first system became very popular[780]. The dual rate strategies were not considered a deferred rebate system. While the dual rate had temporary features, the deferred rebate system had continuous nature. Similarly, deferred rebate system allowed deferments that tie the shippers for certain period[781]. Therefore, the dual rate system was not considered as illegal.

In the process of the time, the conference members abused the dual rate system. They forced other liner companies to join the conference system or forcibly removed other shipping companies from the conference routes[782]. The non-conference shipping companies claimed that the dual-rate system should be considered illegal since the system restricted the competition on the market[783]. In 1958, the Supreme Court[784] had faced with a dual rate system case, which was approved by USSB. The Court discussed that whether the section 14 of The Shipping Act, which included illegal conducts, should be implemented to the dual rate system or not. The Court held that the dual rate system

[779] Blanco, paradox, p. 27.
[780] Warner W. Gardner, "Steamship Conferences and the Shipping Act 1916", **Tulane Law Review** ,Vol. 35/129, 1960-1961, p 133.
[781] Carl A. Auerbach, "The Isbrandtsen Case and Its Aftermath: The Dual Rate System in International Shipping", **Wisconsin Law Review**, Vol: 1959, 1959, p 274.
[782] Manuel R. Llorca, "Anti-trust Exemption of Shipping Conferences", **Journal of Maritime Law & Commerce**, Vol:6 No:2, 1975, p 294.
[783] Richard L. Clarke, "An Analysis of the International Ocean Shipping Conference System", **Transportation Journal,** Vol. 36, No. 4 ,1997, p 17
[784] Maritime Board v. Isbrandtsen Co. 481

was *per se* illegal according to the section 14 of The Shipping Act since the main aim of the system was "*stifling the competition of independent carriers*[785]". Additionally, the court was ruled that the Board did not have a right to approve the dual rate system[786].

Three year after the *Isbrandtsen case*, the Congress introduced an amendment to The Shipping Act with the intent of permitting the dual rate system in 1961. However, the Congress also laid down a condition that the discounts should not exceed 15%. Moreover, the USSB authorities were transferred to the FMC. The investigation and cancellation power were given to FMC[787]. After the amendment, the dual tariff contracts were considered legal as long as they notified to the FMC. Additionally, the contracts did should involve any provisions contrary to the public interest[788]. The district court suggests the following conditions shall be considered during the public interest measurement; whether there is a serious transportation needs for conferences, whether the conferences secure public welfare or whether the conference was establish "*in furtherance of a valid regulatory purpose of the Shipping Act*[789]." This judgment brought fundamental changes. The requirements of the legality for a conference became more difficult. Therefore, liner shipping companies could not establish a common behavior and consequently they remained behind the international commercial developments[790]

3.1.2. The Shipping Act of 1984

Because of prohibition of dual rate practices and hard requirements for conferences, the liner shipping companies worried about the application of the antitrust

[785] Maritime Board v. Isbrandtsen Co. 481, p 482
[786] F. Conger Fawcett and David C. Nolan, p 547.
[787] Statement of Charles A. James Assistant Attorney General Antitrust Division Before The Committee on The Judiciary the U.S. House Of Representatives Concerning H.R. 1253, The Free Market Antitrust Immunity Reform Act Of 2001 Presented On June 5, 2002, https://www.justice.gov/archive/atr/public/testimony/11244.pdf, (19.03.2019).
[788] Blanco, Paradox, p. 33.
[789] Svenska Case, p 243.
[790] Peter A. Friedman and John A. Devierno, "The Shipping Act of 1984: The Shift from Government Regulation to Shipper Regulation", **Journal of Maritime Law and Commerce**, Vol. 15, No. 3**,** 1984, p. 317.

rules and they asserted a claim that they were obliged to terminate the conferences. The ship owners also mentioned that in the absence of the conference system, price wars would start and subsequently the liner market would be controlled by the monopolies[791].

Beside the consequences of the *Isbrandtsen case*, the new shipping, containerization, system had changed the transportation logic and its regulation. When the intermodal rates became fashionable trend for charging transportation facilities, The Hague and Hague Visby Rules were introduced in order to adapt the freight contracts provision to intermodal transportation sea leg[792]. The international carriage of goods by sea regulations gives more responsibilities to carriers than before[793]. The Shipping Act of 1916 did not involve any provision about the intermodal transportation and there was ambiguousness whether the FMC had authority to confirm intermodal agreements established by the conferences[794]. As a result of these, the U.S. shipping companies lost their competitive powers. In order to increase, encourage and maintain the shipping power[795], the U.S. Government again preferred to keep state interventions at minimum and the Shipping Act of 1984 was empowered[796]. Additionally, the Act aimed to create an effective framework for liner shipping to work in harmony with international players. Indeed, the primarily purpose was to encourage the U.S. flag carriers in order to be more competitive on the global market[797].

The attitude of the U.S. Government triggered the freedom among the carriers who were able to contract and collaborate with each other without government intervention. Some freedoms, given to carriers, essentially protected the shippers[798]. Therefore, even if the conferences will be studied under title, it also refers the other type

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[791] John Giduck, "The Shipping Act of 1984: A Return to Antitrust Immunity", **Transportation Law Journal**, Vol:14, 1985, p. 169.
[792] Hakan Karan, "Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules", **Journal of Maritime Law and Commerce**, Vol: 42, No: 3, 2011, p. 443.
[793] Nil Kula Değirmenci, "What Would the Possible Effects of Article 26 and 82 of the Rotterdam Rules on the New Turkish Law Relating to Multimodal Transport of Goods", **Banka Huk. Dergisi**, Vol:30, 2014, p. 124.
[794] Charles L. Buderi, "Conflict and Compromise: The Shipping Act of 1984", **Berkeley Journal of International Law,** Volume 3 Issue: 2, 1986, p. 323.
[795] The U.S. Government had also introduced the U.S. Merchant Shipping Act 1936 in order to have strong and sustainable national fleet. Ademuni-Odeke and Karan, p. 169.
[796] John Giduck, p. 170.
[797] Blanco, Paradox, p. 36.
[798] Peter A. Friedman and John A. Devierno, p. 313.

of collaboration strategies. The members of the conference agreement could independently bargain with the shippers about the rate and services "*upon not more than ten days' notice to the conference*[799]*"*. This provision means that the members of conferences could quote a rate that was not similar to the conference rate. If a member desired to follow this strategy, it would inform the conference ten days before implementation[800]. The scope of the freedom enclosed the not only conference agreements but also other type of agreements like alliances[801].

Moreover, both individual carriers and conferences were free to establish service contracts[802]with shippers[803]. The Shipping Act of 1984 were clearly listed what kind of agreements with in the context of the Act and exempted from antitrust provisions. With respect to the Section 4 and the Section 7 of the Act, the following seven types of agreements in the scope of the Act and antitrust immunities were given to them[804].

> *" (1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service; (2) pool or apportion traffic, revenues, earnings, or losses; (3) allot ports or restrict or otherwise regulate the number and character of sailings between ports; (4) limit or regulate the volume or character of cargo or passenger traffic to be carried; (5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers; (6) control regulate or prevent competition in international ocean transportation; and (7) regulate or prohibit the use of service contracts."*

As it was seen the most of behaviors of conferences had been exempted from the antitrust rules as soon as they got permission from the FMC. When FMC recognized that

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[799] The Shipping Act of 1984, section 5(b)(8).
[800] Clyde and Reitzes, Effectiveness, p. 13.
[801] Edward J. Sheeppard and David Seidman, "Ocean Shipping Alliances: The Wave of the Future?", **International Journal of Maritime Economics,** Vol:3, 2001, p. 358.
[802] *"A contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level-such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party"* The Shipping Act of 1984, section 3(21).
[803]The Shipping Act of 1984, section 8(c).
[804] The Shipping Act of 1984, section 4 and section 7.

a conference unreasonably reduced the competition or unreasonably increased the prices, the Commission had a right to stop the operation of the conference[805].

Beside the exemptions, the Act also involved the prohibited behaviors. The Shipping Act of 1984 banned fourteen actions of the common carriers[806]. The attitude of the law makers about the deferred rebates did not changed and the system was still considered *per se* unlawful[807]. Even though forbidden activities the Shipping Act of 1916 provisions remained same in the new act, there was one important clause, which was added to the Shipping Act of 1984. The loyalty contracts were forbidden unless antitrust law allowed them[808]. In other words, there were not considered *per se* illegal; if the antitrust authorities, which are Department of Justice and Federal Trade Commission, permitted the loyalty contracts, they would enjoy the immunities[809]. Based on their experiences, the antitrust authorities believed that the loyalty contracts restricted competition when the financially strong companies applied them[810].

The evaluation logic of the FMC was changed after the Shipping Act of 1984. The *Svenska*[811] decision focused on the public interest and consequently collaborations among the ship owners were considered *per se* contrary to the public welfare due to the their discriminatory practices. In order to protect the public interest the court added one more difficult condition for burden of proof, the FMC did not seek the whether the agreement was essentially protect the public interest or not, instead the burden of proof about protecting the public interest were given to members of collaboration[812]. The Shipping Act of 1984 had changed both the burden of proof and the public welfare test.

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[805] Report of The Federal Trade Commission, "**Analysis of The Maritime Industry and The Effects of The 1984 Shipping Act",** 1989, p10 https://www.ftc.gov/sites/default/files/documents/reports/analysis-maritime-industry-and-1984-shipping-act/198911maritime.pdf, (18.02.2019).
[806] The Shipping Act of 1984, section 10.
[807] The Shipping Act of 1984, section 10(b)(8).
[808] Nancy Ruth Fox, "Some Effects of the U.S. Shipping Act of 1984 on Ocean Liner Shipping Conferences", **Journal of Maritime Law and Commerce,** Vol. 26, No. 4, 1995, p. 533.
[809] Blanco, Paradox, p. 39.
[810] Peter A. Friedman and John A. Devierno, p. 336.
[811] Federal Maritime Commission Et Al. v. Aktiebolaget Svenska Amerika Linien, 390 U. S, 238, 1968, p 253, http://cdn.loc.gov/service/ll/usrep/usrep390/usrep390238/usrep390238.pdf, (19.03.2019), (Svenska Case).
[812] Martha L. Cecil, "The Shipping Act of 1984: Bringing the United States in Harmony with International Shipping Practices", **Dickinson Journal of International Law,** Vol:3 No:2, 1985, p. 216.

The duty of burden of proof was given to FMC[813]and the substantially anticompetitive test became the applicable test for determining the results of the agreement[814].

3.1.3. Ocean Shipping Reform Act 1998

With respect to the Shipping Act of 1984, the conferences and independent shipping companies should submit their freight rates to the FMC. The main aim of this submission was to inspect whether the conferences or carriers were giving secret discounts from declared rates or not. If they gave, they would be fined. However, there was freedom for conference members when they individually determined different freight rates for special contracts from the conference rate[815]. Therefore, even if, the Shipping Act of 1984 allowed that a member of the conference was able to enter into service contracts with shippers, conferences did not let their members to act individually. In order to solve this problem the U.S. Government established the OSRA, which allowed to members of liner conferences to make service contracts for their own without intervention of the conference[816]. The conferences are only able to introduce *voluntary guidelines* about service contracts in order to lead the carriers and shippers for expected behaviors[817].

Parallel with the allowance, the FMC has changed the freight rate submission procedure. Even though the liner shipping carriers do not file their tariffs to the FMC, they are still under obligation to declare some information about their company on the internet[818]. The company shall download arrival and departure ports information, the commodities which it can able to carry, the minimal volume or portion which it desires

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[813] The Shipping Act of 1984, Section 6(h).
[814] The Shipping Act of 1984, Section 6(g).
[815] Paul S. Clyde and James D. Reitzes," Market Power and Collusion In The Ocean Shipping Industry: Is A Bigger Cartel A Better Cartel" **Economic Inquiry**, Vol: XXXVI, 1998, (Market), p. 293.
[816] James D. Reitzes and Kelli L. Sheran, "Rolling Seas in Liner Shipping", **Review of Industrial Organization**, Vol:20, 2002, p. 55.
[817] OECD Report Competition Issues the U.S., p. 3.
[818] European Commission, The Application of Competition Rules To Liner Shipping, Final Report 2005, (European Commission Final Report), p III-51.
http://ec.europa.eu/competition/consultations/2005_reg_4056_86/shipping_report_26102005.pdf, (18.02.2019).

to transport and the information about contract time[819]. There are some exemptions for information disclosure; for instance, companies are free to upload their freight rates and their multimodal transportation facilities[820].

