‘IS THE EUROPEAN UNION COMPETITION LAW REGIME SUITABLE FOR THE REPUBLIC OF TURKEY: DOES ONE-SIZE FIT ALL?’

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DECLARATION

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INTRODUCTION

Every Ph.D. thesis (thesis) revolves around and aims to address a central research question. This thesis poses the following question: 'Is the European Union Competition Law Regime Suitable for the Republic of Turkey: Does One-Size Fit All?' Essentially, the research question seeks to examine whether and to what extent the European Union (EU) competition law regime is suitable as a model law to be followed by Turkey. In this connection, the problem it seeks to address is the suitability of the EU competition law regime for Turkey against the backdrop of two equally important and challenging issues: first, Turkey's legal obligation to adopt a national competition law regime based on the EU model; and second; divergence between historical backgrounds and political, socio-economic, and broader legal settings of the two jurisdictions.

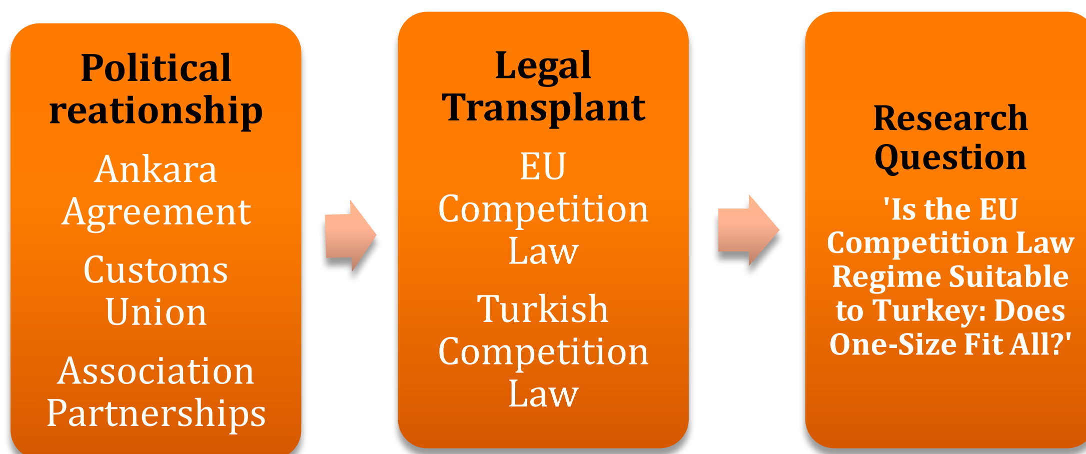
Undoubtedly, there is a particular motive behind the chosen research question and for the choice of jurisdictions under scrutiny. The relationship between the two legal systems, namely the EU and Turkish competition law regimes, has been a rather complicated and challenging topic not only due to complexities peculiar to the field of competition law, but also as a result of the wider political relationship between the EU and Turkey. Even though the relationship between the EU and Turkey rests on a long-lasting political dialogue, initiated as early as in 1963, it has often been considered as ambiguous and complicated particularly due to difficulties faced by Turkey to fulfill political and legal requirements stipulated in the Copenhagen Criteria for full EU membership. And although Turkey's status has not accelerated over the years towards a full EU membership in political terms, the existing relationship based on bilateral agreements such as the Ankara Agreement and the Customs Union arrangement has had implications for all areas of law and policy at the national level in Turkey. In the particular context of competition law, Turkey and the Turkish Competition Authority has been left in a difficult position to adopt competition rules that are suitable for Turkish markets and consumers, but also compatible with the required EU 'standards' for competition law at the same time. This conundrum of having to synthesize

existing national economic and social realities with competition rules 'designed' for and 'imported' from the EU has placed Turkey in an unusual and problematic position that differs from the 'competition law and policy' experience of the former and current EU candidate countries. The long-lasting ambiguity in relation to Turkey's progress in relation to its EU candidacy and uncertainties surrounding the legal nature of existing bilateral agreements, while having 'prevented' the EU from providing technical and institutional aid and assistance to Turkey in the field of competition law, has still imposed on Turkey legal and political obligations in the sphere of competition law.

It is indeed these distinctive political and legal circumstances, and the ramifications of this highly complex position on the Turkish competition law system, that have driven the motive for further research on this particular issue. Nonetheless, as much as Turkey's difficult position concerning its competition law regime, assessing the suitability of the EU competition law to Turkey is a challenging exercise. In order to address this complex problem, i.e. to assess the suitability of EU competition law to Turkey, this thesis shall conduct a comparative legal analysis that aims to review the objectives of the EU *vis-à-vis* Turkish competition law regimes. Even though Turkey is expected to adopt a national competition law system based on the EU competition law model, it remains to be seen whether and to what extent the objectives of Turkish competition law address national social and economic concerns and how these goals differ from that of the EU. Undeniably, in its 'outlook' Turkish competition law has been adopted in accordance with the EU model and has been influenced by its EU counterpart. However, the adoption of the substantive rules and institutional elements of the EU competition law regime does not necessarily mean these rules are perceived and applied in Turkey exactly the same way as they are in the EU. The comparison conducted in this thesis seeks to clarify the differences between the objectives of the EU and Turkish competition law regimes. This comparative legal work sets the criteria against which the suitability of EU competition law to Turkey is assessed. The challenge is to identify those instances in which the unique characteristics, i.e. different

objectives underlying Turkish competition law, lead in a different direction in the application of national competition law.