By permitting the individual carriers for entering the service contract with shippers, the U.S. Government desires to encourage the international intermodal transportation. After the OSRA, independent carriers freely negotiate with other type of transport (rail, air, truck) providers[821] as long as they are not violating the antitrust regulations[822]. In essence, the Act explicitly states that OSRA follows the Shipping Act of 1984 aims and besides them there is one more new aim that *"to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace"* [823].

Loyalty contracts situation has also changed after the OSRA. The agreements on the transport of pre-determined and guaranteed products between a carrier and a shipper will be considered legal. However, the deferred rebates are still unlawful[824].

Consequently, the OSRA has caused a radical change for the liner shipping industry. The liner conferences lost its power; in 1982, there were 99 liner conferences but in 2001, only 19 of them remained[825]. Instead of conferences, liner carriers have been applying "*non-binding discussion agreements, global alliances and long term confidential contracting and mergers"* since 1998[826]. Under these strategies, members can use each other ships (via vessel sharing agreements), ports, containers and etc. in order to develop asset utilization. Additionally, members are able to share their financial

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[819] Anila Premti, p. 17.
[820] Blanco, Paradox, p. 41.
[821] Shashi Kumar and George L. Schatz "Ocean Shipping Reform Act (OSRA) 1998: Impact on International Intermodal Movements" **Transportation Journal,** Vol: 40(1), 2000, p. 13.
[822] European Commission Final Report, p. III-52.
[823] Ocean Shipping Reform Act of 1998, section 2(4), https://www.congress.gov/105/plaws/publ258/PLAW-105publ258.pdf, (19.03.2019).
[824] Paul S. Edelman, "The Ocean Shipping Reform Act of 1998", **Currents International Trade Law Journal,** Vol:65, 2000, p. 66.
[825] William Sjostrom, "Ocean Shipping Cartels: A Survey", **Review of Network Economics**, Vol:3 Issue:2, 2004, p. 110.
[826] Dong-Hua Wang, "Ocean Shipping Reform Act Promotes Competition in the Trans-Atlantic Trade Route" **Transport Policy**, Vol:23, 2012, p. 89.

instruments for long-term assets purchase and exchange[827]. The average cost of the liner companies, mainly container carriers, reduces more than $260/TFEU after the alliance strategies[828]. Not only ship owners but also shippers gain benefit from the spirit of sharing, because minimizing the costs through collaborations return as lower freight rates and quality services[829]. Moreover, these strategies do not force or bind their customers. As a result of their benefits to carriers and shippers, they enjoy immunities. However, they, like previous and future examples of collaborations, are approved FMC[830]. This kind of collaboration strategies do not file to FMC and members of them can arrange meetings to discuss trade conditions. However, the price and capacity fixing strategies are still considered as forbidden behaviors[831].

As above mentioned, the FMC is scrutinized the new form of collaborations[832]. In order to measure the actual effects of the liner shipping collaboration, the HHI test has been implemented by the FMC[833]. Container companies are the driving forces of the liner shipping industry[834]. Therefore, the top 30 container liner shipping companies' figures will be used to show the market power of the liner shipping companies. The Alphaliner Top 30 measurement is updated day by day and it provides market shares of the container companies by considering the current fleets and order books of companies. With respect to data of on 19 June 2019, the HHI is measured almost 981 that means that there is no concentration in the market today because HHI is less than 1000. However, when the alliance members are considered as one company the scenario has changed. For instance, the 3P Alliance, whose members were Maersk, MSC and CGM,

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[827] Sheeppard and Seidman, p. 359.

[828] Federal Maritime Commission, **The Impact of The Ocean Shipping Reform Act of 1998,** 2001, https://www.fmc.gov/wp-content/uploads/2019/04/OSRA_Study.pdf (14.03.2019), p. 3. **(**Impact of OSRA).

[829] Mike Fusillo, "Is Liner Shipping Supply Fixed?", **Maritime Economics & Logistics,** Vol:6, 2004, (Supply Fixed), p. 223.

[830] Ira Lewis and David B. Vellenga," The Ocean Shipping Reform Act of 1998," **Transportation Journal**, Vol:39 No:4, 2000, pp. 29-30.

[831] Michael Fusillo, "Some Notes on Structure and Stability In Liner Shipping" **Maritime Policy and Management**, Vol:33 No:5, 2006, p. 465.

[832] Sheeppard and Seidman, p. 364.

[833] Owen Tang and Po-wan Sun, "Anti Competition of Ocean Shipping Alliances: A legal Perspective" **Maritime Business Review**, Vol:3, Issue:1, 2018, p. 6.

[834] Christa Sys, "Is the Container Liner Shipping Indusrty an Oligopoly?", **Transport Policy,** Vol:16, 2009, p.261.

market share today is %44,3 and in that case HHI is measured almost 2269. The HHI, which change after the collaboration, is more than 200 means the members will possibly increase their market power after the collaboration. The market can face with monopoly, for liner cases oligopoly, danger. For the 2M Alliance, Maersk-MSC alliance, HHI is calculated almost 1510 and the change again more than 200. For the Ocean Alliance, CMA-Cosco-Evergreen-OOCL, HHI is measured again almost 1500.

As seen that collaborations between the big players has increased the concentration in the market. Therefore, it shall not be ignored that there will a danger of monopoly in the future. Fortunately, the intent of the current collaboration strategies is not fix prices or restrains competition. They aim to share the risks and assets in order to gain more advantage from the market. Therefore, they can enjoy the immunities of the competition act. The scenario will be possibly changed, if the collaborations directly or indirectly fix the prices.

To sum up, it can be said that during the initial period of the Sherman Act, the liner collaborations hooked on the antitrust regulations. They were considered as cartel which *per se* unlawful. However, this conception did not take too long. Both shippers and carriers made pressure to the government to introduce a new act about liner shipping because all parties of the liner shipping had gained advantages from the conferences and consequently the Shipping Act of 1916 came into force. The main aim of these regulations was to exempt the industry from competition law rules. Even though the immunities, the Government always inspect the collaboration closely. Collaborations shall file their information to governmental bodies. The U.S. Government takes *ex ante* preventative actions for liner shipping anticompetitive behaviors.

With respect to the U.S. Shipping Acts, if some of the strategies of the cooperation really restrict competition and put pressure on the industry, the government indirectly prohibits those strategies and enables new strategies to be formed. After enacting the new law, the government appoints a committee to evaluate new strategies of collaborations in order to check whether competition is actually restricted. OSRA is a good example for this policy. In consequence of the OSRA, the conferences lost their power and the new collaboration strategies have risen. According to the new strategies,

the liner shipping carriers are able to share their assets and risk via acting collectively[835]. The oceans always contain danger for the ship owners. Some risks are caused by human errors of seamen, some of them occurred as a result of act of god[836].

This sharing enables to reduce the freight rates. Due to their advantages, the standpoint of the U.S. Government for liner collaboration has not been changed yet and the new kinds of strategies are supported by the current the U.S. Government[837]. However, the market power of the liner shipping has been increasing day by day. Therefore, there is a necessity to supervise them. Otherwise, they will be able to control the market as an oligopolistic way.

3.2. EUROPEAN UNION REGULATIONS

As a result of the American power, the maritime transport ministers of the 10 European countries[838] came together and formed the Consultative Shipping Group (CSG). The CSG believed that the Governments should not interfere to the maritime industry in order to encourage the industry. In the meanwhile, the Committee of European National Shipowners' Association (CENSA) was set up by the European ship-owners to support the CSG. The European Countries perspective did not changed after the European Union. The cartels were considered *per se* illegal by the Treaty of Rome (today TFEU) and Regulation 17. However, the European Union introduced Regulation 141 in the aim of excluding the transport industry from the competition regulations. In 1974, the court discussed the application of the exemptions in the *French Merchant Seamen*[839] case and decided that even though maritime industry was excluded from the competition rules, they were subject to the general rules of the Treaty[840].

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[835] Frank LoBiondo Coast Guard Authorization Act of 2018, section 703(6).
[836] Sezer Ilgın," A Study On The Legal Aspects of Piracy And Armed Robery", **Constanta Maritime University Annals**, Vol: X-12, 2009, p. 59.
[837] Frank LoBiondo Coast Guard Authorization Act of 2018, section 703(6). https://www.congress.gov/115/bills/s140/BILLS-115s140enr.pdf , (14.04.2019).
[838] Germany, Belgium, Italy, France, the Netherlands, the U.K., Denmark, Norway, Sweden and Greece.
[839]Commission of the European Communities v French Republic,EU:C:1974:35,https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:61973CJ0167&from=EN, (08.02.2019), (French Merchant Seamen Case).
[840] French Merchant Seamen Case, paragraph 4.

After this decision, E.U. authorizes recognized that they should establish a policy with regard to liner shipping collaborations. With respect to their policy, the TFEU has always been the first source of determining the legality of liner conferences. In order to support the TFEU, the E.U. Horizontal Guidelines and some regulations has been established[841]. The first regulation was the Council Regulation 954/79[842] (Brussels Package) which was established by the European Commission in order to implement the provision of the UNCTAD, which includes private rules about the liner conferences, to its domestic law[843]. Another important regulation was Regulation 4056/86 which involved detailed provision for applying articles 85(now 101) and 86(now 102) of Treaty of Rome to shipping industry[844]. In 2006, the E.U. Council was established Regulation 1419/2006 in the purpose of repealing Regulation 4057/86. Also, the Council Regulation 246/2009 was introduced by the Council to apply article 81(3) (now article 101-3) to current liner collaboration strategies. With respect to the 246/2009 Regulation, the Commission has a right to declare necessary regulations[845]. Based on this right, the Commission was published Regulation 906/2009 in order to regulate the application of article 101(3) to new collaboration strategies. The Regulation 906/2009 will expire in 2020 and therefore the Commission has launched an evaluation process for the regulation[846]. The results of the regulation over the industry are now evaluating in order the test whether the regulation will be applied again or it requires additional provisions[847]. Additionally, the Commission was also published A Guidelines on

[841] OECD Directorate for Financial and Enterprise Affairs Competition Committee, **Competition Issues In Liner Shipping European Union,** Working Party No. 2 on Competition and Regulation, 2015, http://ec.europa.eu/competition/international/multilateral/2015_june_liner_shipping_en.pdf (18.02.2019), p. 4. (OECD Report Competition Issues E.U.)

[842] Council Regulation (EEC) No 954/79 of 15 May 1979 Concerning The Ratification By Member States of, or Their Accession to, The United Nations Convention on A Code of Conduct For Liner Conferences, Official Journal L 121 , 17/05/1979, pp. 1-4, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979R0954:EN:HTML, (08.02.2019), (EU Regulation 954/79)

[843] Blanco, EC Maritime Competition Policy, p. 9.

[844] Bernard Gardner, "EU Competition Policy and Liner Shipping Conferences, **Journal of Transport Economics and Policy**, Vol:31, No:3, 1997, p. 318.

[845] EU Council Regulation No:246/2009, paragraph 8. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009R0246, (12.04.2019).

[846] http://ec.europa.eu/competition/indusrtys/transport/legislation_maritime.html, (14.04.2019).

[847] https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025_en, (14.04.2019).

Maritime Transport Services (GMTS) in order to show how the Commission defines markets and assesses collaborations agreements[848]. There are many regulations, which are not applicable today, in the EU history[849]. Under this title the most important regulations, even if they were not in force today, will be discussed in order to determine how the liner shipping collaboration regulation has been evolved at EU jurisdiction.

3.2.1. Regulation 954/79

The liner shipping services has spread all over the world through liner conferences. Therefore, beside their national rules, the Governments desired to have a sophisticated regulation for liner conferences. Additionally, when the developing maritime nations' fleet were established, they would desired to easily enter the conferences, which were controlled by the ship owners from traditional maritime nations, in order to increase their foreign trade. Therefore, the traditional maritime nations should be implemented policies in favor of the developing maritime nations' fleet for being a member of conferences[850]. UNCTAD had answered these requirements and published The Code of Conduct for Liner Conferences[851]. The UNCTAD Code was the first internationally accepted legal document about the liner conferences[852].

There are fifty-four articles and two nonbinding annex in the Code[853]. Among them article 2 drew all attention towards itself[854]. If the two trade partnership countries'

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[848] Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services, article 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0926(01)&from=EN (14.04.2019).

[849] For the antitrust legislation no longer in force and past revision process, http://ec.europa.eu/competition/indusrtys/transport/legislation_maritime_archive.html (14.04.2019).

[850]Ademuni-Odeke, **Protectionism and The Future of International Shipping**, Martinus Nijhoff Publishers, Dordrecht, 1984, p. 52.

[851]Alan G. Lopatin, "UNCTAD Code of Conduct for Liner Conferences: Time for a United States Response", **Harvard International Law Journal,** Vol. 22, 1981, p. 355.

[852] W.R. Malinowski, "The Code of Conduct for Liner Conferences", **Intereconomics**, Vol: 8, 1974, p. 237.

[853] United Nations Conference of Plenipotentiaries on A Code of Conduct for Liner Conferences, 1974, https://unctad.org/en/PublicationsLibrary/tdcode13add.1_en.pdf (10.02.2019) (UNCTAD Code).

[854] Leslie Kanuk, "UNCTAD Code of Conduct for Liner Conferences: Trade Milestone or Millstone--Time Will Soon Tell, The Perspectives, **Northwestern Journal of International Law & Business**, Vol:6, Issue:2, 1984, p. 363.

national shipping lines carried cargoes among each other, they would have equal rights for freight and volume[855]. The other countries shipping lines could only have 20% share for that trade[856]. In the doctrine, this rule was called as *"40:40:20 formula"*. 80% percent of the traffics was divided equally, 40%-40%, to each national *shipping* lines. The remaining 20% belonged to third states members[857]. The main of this volume sharing was to protect to third country shipping lines by giving guarantee for freight and trade. However, it might affect the big carriers in a negative way because it limited their capacity[858]. As a result of this, during the voting procedure of the code of conduct, the developing maritime nations had supported the conduct but the traditional maritime nations did not build consensus. Even if France, Belgium and Germany (West) had voted in favor of conduct, the U.K., the U.S. and Denmark did not confirm[859].

The UNCTAD Code might or might not involve positive clauses; it was adopted by the E.U. in 1979 and established Regulation 954/79 (it also named as The Brussels Package). Even if the main aim of the regulation to ratify the UNCTAD Code, it also involved important provisions. For instance, in the Preamble, the E.U. had declared its point of view against liner conferences by stated that

> *"Whereas the stabilizing role of conferences in ensuring reliable services to shippers is recognized, but it is nevertheless necessary to avoid possible breaches by conferences of the rules of competition laid down in the Treaty; whereas the Commission will accordingly forward to the Council a proposal for a Regulation concerning the application of those rules to sea transport[860]"*

When the language of the provision it investigated deeply, it can be said that the E.U. legal authorities had recognized the importance of the liner conferences. In addition, by entering the words *"necessary and possible"* the authorities believed that the competition regulations were necessary to avoid possible breaches. This wording

[855] UNCTAD Code, article 2 (4)(a).
[856] UNCTAD Code, article 2 (4)(b).
[857] Lopatin, p. 358.
[858] Kanuk, p. 371.
[859] Ademuni-Odeke and Karan, p. 170.
[860] Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, paragprah 5, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979R0954:EN:HTML 17.04.2019), (EU Council Regulation 954/79).

indirectly means that under the normal conditions the liner conferences did not violate the antitrust regulations. Additionally, it was clearly stated that there was a requirement to introduce regulation about competition in maritime industry[861] . Therefore, beside its provisions, the Brussels Package had instigated the E.U. members to establish a common regulation for liner shipping[862].

3.2.2. Regulation 4056/86

The E.U. authorities believed that the liner companies stabilized the shipping market by establishing satisfactory scheduled shipment. If the liner companies desired to sustain the productivity of services, they would collaborate under the liner conferences. It was inevitable consequences[863]. However, the decision of the *French Merchant Seamen Case* had created awareness that articles 101 and 102 should be implemented to liner competition cases[864]. Therefore, there was a necessity to combine this decision and the E.U. liner shipping policy. Based on this requirement the E.U. had published Regulation 4056/86 with considering article 101 and 102 of TFEU[865]. The Regulation was the first regulation about the liner shipping and involved provision about how the E.U. authorities evaluate and implement the competitive regulations to transport industry[866]. Before discussing the title it is beneficial to mention that the regulation did not cover the multimodal transportation rates, passenger carriage and liner shipping activities between non EU ports[867]. These carriage systems were regulated by the Regulation 17/62[868].

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[861] Blanco, Paradox, p. 109.
[862] Hongyan, p.15.
[863] Benacchio et al, p. 4.
[864] French Merchant Seamen Case, paragraph 4.
[865]COUNCIL REGULATION (EEC) No 4056 / 86, 22 December 1986, article 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986R4056&from=EN (22.04.2019), (EU Regulation 4056/86).
[866] Chris Townley, "The Liner Shipping Block Exemptions in European Law: Has the Tide Turned?", **World Competition**, Vol:27/1, 2004, p. 114.
[867] Blanco, EC Maritime Competition Policy, pp. 10-13.
[868] Ademuni-Odeke and Karan, p. 189.

As it was mentioned before, article 101(1) of TFEU forbids the restrictive activities but the third sub-clause of the same article gives some exemptions when the certain conditions are met. The Commission has applied the immunities case by case or has given the exemptions to certain category of agreements as block exemptions[869]. The block exemptions to liner shipping conferences were given by article 3 of the Regulation 4056/86 which stated that *"Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85 (1) of the Treaty…. when they have as their objective the fixing of rates and conditions of carriage…*[870]". However, there was a one condition that they should oblige to condition stated under article 4[871]. With respect to this condition, the conferences should not practice favoritism in the market between shippers or port via charging different rates or discriminating the goods according to their nationalities, discharge and loading ports[872]. When the wording of article 3 is investigated deeply, the one condition was indirectly inserted to article. If the liner companies desired to have an exemption, they had to be member of a conference, otherwise an individual carrier could not enjoy the immunities[873]. In addition, the Regulation considered the price fixing strategy of the conference was legal and it was commonly accepted that the price fixing became unavoidable and necessary. However, there was a limitation for price fixing, only conferences were able to fix the prices and they were able to offer different freight rates based on the nature of the goods. If the two un-conference carrier desire to fix price, they would breach article 101 of TFEU[874]. Beside the condition, the regulation also included five obligations[875] to liner conference before giving exemptions[876]. The conference and carriers should establish a consultation to discuss the freight rates and

[869] B. Gardner, p. 318.
[870] EU Regulation 4056/86, article 3.
[871] EU Regulation 4056/86, article 3.
[872] EU Regulation 4056/86, article 4.
[873] Blanco, EC Maritime Competition Policy, p. 11.
[874] Blanco, EC Maritime Competition Policy, p. 11.
[875] These five obligations was adopted from article 11 of the UNCTAD Code of Conduct. Ademuni-Odeke and Karan, p. 195.
[876] EU Regulation 4056/86, article 5.

service conditions[877]. The conference should institute loyalty agreements to shippers based on the result of consultation[878]. The conference should be free to negotiate the inland transport operations to customers[879]. The tariffs of the conference should been published[880]. In addition, both conference and shippers should inform the Commission when they faced with disputes among each other[881]. As seen that, even if the E.U. had given block exemptions, the implementation of the immunities required strict condition and obligations[882] and this means that liner shipping conferences did not under obligation to file their agreements to the Commission[883] as long as they comply with the conditions of the regulation.

Additionally, the Regulation had also focused on the abuse of dominant position and stated that the abuse of dominant position was *per se* illegal[884]. When the commission caught the abuse of dominant position, it took back the immunities[885].

E.U. has recognized that the liner shipping companies started to establish new and beneficial collaboration strategies rather than conferences. The new type of collaborations offered high quality intermodal services when they compared with the conferences[886]. However, as it was mentioned, the block exemptions did only cover conferences[887], therefore, in 1992, the Council Regulation 479/92 was published in order to give immunities to new kind of collaborations[888]. The new collaboration agreements were named as consortia and were exempted from the antitrust provisions of TFEU as long as their intent did not involve price fixing[889]. The Regulation gave a task to

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[877] EU Regulation 4056/86, article 5(1).
[878] EU Regulation 4056/86, article 5(2).
[879] EU Regulation 4056/86, article 5(3).
[880] EU Regulation 4056/86, article 5(4).
[881] EU Regulation 4056/86, article 5(5).
[882] Blanco and Houtte, p. 112.
[883]Ademuni-Odeke and Karan, p. 191.
[884] EU Regulation 4056/86, article 8.
[885] Terry Marquez, "Shipping, Competition, and Dumping: The European Community's Liner Shipping Regulations", **Tulane Maritime Law Journal,** Vol:23, 1998, p. 168.
[886] Marquez, p. 148.
[887] Ademuni-Odeke and Karan, p. 196.
[888] Rosa Greaves, "EC Maritime Transport Policy and Regulation", **Duke Journal of Comparative & International Law**, Vol: 3, p. 134.
[889]Council Regulation (EEC) No 479/92 of 25 February 1992, Article 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R0479&from=EN (19.04.2019),
(Regulation 479/92).

Commission to update its provision if it was necessary[890]. To this respect, the Commission published Regulation 870/95[891], Regulation 823/2000[892], Regulation 611/2005[893], Regulation 906/2009[894] and current Regulation 697/2014[895].

3.2.3. Regulation 1419/2006

In 2004, the Commission had published a white paper in order to evaluate the effect of the Regulation 4056/86 over the shipping industry. The white paper mainly discussed whether the exemptions given to liner shipping conferences were still necessary after the effects of OSRA[896]. After the evaluation process, the Commission concluded that even if the liner conferences fulfilled the four conditions of article 81(3), the Commission would consider repealing the current block exemptions[897].

In 2006, the E.U. Council has published Regulation 1419/2006 in the aim of repealing the block exemptions of Regulation 4056/86. After the 2006, the E.U. policy about liner shipping has changed. Previously, legal authorities of the E.U believed that due to the nature of the liner shipping, it should be differed from other industries. However, in the Regulation 1419/2006, they have clearly stated that the liner shipping has no special characteristics and shall be evaluated as other industries. Therefore, there

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[890] Regulation 479/92, article 2(2).

[891]Commission Regulation (EC) No 870/95 of 20 April 1995, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995R0870&from=en (19.04.2019).

[892]Commission Regulatıon (EC) No 823/2000 of 19 April 2000, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R0823&from=EN, (19.04.2019).

[893]Commission Regulation (EC) No 611/2005 of 20 April 2005 amending Regulation (EC) No 823/2000 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005R0611(19.04.2019).

[894] Commission Regulation (EC) No 906/2009 of 28 September 2009, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0906 (19.04.2019), (Regulation 906/2009).

[895] Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0697, (19.04.2019).

[896] White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport, SEC(2004) 1254, 2004, p. 3. https://publications.europa.eu/en/publication-detail/-/publication/a181b3df-9154-46bb-b7af-50da50e2d917/language-en, (16.04.2019) (White Paper)

[897] White Paper, p. 9.

is no necessity to be protected from antitrust rules[898]. With respect to this statement, a question can be arisen, if the liner shipping has similar features like other industries, why they did differ and why the immunities were given to liner shipping industry[899]. The Regulation also clarified these questions. As a result of changes in the liner market, liner conferences did not promote competition anymore; they are not able to offer stable freight rates and reliable services[900] and also conferences began to set policies to protect the interests of their members without considering the public welfare[901]. The establishment of consortia agreements has also changed the legal position of the conferences and the E.U. authorities have considered that consortia have less restrictive features than conferences[902]. The Council has also mentioned that the determination of the legality of a conference is very hard and is done case by case[903]. Based on these four reasons, the E.U. has removed conferences from competition law exemptions[904].

It would not be wrong to say the consequences of OSRA influenced the E.U. legal authorities and they indirectly inhibited the liner conferences as the U.S. authorities did. Both the U.S. and E.U. have preferred to give immunities to new kind of collaborations instead of conferences[905].

To sum up, after the extensive review, the Regulation has terminated antitrust immunities to conferences[906]and price fixing and capacity control strategies of the liner

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[898]Council Regulation (EC) No 1419/2006 of 25 September 2006, 2006, Article 3, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1419&from=EN, (17.04.2019), (Regulation 1419/2006).

[899] Francesco Munari, "Competition in Liner Shipping", **The Hamburg Lectures on Maritime Affairs 2009 & 2010 (International Max Planck Research School for Maritime Affairs at the University of Hamburg),** (Ed. Jürgen Basedow , Ulrich Magnus, Rüdiger Wolfrum), Springer, Berlin, Heidelberg, 2012, p. 17.

[900] Regulation 1419/2006, article 4.

[901] Regulation 1419/2006, article 5.

[902] Regulation 1419/2006, article 6.

[903] Regulation 1419/2006, article 7.

[904] Regulation 1419/2006, article 8.

[905] Federal Maritime Commission, Bureau of Trade Analysis, **Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law,** Washington D.C., 2012, p. viii., https://www.fmc.gov/wp-content/uploads/2019/04/FMC_EU_Study_508compliant.pdf (17.04.2019) (FMC Analysis for EU Exemption)

[906] Peter C. Carstensen, "Replacing Antitrust Exemptions for Transportation Industries: The Potential for a Robust Business Review Clearance", **Oregon Law Review,** Vol: 89, p. 1065.

conferences have been considered per se illegal since 2006 with respect to article 101 of TFEU[907].

3.2.4. 2008 Maritime Guidelines

As it was mentioned under the previous chapter, the liner conferences did not enjoy the immunities of the competition regulations. However, there are still exemptions for consortia. Therefore, there was a requirement to inform liner operators about the changes[908]. In order to provide information about how article 101 would be implemented to liner consortia, the 2008 Maritime Guidelines was published[909].

Like other cases, the evaluation of effects of a collaboration starts with the determination of relevant product market and geographic market. Based on the case experiences, the relevant market of liner shipping was identified as "*containerized liner shipping services"* by commission[910]. However, there could be some limitations for the relevant market. For instance, for perishable cargos the relevant market could be considered as reefer container or other type of reefer shipments. The commission also clearly mentioned that *"break bulk does not offer a reasonable alternative to containerized liner shipping*[911]". For the relevant geographic market, the Commission stated the loading and unloading port for scheduled services represents the relevant geographic market. For Europe there are two different relevant geographic market; Northern Europe or in the Mediterranean because "*as liner shipping services from the Mediterranean are only marginally substitutable for those from Northern European ports, these have been identified as separate markets"* [912]. The other important variable

[907] Premti, p. 12.
[908] Blanco and Houtte, p. 285.
[909] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, 2008/C 245/02, article 1, http://ec.europa.eu/competition/consultations/2014_maritime_consortia/g6_annex_guidelines_on_the_application_of_article_81_to_maritime_transport_services_en.pdf (22.04.2019) (2008 Maritime Guidelines).
[910] 2008 Maritime Guidelines, article 18.
[911] 2008 Maritime Guidelines, article 19.
[912] 2008 Maritime Guidelines, article 20.

for evaluation is the market share. In order to calculate the market share, the Commission uses *volume and/or capacity* of the companies[913].

Like other guidelines, the maritime guidelines applied for certain period of time, 2008-2013[914]. If the Commission sees a necessity to renew a guidelines or regulation, it will introduce new one or protract the current one. In 2013, the Commission announced that the Maritime Guidelines accomplished its goal and therefore there will be no upgrade for Maritime Guidelines, instead horizontal collaboration guidelines will be implemented[915].

3.2.5. Regulation 906/2009

At the beginning of the 2009, the Council had introduced the Regulation 246/2009 to give block exemptions to liner consortia[916] and had given permission to Commission to publish its own regulation about how the Commission would give exemptions[917]. Based on this provision, the current regulation was introduced as named Regulation 906/2009.

While implementing the Regulation 906/2099, the Commission holds that the consortia offer advantages to shippers instead of simply increasing the success of ship owners[918]. However, even if the consortia are more beneficial than conferences, they involve potentially anticompetitive features[919]. Therefore, the commission gives the limited immunities to liner shipping consortia to "*synchronization, rationalization and*

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[913] 2008 Maritime Guidelines, article 33.
[914] 2008 Maritime Guidelines, article 8.
[915] http://europa.eu/rapid/press-release_IP-13-122_en.htm, (19.04.2019).
[916]Council Regulation (EC) No 246/2009 of 26 February 2009, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0246&from=EN (22.04.2019) (Regulation 246/2009)
[917] Regulation 246/2009, paragraph 8.
[918] Matthew T. Drenan, "Watchdogs of the World: Global Linear Conference Regulators in the Modern Shipping Market and Why the P3 Agreement Failed", **Michigan State International Law Review,** Vol:24/1, 2015, p. 95.
[919] Vincent J. G. Power, "The Historical Evolution of European Union Shipping Law", **Tulane Maritime Law Journal**, Vol:38, 2014, p. 354.

achieve economies of scale[920] among each other for quick responding the changeable economic conditions[921].

The third article deals with the exempted agreements, the forth one focuses on forbidden behavior and the other provision states the conditions of immunities[922]. The most important condition for safe harbor is the market share of the consortium. If the markets share of a consortium exceeds 30%, it will not enjoy the exemptions[923]. In this case, in order to have immunity, parties of the consortium must prove that there will be no potential restriction to competition and subsequently they must secure that the conditions of article 101(3) will be satisfied[924]. When the Regulation 906/2009 is described the previous one, the market share threshold had been decreased 5% from 35% to %30[925]. Additionally, the Regulation also set out one more condition according to which a consortium must act fairly when a member of it desire to withdraw[926]. Nevertheless, the withdraw right shall be used in good faith. If a member wants to leave from the agreement, it will give a notice six months, for high ingrate constortium12 months, prior to withdraw[927].

With respect to article 4, strategies of the price fixing, the limitation of capacity or sales and market or customer allocations must not benefit from the privileges[928] because they are not beneficial to market and customers[929]. Moreover, a liner shipping company can be member of different consortia therefore it is able to restrictive competition by establishing coordinated policies between the conferences[930]. The

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[920] Matthew Bennett and Philip Collins, "The Law and Economics of Information Sharing: The Good, the Bad and the Ugly", **The Law and Economics of lnformation Sharing**, Vol:6 No:2, p. 319.
[921] Mary R. Brooks, Hilde Meersman, Christa Sys, Eddy Van de Voorde and Thierry Vanelslander "Technical Report: Regulation in the liner shipping industry: pathways to a balance of interests", **The Dalhousie University**, 2019, p. 9., https://www.uantwerpen.be/en/staff/christa-sys/my-website/research-interest/ (23.06.2019).
[922] Brook et al, p.9.
[923] Regulation 246/2009, article 5(1).
[924] Blanco and Houtte, p. 297.
[925] FMC Analysis for EU Exemption, p. 30.
[926] Regulation 246/2009, article 6.
[927] Henning Jessen and Michael Jurgen Werner, **EU Maritime Transport Law**, C.H. Beck-Hart-Nomos, The U.S., 2016, p. 339.
[928] Regulation 246/2009, article 4.
[929] Jessen and Werner, p. 337.
[930] Blanco and Houtte, p. 298.

exempted behaviors are listed under article 3 of the Regulation and with respect to article timetable coordination, vessel, port infrastructure, office, container and other equipment sharing and operating are exempted from the antitrust provisions[931].

The Regulation 906/2009 will expire in 2020[932] and the Commission is in the process to collect public consultation about how the regulation has been affecting the market for determining the updated or ended the regulation[933].

The enforcement of the U.S. and E.U. liner shipping regulations were not deliberately studied under this title and they will be discussed under the following title. Because it is believed that comparing the selected cases will be more beneficial to understand the differences of the U.S. and E.U. legislation.

3.3. COMPARATIVE ANALYSIS OF THE U.S. AND E.U. REGULATIONS WITHIN THE FRAMEWORK OF PRIMARY JUDGMENTS OF LINER SHIPPING AND A GUIDE FOR TURKEY

E.U. legislation has been introducing immunities to the liner collaborations since 1979. Indeed, for liner conference cases, the exemptions are applied to narrowly and they were interpreted mainly with regard to article 101 and article 102[934] as long as they did not meet the conditions of exemptions. Same as E.U., the U.S. has applied the antitrust provisions, mainly Sherman Act, when the conduct of the liner shipping companies did not satisfy the conditions of the immunities[935].

For, Turkish perspective, there is no unique competition regulation and exemption for shipping industry and also the Act on the Protection of Competition does not involve any provision for liner collaboration strategies. The absence of any provision does not imply an exemption for collaborations. When the effect of the collaborations is considered, it can be said that the collaborations are regulated under articles 4, 6 and 7 of

[931] Regulation 246/2009, article 3.
[932]Commission Regulation (EU) No 697/2014, Article 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0697&from=EN (23.04.2019)
[933]Hercules E. Haralambides, "Gigantism in Container Shipping, Ports And Global Logistics: a Time-Lapse into The Future", **Maritime Economics and Logistics**, Vol:21, 2019, p. 14, footnote 15.
[934] Munari, p. 14.
[935] OECD Report Competition Issues The U.S. p.4.

Protection of Competition Act. In addition, article 5 shall not be ignored because it includes exemptions clauses[936].

As seen that, the U.S., E.U. and Turkey implement their competition acts when the liner shipping collaboration restrict the competition in despite of the exemptions. Under this title, the competitive act enforcement related to liner collaborations will be discussed based on the selected cases in order to find the most appropriate legislation for Turkey.

3.3.1. Primary Judgments

Under this title, the enforcement of the competitive acts of the U.S. and E.U., Shipping Acts of the U.S. the E.U. Regulation to liner shipping collaborations will be analyzed through the selected cases. For each jurisdiction, two most important cases will be analyzed and finally two liner shipping collaboration decision of The Turkish Competition Authority will be questioned.

3.3.1.1. The Hamburg Line Case

In 1911, the Hamburg line case was the first liner collaboration case in the U.S. antitrust history. The steerage passenger carriers established a conference system for their European- United States (also Canada) route[937]. According to the rules of conference, every company shall carry a limited capacity of passenger. When a company had exceeded its portion, it was under obligation to pay 4 pounds for each passenger to conference. The collected money was summed to other carriers, which did not sail with full quota. Alternatively, when a carriage had exceeded its portion, the others were able to set sail by offering fewer or lower rates to fulfill its determined capacity. Consequently, the rates were increased[938] and the conference became the subject of law.

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[936] Muhammed Gundogdu, **Rekabet Hukuku Perspektifinden Havayolu Taşımacılığı Sektöründe Stratejik Ittıfaklar**, Rekabet Kurumu, Uzmanlık Tezleri, Seri No:98, 2009, pp. 77-78.
[937] Hamburg-Amerikanische Packetfahrtactien Gesellschaft, Appellants, *v.* United States of America, http://cdn.loc.gov/service/ll/usrep/usrep239/usrep239466/usrep239466.pdf (19.02.2019), (Hamburg Case).
[938] Hambur Case, p. 471.

When the decision of the Court is investigated, it is found that the judges was complain about the absence of any shipping act by stating that *"transportation covered by the main agreement was under the control of the Anti-Trust Act, yet held that the assailed contract and the action of the parties under it were not within the terms of the act and therefore that the complaint of the Government on that subject was without foundation*[939]*"*. Hence, the court believed the dynamics of the shipping industry had been changing day. Today's problem would be beneficial for human who would enjoy the benefits of ship[940]. It can be said that the war conditions in Europe were influenced the court decision. However, the court also stated that even if the parties of the case were the shipping companies, the case still involved anticompetitive behaviors[941].

The court prohibited the conference based on the Sherman Act, Section 2. According to the court decision, the aim of the conference was to restrain the competition via fixing or increasing the rates, which would be resulted in monopoly[942].

The application of the monopolization rules to shows that at the first day of the Sherman Act, the Courts avoided to implement Sherman Act Section 1 to liner shipping industry. With respect to the Sherman Act Section 2, the legality of an agreement depends on the relevant market conditions, market shares and the intent of the parties. But on the other hand, the Section 1 involves more *per se* violations. As a result of the war conditions, the Court believed that the market would be change after war. Consequently, it did not apply Sherman Act Section 1. Instead, the court had shaped its decision by focusing the current intent of the parties and shaped its decision. Based on this assumption, it can be said that when the Court had implemented the monopoly provisions, it was indirectly applied rule of reason rules. It should be highlighted that the rule reason was introduced at the same year of this case.

[939] Hamburg Case, p. 473.
[940] Hamburg Case, p. 473.
[941] Hamburg Case, p. 474.
[942] Hamburg Case, pp. 475-476.

3.3.1.2. The Isbrandtsen Case

Isbrandtsen is an individual, non-conference member, company operated from Japan to Atlantic Coast ports via Suez Canal and Panama Canal. The Japan-Atlantic and Gulf Freight Conference, which was established by 17 carriers, also served in the same market. In order to maintain its operations, Isbrandtsen had offered 10% cheaper services than the conference[943]. After the World War II, the Japanese liner companies entered to the market and they increased their market share year by year while the American companies' market share, including Isbrandtsen, had started to decrease. With response to the Japanese power, the conference reduced its freight rates almost 10% below the market conditions. The respond of Isbrandtsen was very competitive and offered another 10% reduction under the conference prices[944]. Consequently, the Japan-Atlantic and Gulf Freight Conference had implemented a dual rate system which allowed the shippers to pay less than usual rates, almost 9% below the market conditions, for the equal shipping as long as shippers ratified the exclusive patronage contract of conference[945]. The dual rate strategy triggered the rate wars. The freight rates had consistently decreased below handling costs[946].

The Conference filed the dual rate strategy to The Federal Maritime Board who had approved the conference strategy after the long run investigation. According to the Board, the dual rate system was a traditional conference strategy, which *"resort to other discriminating or unfair methods to stifle outside competition in violation of section 14 of Shipping Act of 1916"*[947]. Additionally, the Board has stated that the dual rate system balances the freight rate prices and shipping services and therefore it was considered reasonable in the sight of shippers[948].

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[943] Isbrandtsen Case, pp. 484-485.
[944] Isbrandtsen Case, pp. 486-487.
[945] Isbrandtsen Case, p. 483.
[946] Auerbach, p. 234.
[947] Isbrandtsen Case, p. 481.
[948] Stanford Law Review, "The American Shipping Industry and the Conference System", **Stanford Law Review**, Vol:11, No:1, 1958, p. 147.

In response, the Isbrandtsen had litigated the approval of the Board[949]. The Court of Appeals had reversed the order of Board on the ground that the dual rate system was illegal according to the section 14 of Shipping Act of 1916[950]. The court also stated that the immunities were given to the ocean conference as long as they do not restrictive competition[951]. As a result, the Board approval power is limited by the Shipping Act of 1916 and had a no right to approve illegal behaviors[952].

As it was mentioned, the consequences of the Isbrandsten judgment had literally changed the conference strategies. When the case is investigated as whole, it can be said that judges were aware the possible results of their decision and they avoided to implement *per se* rule. This approach was very correct. Hence, The Shipping Act of 1916 section 14 *per se* banned the following four situations[953]; *establishing a deferred rebate system to any shipper, using a fighting ship retaliating against shippers and making discriminatory shipping contracts.* Even if today the dual rate system are involved under *discriminatory shipping contract* provision, during that days the it was implemented by the all conferences and considered as a tradition of liner shipping. Additionally, The *Far East Conference v United States*[954] had encouraged to liner carriers to establish the dual rate strategies via its judgment in which it was stated that *"if the Board had expressly approved the dual rate system, and the dual rate system did not violate the Shipping Act, then there would be immunity from the Sherman Act"*[955]. Based on this decision, the conferences could applied the dual rate as long as the Board had approved them otherwise they were considered *per se* illegal. The Isbrandtsen judges have totally refused this approach and stated the trade conditions and the strategies of the collaborations had a very changeable nature. Hence, each case should be

[949] Isbrandtsen Case, p. 486.
[950] Isbrandtsen Case, p 481.
[951] Isbrandtsen Case, p 491
[952] Isbrandtsen Case, p 481.
[953] The U.S. Shipping Act of 1916, Section 14.
[954] Far East Conference et al. v. United States et al., 342 U.S. 570 , https://www.law.cornell.edu/supremecourt/text/342/570 (15.04.2019) (Far East Conference case).
[955] Far East Conference case, paragraph 16.

investigated with reasons[956]and the main duty of the agencies was to implement the *rule of reason* to clarify the main reasons and consequences of agreement, not judge them[957].

When the Isbrandtsen decision is described with other industry cases, it is found that the application of the rule of reason was an appropriate decision. Hence, *Colombia Broad Casting* decision showed that every industry has its own dynamics therefore the discriminatory practices can change from industry to industry. The *per se* rule shall be applied only price fixing, market allocation and behaviors expressly stated in the law. Like the *United States v. Trenton Potteries* case, which judges said the consequences of the price fixing strategies do not change from the market to market or time to time. They always have restrictive features.

3.3.1.3. Trans-Atlantic Conference Case

Trans-Atlantic Conference Agreement (TACA) was established by 17 shipping company including Maersk, Hapag Lloyd and MSC. TACA had dominated the market with 80% of market share in 1992. Because of its dominative power, TACA became a subject of complex regulatory decisions, which was ended by Judgment of The Court of First Instance in 2003[958].

In 1998, the E.U. Commission had published its detailed decision about TACA[959], which contains 112 pages and 611 paragraphs. After determining the relevant market, the Commission focused on the certain behaviors of the TACA and generally discussed the service contracts. The Commission discovered that TACA had followed strict service contract strategy with no allowance for individual service contracts. Additionally joint service contracts should be filed to TACA for approval[960].

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[956] Isbrandtsen Case, pp 523-524.
[957] The University of Chicago Law Review, "Primary Jurisdiction and the Applicability of Antitrust Remedies in the Shipping Industry", **The University of Chicago Law Review**, Vol. 26, No. 4, 1959 , pp. 606-607.
[958] FMC Analysis for EU Exemption, p. 4.
[959] Commission Decision of 16 September 1998 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 Trans-Atlantic Conference Agreement), 1999/243/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0243&from=en (14.04.2019), (Commission TACA Decision).
[960] Commission TACA Decision, paragraph 442.

According to the TACA, the joint service contracts should be considered as a tradition of the liner shipping conferences, which were beneficial for both shippers and carriers. Consequently, the joint service contracts should be exempted from the competition regulations and they should be considered with the Regulation 4056/86[961]. In response, the Commission stated the importance and the benefits of the individual service contracts, which could not be subject to any discussing. But conferences did not give permission to its members to sign individual service contracts and consequently *"it may have hindered the development of long-term trading relationships between shippers and individual carriers; it may have reduced the service level provided to that of the least efficient member of the conference; it may have inhibited the development of new value-added carrier services; it may have obstructed the negotiation of specific contractual terms which might benefit shippers, such as the negotiation of higher liability limits for damaged goods or liquidated damages; it prevented the negotiation of global service contracts[962]"*. Based on this consideration, the Commission held that the determination of the service contract conditions jointly fall within article 101(1). Hence, the conference restricts competition by price determination without giving valuable services to shippers[963].

It is obvious that, the Commission had considered the joint service contracts as a kind of price determination behavior, which is *per se* illegal with respect to article 101(1)(a) of TFEU[964]. The *per se* rule was also applied by the United States Court of Appeals in *Svenska decision* dated 1968. In this case the Court held that *"shipping and antitrust factors the agreement would be "contrary to the public interest" in the absence of further explanation[965]*". It can be said that the E.U. Commission had implemented *Svenska* test. Hence, it was highlighted that *"the TACA parties have supplied no*

[961] Commission TACA Decision, paragraph 451.
[962] Commission TACA Decision, paragraphs 483-484.
[963] Commission TACA Decision, paragraph 445.
[964] Alla Pozdnakova, **Liner Shipping and EU Competition Law,** Wolters Kluwer, The Netherlands, 2008, p. 84.
[965] Svenska Case, p. 253.

evidence that joint service contracts result in additional benefits for shippers in comparison with the services that could be offered by individual lines[966]*".*

The Commission also mentioned that the TACA abused its dominant position by implementing joint service contracts and by altering the competitive structure of the market in order to prevent price competition. While discussing the dominant position of the TACA, the Commission had referred to the *Continental Can c*ase in which the Court focused on the degree of the market power and stated that over dominance collaborations generally abuses their market power[967]. Based on this decision, the Commission did not establish the actual effect of TACA[968] and fined the companies in an aggregate amount of EUR 273 million[969].

Almost one month after the Commission decision, the U.S. government had introduced the OSRA, which allowed to the members of the liner conferences to make service contracts on their own without any intervention of the conference[970]. Based on the Commission decision and the OSRA, it can be said that joint service contracts have been considered *per se* illegal since 1998.

In 2003, CFI upheld the Commission decision with more detailed judgment[971]. The CFI has approved the abuse of dominant position. The CFI held that for maritime industry, the existence of high market share is not an adequate evidence of the dominant position[972]. By this means, the court had investigated article 102 with reasons throughout the decision in which there were 1648 paragraphs as a result of detailed investigation. Indeed, the CFI overruled the Commission *per se* rule application for abuse cases and ruled that there is no safe harbor for abuse cases therefore they require

[966] Commission TACA Decision, paragraph 445.
[967] Continental Can Case, p. 217.
[968] Commission TACA Decision, paragraph 568.
[969] Commission TACA Decision, article 8.
[970] James D. Reitzes and Kelli L. Sheran, p55.
[971] Judgment of The Court of First Instance (Third Chamber), 30 September 2003, In Joined Cases T-191/98 And T-212/98 To T-214/98, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=-CELEX:61998TJ0191&from=GA, (23.04.2019), (Court TACA Decision),
[972] Court TACA Decision, paragraph 938.

detailed investigation. Consequently, the *rule of reason* rule becomes the only rule for determination of the legality of dominant position cases[973].

3.3.1.4. The Cewal Case

In 1992, The Commission published its decision about the Cewal liner shipping conference, which operated Europe and west and central Africa. In the same route there was also other conferences named as, Cowac, Ukwal and Mevac[974]. In order to eliminate its main rivals, the Cewal conference forced an independent shipping company, named as Ogefrem, to be member of the conference with strict provisions[975], established the fighting ship strategy[976] and offered illegal loyalty agreement[977].

The Commission firstly discussed these behaviors within the meaning of article 101 of TFEU. In order to measure the real intent and effect of the conference behaviors, the Commission examined the market determinants. Based on the its measurement, the court held that the discriminatory practices of the Cewal felt into article 101(1) and did not comply with safe harbor conditions of article 101(3). In addition, the Commission investigated the block exemption regulation, regulation 4056/86, and stated that the conference was in the aim of eliminating competition hence it could not enjoy the benefits of exemptions. Additionally, the Commission focused on the abusive conduct of the Cewal. The Cewal claimed even if they offered lower freight rates by establishing a fighting ship strategy, the offer was not under the cost and they still earned money from this strategy[978]. In other words, Cewal supported that freight rates decrease should not be considered as an abuse behavior since it was still above the cost[979]. This argument was discussed in the *Akzo* case. *Akzo* sold its products under its total average costs but above

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[973] Blanco, Paradox, p. 419.
[974] Commıssıon Decısıon of 23 December 1992 Relating to a Proceeding Pursuant to Articles 85 (IV/32.448 and IV/32.450 : Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450 : Cewal) of the EEC Treaty, Introduction, paraghrah 2, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993D0082&from=EN, (28.04.2019), (Commssion Cewal decision).
[975] Commssion Cewal decision, paragraph 20.
[976] Commssion Cewal decision, paragraph 32.
[977] Commssion Cewal decision, paragraph 28.
[978] Commssion Cewal decision, paragraph 82.
[979] Commssion Cewal decision, paragraph 82.

its average variable costs and harmed its rival. Court held that if the dominant undertaking seeks to eliminate a competitor via decreasing prices under average variable costs of the products (fixed cost plus variable costs), the undertaking will be regarded as abuse[980].In response, the Commission focused on the consequences of the fighting ship and held that "*Cewal being a shipping conference, its members are bound to respect the common tariff. The members of Cewal thus abused their joint dominant position by seeking to eliminate the competition of their principal competitor through the use of fighting ships*[981]*"*.

As it was mentioned, the using a fighting ship was *per se* banned by the U.S. Shipping Act of 1918. However, the E.U. Commission believed that when the dominant position conferences had implemented the restrictive practices, it should be governed with regard to article 82[982]. That means that E.U. preferred to apply *rule of reason* instead of *per se* rule. This approach was also adopted by the Court of First Instance, which held that after the examining the all conditions, the Commission decision about implementing article 101 was considered correct hence the practice of fighting ships constituted an abuse of a dominant position.[983]

It shall be highlighted that The Cewal also abused its dominant power via forcing an individual carrier to sign a strict contract and establishing 100 % loyalty arrangements[984].

3.3.1.5. The Canakkale Strait Cases

In 2006, The Turkish Competition Authority (TCA)[985] had investigated the restrictive behaviors of a pool agreement, which was established by the companies

[980] Akzo Decision, paragraph 79.
[981] Commssion Cewal decision, paragraph 81.
[982] Pozdnakova, p. 358.
[983] Judgment of The Court of First Instance (Third Chamber, Extended Composition) 8 October 1996* In Joined Cases T-24/93, paragraph 153, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993TJ0024&from=EN (26.04.2019).
[984] Commssion Cewal decision, article 2.
[985] The Competition Authority was established as per Article 20 of the Act No. 4054, in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment, to observe the implementation of this Act, and to fulfill the duties assigned to it by the Act.

operating on the Canakkale Strait Cases[986]. After determining the relevant product market and relevant geographic market, TCA mentioned that the E.U. Regulation 4056/86 had given to block exemptions for liner collaboration practices even if the conferences engaged in *per se* illegal behaviors[987]. Based on the E.U. block exemption provision, TCA declared that the shipping industry has its own features therefore they should be exempted from the antitrust provisions[988]. Consequently, the pool agreement was exempted from the Protection of Competition Act without making any investigation[989].

The same pool was also became a subject of investigation in 2010[990]. The dispute was about the excessive tariff rate practices at the Canakkale Strait. According to the findings of TCA, The Gestas[991], which was owned by Turkish Government, hold its dominant position on the market and was capable to implement strategies for its own purpose. Additionally, berths on the markets were belonging to Turkish Government who had given privileges to Gestas for port usage[992]. The other liner shipping companies on the market were family based companies and they were under pressure of the Gestas[993]. In order to overcome Gestas power[994], other four market players had

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Within that framework, the main duty of the Competition Authority is to prevent any threats to the competitive process in the markets for goods and services through the use of the powers granted by law. Ensuring the fair allocation of resources and increasing social welfare by the protection of the competitive process constitutes the basic foundation of the mission of the Competition Authority. https://www.rekabet.gov.tr/en/Sayfa/About-us/turkish-competition-authority (28.04.2019).

[986] Rekabet Kurulu Karari Dosya Sayısı : 2006-4-209 Karar Sayısı : 06-79/1032-298 Karar Tarihi : 2.11.2006, https://www.rekabet.gov.tr/Karar?kararId=6bb322b5-e99f-43c5-a2b6-613f2b3613a9 (28.04.2019) (The Canakkale Strait Case I).

[987] The Canakkale Strait Case I, p 2.

[988] The Canakkale Strait Case I, p 3.

[989] The Canakkale Strait Case I, p. 3.

[990] Rekabet Kurulu Karari, Dosya Sayısı : 2010-4-165, Karar Sayısı : 10-60/1256-470 Karar Tarihi : 23.9.2010, https://www.rekabet.gov.tr/Karar?kararId=57352ca3fbb7414797e911b872eff09c, (29.04.2019) (The Canakkale Strait Case II)

[991] There were five shareholders of company but 99% of shares were belong to Governer of Canakkale.

[992] The Canakkale Strait Case II, pp 2-3.

[993] The Canakkale Strait Case II, p. 4.

[994] The Canakkale Strait Case II, p. 13.

implemented a pool strategy[995] under which they acted like a one company[996]and implemented a common tariff strategy[997].

In this decision, there are important factors, which it must be clarified. The geographical market was determined as Canakkale Strait where there are four main routes; Canakkale-Ecabat, Gelibolu Lapseki, Gelibolu-Cardak and Canakkale-Kilitbahir. In the first two routes only the dominant company Gestas was able to operate. The world *able to* was initially written because the dominant company, which also the owner of the berths, forced its rivals to not enter into its market via provisions of the berth usage agreement[998]. The other companies should obey the Gestas directives otherwise there were no any useable berth on the market especially at Canakkale. In the third route, the six companies operated and they were struggled with the lack of infrastructures of ports. In order to be more powerful against port authority they established a pool named as Gelibolu Denizcilik ve Liman İşletmeleri[999]. The aim of the pool had evaluated and the companies started to establish common tariff rates for special type of determined products[1000]. The pool had enjoyed the exemption of competitive provisions based on The Canakkale Strait Case. On the fifth route, there was only one who was bounded by the Gestas' berth usage agreements[1001].

TCA started an investigation to find out whether the monopoly has abusive behaviors or not and whether the pool agreement should be exempted from antitrust provisions or not. Parallel with E.U. practices, TCA had implemented the *rule of reason* in order to determine the legality of both Gestas monopoly power and the pool agreement. During the assessment process, TCA had tested the incomes and expenses of the Gestas and concluded that the Gestas profit margin was not high enough to be a subject of measurement. Additionally, TCA had also evaluated the all rates of the Gestas and found that in certain routes, the Gestas lost money, but the company would still

[995] The Canakkale Strait Case II, p. 12.
[996] The Canakkale Strait Case II, p. 14.
[997] The Canakkale Strait Case II, p. 15.
[998] The Canakkale Strait Case II, p 6.
[999] The Canakkale Strait Case II, p 5.
[1000] The Canakkale Strait Case II, p 6.
[1001] The Canakkale Strait Case II, p 6.

operate because of its public service duty[1002]. Consequently, TCA held that the dominant Gestas did not abuse the market by implementing an excessive price strategy[1003]. For the pool agreement, TCA had implemented enforced the E.U Regulation again[1004] and had removed exemptions of the liner shipping conferences. Based on the E.U. implementation, TCA had revoked the immunities of the pool agreement[1005].

3.3.2. A Guide for Turkey

In the U.S. jurisdiction, during the first days of the Sherman Act, the Courts were not familiar with the competition provisions and judges did not investigate the reasons of the restrictive practices that were considered *per se* illegal by the U.S. courts. Hence, the Sherman Act Section 1 states that "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal*".

The Hamburg Line case was the reflection of this practice on shipping industry and the collaboration of Hamburg Line was *per se* banned without making further investigation. In the same year of the Hamburg case, in 1911, the majority of judges of *Standard Oil* case introduced a rule that the Sherman Act shall be implemented with reasons in order to provide safe harbors for *prima facia* restrictive practice. This decision entered into doctrine as *rule of reason.* Introducing the *rule of reason* also triggered another problem that what kinds of behaviors are *per se* illegal or requires *rule of reason*. From the different cases, it was determined that cartel behaviors (price fixing, market allocation and bid ringing) shall be considered *per se* illegal. Most of the liner shipping conference behaviors involved these practices and they were considered *per se* illegal until 1916. The U.S. introduced The Shipping Act of 1916 in order to give exemptions to liner shipping conferences from competition acts and to control the liner shipping conference via a maritime board, USSB. The liner conference could enjoy the immunities as long as it got approval from USSB. It shall be highlighted that in order to

[1002] The Canakkale Strait Case II, pp. 22-24.
[1003] The Canakkale Strait Case II, p. 26.
[1004] The Canakkale Strait Case II, p 16.
[1005] The Canakkale Strait Case II, p 25.

comply with the Sherman Act Section 1, The Shipping Act of 1916 *per se* forbade establishing a deferred rebate system to any shipper, using a fighting ship, retailing against shippers and making discriminatory shipping contracts. When these behaviors were considered illegal, the liner shipping conferences had established dual rate system. When the nature of the dual rate system is studied, it is clearly determined that it involves discriminatory practices that are prohibited by Sherman Act Section 1. The American legal authorities believed that the liner shipping industry was differ from the other industries and should be exempted from the antitrust provisions in order to promote international trade. Consequently, the system was considered legal after the 1916. Based on the Shipping Act of 1916, it can be said that the U.S. gave the block exemptions to liner shipping conferences as long as the liner companies did not follow certain kind of strategies.

The Isbrandtsen case had changed the liner shipping immunities from a while. With regard the judgment, the dual rate system was considered illegal and it was highlighted that the USSB had no right to approve this kind of agreements. This decision had only changed the agent name from USSB to FMC. The Shipping Act of 1984 had given extensive immunities for liner shipping collaborations again. Hence, it can be stated that the U.S. legal authorities indirectly gave block exemptions to dual rate strategy of liner conferences via the Shipping Acts.

The block exemptions nature has changed after the OSRA 1998. According to the act, the individual service contracts of liner shipping companies offer more advantageous than the conference dual rate system. However, the conferences did not allow its members to sign individual service contracts; contrary did force the member to follow dual rate service contracts. The OSRA had prevented the illegal conduct of the conferences and it has been giving permission to liner shipping companies to make service contracts with shippers for their own way. When the dual rate system was considered illegal by OSRA, the conferences lost their power and the liner companies have established alliances. The OSRA and FMC believe that the alliances do not have any discriminatory practices, contrary the alliances increase the liner shipping service quality and decrease the freight rates because of the economy of scale. These findings

clearly show that the U.S. jurisdiction always desires to give block exemption strategy to liner shipping collaborations. Only the limits of the block exemptions have been changing since 1916.

Based on the American practice, it is questioned that whether a kind of board must be created by the Turkish Government or not. The answer lied on the Isbrandsten case, in which the court dealt with the illegal decision of the Board. Consequently, the U.S. Shipping Act had changed after the Boards' illegitimate decision. Even if its wrong decisions, today FMC (new Board), is holding its regulating power for the liner shipping in the U.S.[1006]. The U.S. example about shipping board is questionable, the misbehaviors of the board resulted in a change of law but it is still considered as a regulatory body. Therefore, it is beneficial to seek the E.U. application. There is no special authority for shipping industry in the E.U. and the Commission regulates the all sectors including shipping. Consequently, it can be said that there is no requirement to establish a shipping board or commission for regulating the liner shipping collaborations in Turkey. Instead, TCA must establish close relations with shipping sector players in order to test the market conditions correctly. Work principles of TCA are supported this idea by stating that the *"Authority conducts its activities in active cooperation with the relevant persons and institutions and by taking the opinions of these circles into account in its decision-making process[1007]".* As seen that, TCA is the only one authority to govern the liner shipping collaborations and therefore it shall takes following duties under the block exemption of liner shipping consortia agreements. First, TCA is only one authority to approve the all kind of liner shipping collaborations. Hence, the agreement shall be filed to TCA before its enforcement. From the U.S. cases, it is found that the agreement may not have any restrictive features when it is filed to authority. However, because of market conditions, the same agreement could become illegal even if it got approval. Therefore, TCA must have a right to cancel the liner shipping consortia when the consortia breach the competition act. Additionally, TCA must have a right to withdraw exemptions if it is required. Hence, the block exemptions of liner shipping conferences

[1006] https://www.fmc.gov/about-the-fmc/our-history/, (12.05.2019).
[1007] https://www.rekabet.gov.tr/en/Sayfa/About-us/work-principles, (12.05.2019).

are considered as a government policy. When the Turkish Government desires to abandon block exemption policies, the TCA shall easily withdraw the immunities.

The liner shipping collaborations fall into article 101 and 102 of the TFEU in the E.U. jurisdiction. With respect to article 101(1), the determined practices are considered illegal as long as "*their object or effect the prevention, restriction or distortion of competition within the internal market*". On the other hand, article 101(3) provides safe harbors for these kind of practices as long as "they *contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*". Based on these provisions, it can be stated that the liner shipping conferences fall into article 101(1) and they are considered illegal by E.U. authorities as long as they do not meet the conditions of article 101(3). In other words, the E.U. authorities preferred to give individual exemptions to liner shipping conferences when the plaintiffs proved that the agreement did not have discriminatory practices. However, this practice has ended after the Regulation 4056/86 that gave block exemptions to liner shipping conferences.

Before discussing the block exemptions, it is beneficial to show what would happen in the absence of block exemption. The E.U. lawmakers prefer to introduce regulations about how article 101 and 102 are interpreted. When the Regulation 17, 2003 and 2010 are investigated, it is found that the liner shipping behaviors were considered illegal. Hence, cartel behaviors cannot gain favor from article 101(3) as a result of their restrictive features.

When the block exemption regulation (Regulation 4056/86) was established, the liner shipping conferences got exemptions from the competition provisions even if they followed price fixing strategy. Like the U.S., E.U. legal authorities believed that the price fixing strategy was a kind of tradition for liner shipping market and the market should be differed from other type of industries.

The decision of Cewal Case had changed the block exemption nature. In this case, the court had investigated the fighting ship and loyalty agreement strategies of the Cewal Conference. After the detailed examination, the court held that the conference was in the aim of eliminating competition by establishing these two strategies and the

strategies should be considered with article 101(1) and did not comply with the safe harbor conditions of article 101(3) and block exemptions provisions of Regulation 4056/86. This approach was also followed in the TACA decision. The TACA conference did not give permission to its members to sign individual service contracts with shippers and did force its members to follow joint service contract strategy. The Commission held that the determination of the service contract conditions should not be considered with block exemption and safe harbor. Hence, the joint service contract aimed to determine the prices at the high levels without giving value added services. Consequently, the joint service practices were considered illegal practice with regard to article 101(1).

These two decisions had changed the exemption policies of the E.U. In 2006, the E.U. Council had published Regulation 1419/2006 in the aim of repealing the block exemptions of Regulation 4056/86. This regulation showed that the liner shipping industry does not have specific features and they should be governed like other industries. In other words, there is no necessity to protect the industry from antitrust provisions. However, when the Regulation 1419/2006 had introduced, the consortia agreements of the liner shipping companies fall into the regulation provisions and did not get any immunities.

The E.U. legal authorities had followed the same point of view with the U.S.: the consortia agreements offer advantageous and increase the market welfare. Based on this finding, the E.U. has introduced a limited block exemption provision to liner shipping consortia agreements under the Regulation 906/2009. With respect to article 4 of the regulation, the price fixing, the limitation of capacity or sales and market or customer allocation practices cannot enjoy the immunities. In addition, the regulation has also introduced the thresholds for exemptions. According to article 5(1), when the market share of consortia exceeds 30%, it will not enjoy the exemptions.

In terms of the abuse of dominant position cases, the determination of the relevant market and the conduct are the two important processes to test whether the dominant position really abuses its market power or not. When the U.S. and E.U. competition acts and given cases are analyzed, it is seen that all jurisdictions implement

the same logic for relevant market and geographic market determination. For liner shipping market relevant product market is generally determined as liner shipping market. In addition, the routes of the ships show the geographic market. As seen that testing the relevant market of liner shipping companies are not complicated as other industries. However, the conduct of the liner shipping companies requires additional evaluation process. While testing the conduct, the courts generally focus on the market shares of the companies and it is found that market dominance companies' price strategies are generally considered abusive behavior. Consequently, even if there was a block exemption or safe harbors, the collaborations felt into section 2 of the Sherman Act and article 102 of TFEU. Therefore, it can be said that the dominant position behaviors cannot enjoy the exemptions. The threshold under the Regulation 906/2009 also supports this policy.

Upon the examinations of the Canakkale Strait Cases, it is mentioned that, TCA has ruled both a liner shipping conference and dominant position of a liner shipping company. For liner conference, there were two different cases. Due to their trial date, TCA had directly implemented the EU Regulation 4056/86 without making further investigation in the first case. Same approach had continued in the second case, the E.U. Regulation 1419/2006 was enforced by TCA without detailed evaluation. Consequently, the liner conference was firstly exempted from the antitrust provision but four years later its immunities were taken back without establishing any test. In order to determine the legality of dominant position, TCA applied insufficient tests and held that the dominant position did not abuse its power. The each cases clearly shows that due to the lack of a liner shipping regulation, act or guide whatever it is called, TCA had directly implemented the E.U. Regulations. However, this application was false. Hence, in the absence of the block exemptions the agreements shall be evaluated under article 5 of The Act on The Protection of Competition[1008], which has same wording as article 101(3) and provides safe harbor. Therefore, it shall be questioned that how the authority applied the block exemption provision during the individual exemption process.

[1008] The Act on The Protection of Competition, 1994, Article 5.

As it seen the competition regulations of the countries mainly deal with two liner shipping collaborations: conferences and consortia. Even if the two or more liner shipping companies establish these two collaborations, there is a big difference among them. The conference system aims to determine the freight rates via conference service contracts. The member of the conference system does not have a right to sign individual service contracts with shippers. On the other hand, the members of the consortia do not desire to price fixing or market allocation. They simply aim to share ships, terminal, officers and documentation system. Consequently, the members of the consortia have a right to negotiate freely with shippers for contract of carriage[1009].

Because of this difference, the legal authorities had changed their point of view against the liner shipping conferences and they do not exempt the conferences from the competition acts. On the other hand, the consortia agreements can enjoy the immunities today. However, the immunities are subject to discussion and maybe there will be no block exemption for consortia agreements after 2020. Based on these findings, it must be highlighted that the guidance shall have changeable features in order to comply with E.U. and the U.S. regulations.

The competition acts of the U.S., E.U and Turkey involve only two or three articles about collaborations. Because of the limited provisions, the countries have been establishing industrial based competition acts or regulations and guidelines. It was determined that in Turkish jurisdiction there is not any competition guideline or regulation about shipping industry. In the absence of a guideline, it means that the liner shipping collaborations are evaluated same as other industries and there is no block exemptions for them. Today, due to the absence of exemptions for liner shipping consortia agreements, the TCA evaluates the each liner shipping collaboration case in the framework of individual exemption. When the U.S. and E.U. jurisdictions are investigated, it is found that the lawmakers introduce block exemptions to liner shipping conferences and they have been changing the limits of the exemptions depending on the economic variables. For Turkey, in order to promote the foreign trade, the Turkish's lawmakers shall follow a block exemption policy for liner shipping collaborations.

[1009] Ademuni-Odeke and Karan, p. 168.

When the block exemptions are introduced, it will probably encourage the financially strong liner companies to sign consortia agreements with Turkish liner shipping companies. Moreover, Turkish Government has a duty to comply with the E.U. competition regulations. Therefore, the liner alliances in other wording consortia agreements shall be exempted from the competition act provisions via block exemptions in order to comply with the E.U. and the U.S. jurisdictions. Additionally, when the abuse of dominant position provisions and cases are studied, it is found that price strategies of the dominant liner shipping collaborations are generally considered as abusive behaviors. Consequently, they do not enjoy the block exemptions. The current regulation of E.U. has supported this idea and it introduces thresholds for consortia. Therefore, the Turkey block exemption shall also include thresholds, which must comply with the E.U. ones.

Additionally, when the TCA decisions are investigated it is clearly determined that the Authority referred the E.U. regulations for liner shipping collaborations. It is believed that there is a necessity to add a provision about E.U. regulations to the block exemption to make these references lawful and to prevent any unforeseen errors. Hence, the block exemption shall involve following article: In the absence of any provision, the E.U. Regulation No 906/2009 is applicable. The name of regulations shall be updated when the E.U. introduce new one.

The block exemption provision must clearly show what kind of practices will be considered illegal. Based on the U.S. and E.U. jurisdictions, it can be recommended that price and market allocation practices must be evaluated illegal. Hence, each of strategy has been considering unlawful practices for the common law. Even if the previous regulations preferred to give immunities to these behaviors because of the liner shipping industry structure, today the lawmakers believed that there are no differences between the liner shipping industry and other industries.

As it was mentioned, in the absence of block exemption, the agreements are fall into competition act provisions. For the Turkish Competition Act, the liner shipping collaborations are considered under articles 4, 5 and 6 of the protection of competition act. When the block exemptions for liner shipping consortia agreements will be

introduced, there is a requirement to show how the other type of collaborations can enjoy the exemptions. Based on this assumption, the block exemption provision shall clearly involve how the other types of collaborations are governed. In this framework, the block exemption shall involve following wording; the other type of liner shipping collaborations can only get exemption as long as they comply with the conditions of Article 5 of The Act on The Protection of Competition. The Guidelines on Horizontal Cooperation Agreements is the applicable guidelines for these kinds of agreements.

CONCLUSION

The contributions of the economic authors to competition literature have affected the government policies and strategies of companies. When Adam Smith and David Ricardo supported the *laissez faire*, it gained more acceptances and consequently, governments preferred to not intervene the market, which was regulated by market players. After the capitalism idea and the industrialization, the financially strong companies became more powerful and they had determined the market rules for their own purposes. Consequently, the welfare of society began to deteriorate due to cartels and monopolies. Economists, like Keynes, had abandoned the *laissez faire* approach and they stated that in order to have more productive and peaceful economic and social environment, the governments shall apply new rules about competition on the market.

Additionally, both the management and consultant scientists have studied the impact of the competition over the companies. In the early days of the strategic management science, the authors had supported that only well skilled managers can overcome the negative effects of the competition, hence they are able to implement strategies by evaluating the internal dynamics of company. Porter has evaluated that idea and contributes that not only internal factors but also external environment of companies have influenced the competitive position of the firms. The evaluation of the strategic management science from the internal to external has changed the companies' strategies. When the companies had realized the importance of the external environment, they established collaboration strategies with other companies. Each collaboration strategy has different aims. Strategic alliances enable to its member to share the assets of each other without any cost. Additionally, members can share their know-how and markets via strategic alliances. M&A gives more market power to its members. Under the merger strategy, two companies compound their assets to create a new company. With respect to the acquisition strategy, a financially strong company takes over the weak company in order enter its market and use its facilities. According to the joint venture strategy, two or more difference companies create a new firm in the aim of sharing the resources for a certain type of a business.

The liner shipping companies had closely monitored economic and managerial changes. During the *laissez faire* period, when the strategic management science did not born, liner shipping companies established conference in the aim of freight rate fixing and market allocation. They were able to make pressure to non-conference members and the shippers in terms of freight rate prices. Consequently, they determined the market rules for their own purposes. When the anticompetitive legislations had been implemented to liner shipping conferences, the conferences had lost their power. However, liner shipping did not desist from the collaboration strategies and they have adopted other type of collaboration strategies. The top container companies, who sail all over the world, have been creating new alliances with each other for cost reduction, risk diversification, horizontal magnification, improvements in services. Top 2 container carriers, Maersk and MSC, have created to 2M alliance for Asia-Europe, Transpacific and Transatlantic routes. The companies were controlling 37% of the global shipping market via the 2M alliance. In 2016, COSCO Container Lines, CMA CGM, Evergreen Line and Orient Overseas Container Line established the broadest operational memorandum in which more than 40 maritime services and 331 ships are working in harmony. Additionally to the alliance strategies, liner shipping companies crate mergers when the market became more competitive. There are certain differences between the liner alliances and mergers. Firstly, under the alliance strategy the liner companies do not change their company structures. On the other hand, with respect to the merger strategy the one company, mainly financially strong company, manages the other member companies. Moreover, liner shipping companies have implemented joint venture strategies with ports in order to guarantee port calls.

Not only economical and management changes but also legal environment has affected liner shipping companies collaboration strategies. The government regulations about the liner shipping collaborations are the main reasons behind the evolution of liner shipping strategies. In the legal doctrine, there are two different kinds of competition regulations; protection of competition and unfair competition. Both of them regulate market conditions in different ways. The unfair competition regulations aim to prohibit competition among the market players. Contrary, the protection of competition

provisions desire to promote the competition on the market. Additionally, the protection of competition regulations has macro perspective; it regulates discriminatory practices and dominant positions in order to protect the public welfare. When the collaborations among the liner shipping are considered, they are in the scope of protection of competition acts. Even though the protection of competition regulations of the U.S., E.U. and Turkey differs from each other, their main purpose is similar. Each of them desires to block restrictive practices in order to promote the market and to secure social rest.

The story of the competition acts starts with Sherman Act 1890, which is still in force. From the language of the Section 1 of the Sherman Act, it is understood that the act is only applicable when the commercial joint activity restrain the trade. The Act does not involve any provision about what kind of behaviors and joint activities restrain the trade. The *Copperweld* case had answered the joint activity question and it was held that every kind of collaboration agreement is considered a joint activity when the member companies are owned by the different persons. During the early times of the Sherman Act, the common law rules were implemented to determine the restrictive practices. With regard to common law, every cartel and monopolization activities were *per se* illegal. Hence, they consequently restrict the individual freedom of contract rights. The *Standard Oil* decision has changed this rule and claimed that the Sherman Act shall be implemented with reasons. This statement has entered into the doctrine as *rule of reason* rule. Even though the *rule of reason* are implemented to competition cases, the cartel behaviors, which are price fixing and market allocation, is still considered *per se* illegal without further investigation. The *Columbia Broad Casting* case showed that the enforcement of the *per se* rule requires considerable experienced judges. Hence, even if the price strategy seems like a price fixing activity, as a nature of the market it can be normal and shall not be considered illegal. Therefore, it can be said that the *per se* rule shall be implemented when the cartel behavior is obvious. However, when a judge has a doubt and cannot clearly determine the cartel activity, he must conduct further investigations to disclose the real intent and the consequences of the cartel behavior.

When the Clayton Act and the Robinson Patman Act are investigated, it is found that each of the act include same provisions as Sherman Act for cartel cases.

The first competition rules were introduced by the E.U. law makers in the Treaty of Rome. Even if the Treaty has changed, only one word of the competition rules was changed and others remain same in articles 101 and 102 of TFEU. The cartel behaviors are regulated by article 101 and when language of article 101 is investigated, like Sherman Act, the act inhibits the restrictive joint commercial activities. The *Dyestuffs* case has clarified the restrictive activities with the concept of concerted practices and conduct. Based on its judgment, it can be said that a knowledge sharing during a meeting can also be considered as a restrictive behavior. Contrary to the Sherman Act, article 101 (1) lists the illegal behaviors, which are mainly cartel strategies. Article 101(1) includes controversial wordings; "*The following shall be prohibited… may affect trade…"*. In the *Consten and Grunding* case the term of may affect was discussed and it was held that may affect must be evaluated in reasonable manner by considering the main aim of E.U., which is to create a common market. Article 101(3) provides safe harbors for restrictive practices and states that if a trade movement consequently improves the customer welfare, article 101(1) will not be applicable. Based on its provisions, it can be said even if article 101(1) includes *per se* illegal behaviors; the plaintiffs can enjoy the safe harbors as long as they meet the conditions of article 101(3). It shall be not forgotten that Americans generally focuses on the intent of the agreements, while, E.U. authorities considers the economic aspect of the agreement while implementing the rule of reason. Moreover, in the *Völk* case, the financially weak companies are exempted from article 101(1) and this judgment becomes a principle, which is called *de minimis.* According to the current thresholds, the market share of members of an agreement, jointly, shall not exceed more than 5% and their turnover shall not be more than 40 million EURO. For the cartel behaviors, they cannot get any benefit from the *de minimis principle.*

The E.U. Commission has been introducing regulations to show the how articles 101 and 102 of TFEU are enforcement with regard to changeable market conditions. When the all regulations are investigated, it is found that the cartel behaviors are considered *per se* illegal. The E.U. lawmakers believe that cartel behaviors cannot enjoy

any exemptions since their main purpose is to restrict the competition. The both the U.S. and E.U. legislation show that the common law *per se* rule is still applicable to cartel behaviors, which are price fixing and market allocation. Even if the price fixing strategies are illegal for every kind of industries, not all price strategies are price fixing strategies. Therefore, while implementing the *per se* rule, it is recommended that judges must investigate the features of the questioned market. Hence, there are no safe harbors for cartel cases in both the U.S. and E.U. regulations.

The competition legislation of the U.S. and E.U. regulate the abuse of dominant position of collaboration under a special and different article. During the preparation of the dominant position provisions, the U.S. and E.U. have focused on the following four key topics: necessity of establishing administrable standards, the thresholds for determining dominance, conduct of the firm and dominant firm price cutting behavior[1010]. According to the Sherman Act 2 and article 102 of TFEU, any kind of dominant position activity, for the U.S. monopolization, is considered as illegal as long as the dominant position is abused by the monopoly. Therefore, it can be said that the dominant positions will be considered as legal when companies do not abuse that power. In order calculate abuse of dominant position, the Court firstly determine the relevant product and geographical markets of the goods. After that, the market share and the intent of the company are measured. For the relevant market test, Courts generally examine the substitutes of products of the dominant position firm, which is calculated by SSNIP test[1011]. The relevant geographical market is defined as the region in which all undertakings have same conditions for competition of the relevant products[1012]. Although both E.U. and the U.S. have different thresholds for market share, in general, if the market share of the undertaking exceeds over 70%, it will be regarded as a dominant position without any further investigation. The market share between 40%-60% is generally considered a dominant position after the detailed analysis. On the other hand, between 30% and 40% market power are evaluated as dominance but again these percentages requires additional supporting factors. Market share under 30% is the safe

[1010] Kolasky, p. 40.
[1011] Craig and Burca, p. 1012.
[1012] Craig and Burca, p. 1015.

harbors for dominance[1013]. The legality of intent differs from the case to case. Even though the courts have applied their own analysis for each cases, abuse of price, refusal to deal and accessibility to essential facilities have already accepted as abuse behaviors[1014].

In order to control the horizontal mergers and horizontal collaboration agreements both the U.S. and E.U. have introduced special regulations and guidelines. In the absence of a block exemption, the collaborations are evaluated based on these guidelines. Generally, if a merger has restrictive features, it will be precluded. The evaluation process of a merger requires two-step analysis: relevant market identification and market shares or market concentration measurement[1015]. HMG of the U.S. introduced the HMT tests for market definition. HMT defines the relevant market by using the price increases of the substitute products. If the prices of testing substitutes products increase more than 5% after the merger, these products group will be considered relevant market of the merger firms' products. For market concentration, HMG of the U.S has introduced HHI[1016] which sums the squares of the each company's' market shares. Based on the results of the HHI, the FTC implements further investigations or give permission to a merger. In addition, the AGCAC was published by Department of Justice and Federal Trade Commission. According to the AGCAC, if the collaboration implements price fixing and market allocation strategies, the collaboration will be considered *per se* unlawful[1017]. The other type of strategies is analyzed under the rule of reason to measure their overall competitive effect[1018]. In order to regulate the horizontal mergers, E.U. has published guidelines on the assessment of horizontal mergers[1019]. HMG of E.U. involves measurements in order to show how the Commission analysis horizontal mergers. The HMG of E.U. clarifies the approach of Commission about concentration levels in details[1020]. The HMG of E.U. clarifies the

[1013] Facey and Asaf, pp. 534-536.
[1014] Goyder, p. 283.
[1015] Butler,p. 653.
[1016] Matsumotoa et al, pp. 181–184.
[1017]The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 8.
[1018] The U.S. Antitrust Guidelines for Collaborations Among Competitors, p. 10.
[1019] EU Guidelines on the assessment of horizontal mergers.
[1020]Weitbrecht,, p. 68.

dominant position in two ways; non-coordinated effects and coordinated effects, which were clarified as a new category of cases beyond the concepts of traditional collective dominance to which the Merger Regulation is intended to apply[1021]. The non-coordinated effect in oligopolies generally occurs in the different product market and the merger parties are close competitors[1022]. In the second alternative, called coordinated effect, irrelevant companies coordinate their behaviors for raising prices to harm effective competition and mergers can lead this kind of behaviors via tacit collusions or collective dominance[1023]. Additionally, E.U. has introduced "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements"* to show the how article 101 is implemented to horizontal collaboration agreements. The guidelines provide detailed information research and development agreements, production agreements, purchasing agreements, commercialization agreements, standardization agreements including standard contracts and information exchange.

Joint activities are a tradition for ship owner. The first formal joint activity was the Calcutta Conference in which ship owners established a binding system of deferred rebates for shippers. When the U.S. government had introduced the Sherman Act, most of the conferences fell in Sherman Acts' provisions and consequently the U.S. Government had exempted to liner shipping conferences from the antitrust rules via the Shipping Act of 1916. In order to control the activities and approve the conferences the USSB was created. The USSB *ex ante* to protected the public welfare against the harmful effects of the conferences. The liner conferences were considered illegal as long as they were approved by the USSB.

The conferences had mainly followed the dual-rate strategy during those days. According to this system, the conferences offered lower rates to shippers who concluded an agreement with the conference to use only conference ships. In order to sustain this policy, the conferences made pressure to non-conference members to join the conferences. The USSB did not take any action against the dual-rate strategy and

[1021] Horner, p. 35.
[1022] EU Guidelines on the assessment of horizontal mergers, paragraph 22(a).
[1023] EU Guidelines on the assessment of horizontal mergers, paragraph 22(b).

continued to approve the conferences even if they followed dual strategy. The dual-rates system was overruled by the *Isbrandtsen* decision. According to this decision, the immunities should be given to the ocean conference as long as they do not restrictive competition. After this decision, the U.S. government had introduced the Shipping Act of 1984 in order to give limited immunities to liner shipping conferences. Additionally, the USSB was terminated and the FMC was authorized for approval. After this act, the shipping conferences had started to establish loyalty contracts with the shippers. Like dual rate strategy, the conferences were added strict provisions to their loyalty contracts on the behalf of their own interest. Consequently, member of the conferences has negotiated with the shippers individually for their services. In order to sustain its power, conferences did not let their members to act individually. In order to solve this problem the U.S. Government established the OSRA that allowed to members of liner conferences to make service contracts for their own without intervention of the conference. Consequently, the OSRA has caused a radical change for the liner shipping industry. The liner shipping companies has collaborated under the alliances and the conferences lost its power. According to the new strategies, the liner shipping carriers are able to share their assets and risk via acting collectively. This sharing enables to reduce the freight rates. Due to their advantages, the standpoint of the U.S. Government for liner collaboration has not been changed for that day and the new kinds of strategies are supported by the current the U.S. Government.

On the European side of the world, the E.U. has firstly established the EU Council Regulation 954/79, which ratified The UNCTAD Code of Conduct. This Code aimed to protect to third country shipping lines by giving guarantee for freight and trade. The E.U. big shipping companies carriage capacity was decreased by the UNCTAD and therefore the E.U. authorities had created E.U. Regulation 4056/86 that gave block exemptions to liner shipping conferences. The liner shipping conference could enjoy the block exemptions as long as the conferences should not practice favoritism in the market between shippers or port via charging different rates or discriminating the goods according to their nationalities, discharge and loading ports.

The liner shipping conferences attitude against the individual carriers also took attention of the E.U. authorities. Because of the harmful effects of conferences, The E.U. Commission repealed the block exemptions under the E.U. Regulation 1419/2006. With respect to this regulation, the liner shipping has no special characteristics, and shall be evaluated as other industries.

The alliances, for E.U. consortia, also get exemption from the E.U. jurisdictions after the Regulation 906/2009 that gives limited immunities to liner shipping alliances. Hence, it is believed that even if the consortia are more beneficial than conferences, they involve potentially anticompetitive features. Based on this idea, the Conference states that if the markets share of a consortium exceeds 30%, it will not enjoy the exemptions.

In 2020, the Regulation 906/2009 will expire and nowadays the Commission evaluates how the regulation has been affecting the market.

In Turkish jurisdiction there is no a competition guideline or regulation about shipping industry. In the absence of any special provision, the TCA shall implement the competition act provisions in order to give individual exemptions to liner shipping collaborations. However, TCA has been wrongly implemented the E.U. Regulations without making a further investigation. In addition, both the U.S. and E.U. jurisdiction prefer to give block exemptions to liner shipping collaborations in order to encourage the international trade. If Turkish Government desires to promote the shipping industry for having strong export conditions, there is a requirement to introduce a block exemption for liner shipping consortia agreements. When the Turkish Government announces the block exemptions, it will give the message that it supports the Turkish liner shipping companies. Moreover, the Turkish Government has a duty to comply with the E.U. competition act provisions according to the Custom Union Agreement. When the U.S. and E.U competition acts, block exemption provisions and cases are investigated, it is determined that the Turkish block exemption shall involve following provisions;

- The liner shipping consortia agreements are hereby exempted article 4 of The Act on The Protection of Competition as long as they do not abuse their dominant positions. Exemptions are only given to consortia which is

defined "*as an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements*"

- The exemptions do not involve price fixing, dual rate, fighting ship and market allocation strategies.
- The other type of liner shipping collaborations can only get exemption as long as they comply with the conditions of Article 5 of The Act on The Protection of Competition. The Guidelines on Horizontal Cooperation Agreements is the applicable guidelines for these kinds of agreements.
- In order to get exemptions, the combined market share of the consortium members in the relevant market upon which the consortium operates shall not exceed …..% calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units.
- In order to approve all kind of liner shipping collaborations, the case shall be filed in front of TCA before its enforcement.
- TCA has a right to cancel the liner shipping consortia when the consortia breach the competitive act.
- In the absence of any provision, the E.U. Regulation No 906/2009 is applicable.
- TCA has a right to withdraw exemptions if it is required.

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