The choice of comparison between the Turkish and EU competition law systems mainly relies on two reasons: first, the historical and political relationship between the two jurisdictions, which also sets the legal foundations for the existing relationship between Turkish and EU competition law systems; and, second, the adoption of Professor Alan Watson's notion of 'legal transplant' and his understanding of comparative legal work as a methodology in the examination of legal transplants.



In relation to the first point, what makes the problem of Turkish competition law a highly complex and extraordinary 'case-study' is indeed the relationship between these two jurisdictions, both in the broader political sense and in the particular competition law context. Essentially, any study concerning Turkish competition law without both the analysis of pre-EU candidacy legal documents, i.e. the Ankara Agreement of 1963[1] and the Customs Union of 1994,[2] both of which have

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[1] The 'Agreement Establishing an Association Between the European Economic Community and Turkey', Ankara, 1 September 1963 (Association Agreement).

competition law components, and the examination of Turkey's post-EU candidacy legal obligations, i.e. Association Partnerships, would be incomplete. Therefore, the long-lasting bilateral relationship makes a strong case for the choice of comparison between the EU and Turkish competition law systems with the motive that this comparison shall reveal whether and to what extent the competition law provisions of the bilateral agreements conducted between the EU and Turkey have been effective in practice and its implications for the 'legal transplant'. However, as important as the historical and political relationship between the two jurisdictions as a motive behind the choice of comparison is the ultimate result of this relationship, i.e. the actual 'exercise' of legal transplant conducted in the field of competition law.

The second rationale for the choice of comparison relates to the adoption of Watson's methodology, and his understanding of 'legal transplants' as a form of comparative legal work, in assessing the suitability of the EU competition law regime to Turkey. The term and notion 'legal transplant' was introduced to literature by Professor Alan Watson of Edinburgh Law School with his work '*Legal Transplants: An Approach to Comparative Law*'.[3] Watson's central argument relies on his observation that transplant of laws has been common in the 'ancient world' as well as in recent legal history and that this practice of legal transplanting has been the main source of legal change.[4] Watson's work relates to and is important for this thesis for two fundamental reasons: first, his comparative approach to the analysis of legal transplants; and, second, the outcome of his extensive research.

Watson's work on 'legal transplant' is unique and important because it does not introduce the notion of legal transplant merely as a term to define and explain the

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[2] Decision No. 1/95 of the EU-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L035/1 (Decision No. 1/95).

[3] A Watson, Legal Transplants: An Approach to Comparative Law (1974).

[4] ibid

diffusion of law, but his work presents legal transplants to literature as a method and form of comparative legal study that analyses the borrowing of law. Under his comparative legal method, Watson conducted, *inter alia*, a comparative legal analysis to study the diffusion of certain parts of Roman law into the Scottish legal system.[5] In his view, the most effective way to examine legal transplants is to conduct a comparative legal study focused on the patterns and divergences between two jurisdictions. Based on his studies, he drew the conclusion that a rule that is transplanted is different in its new home and the same legal rules operate differently in two jurisdictions primarily because it is rules, institutions, legal concepts and structures that are borrowed but not the 'spirit' of the legal system. However, Watson adds, the significance of partial 'acceptance' and partial 'non-acceptance' of foreign law in the transplanted jurisdiction is indeed the main theme of 'legal transplant' as a comparative legal study. Ultimately, comparative legal work for purpose of legal transplant is indispensable because '...it teaches what has been done, therefore what can be done'.[6]

As seen from the chart above, the central research question of this thesis appears against the backdrop of the political relationship between the EU and Turkey and ultimately against the 'transplant' of the EU competition law model into the Turkish legal system. This thesis seeks to examine this particular transplant in light of Watson's understanding of 'legal transplant' and his methodology of 'legal transplant as a comparative legal study'. The 'acceptance' and 'non-acceptance' of EU competition law in Turkey shall be analysed under this comparative work to be able to ultimately assess the suitability of the EU model law to Turkey.

The above discussion on 'legal transplants' also leads to the question of how the term 'legal transplant' relates to and conceptually differs from the notions of

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[5] ibid

[6] A. Watson, 'Legal Transplants and European Private Law' (2000) 4(4) EJCL <http://www.ejcl.org/44/art44-2.html>

‘approximation’ and ‘convergence’ of law as referred to under EU law. While ‘legal transplant’, as understood and analysed by Watson, refers to the diffusion of law, and its rules, institutions, concepts and structures, from its main source of origin to a foreign jurisdiction, the term ‘approximation of laws’ specifically referred to in the Customs Union and Ankara Agreement, is a technical legal term utilized under EU law and is more precise in terms of is scope and objective. The process of approximation of laws is more precise, as it refers to the transposition of the EU *acquis communautaire* at the national level by EU candidate and potential candidate countries. The ultimate purpose of this process is to effectively pursue the overarching goals of the EU upon full EU membership. The term ‘convergence’, on the other hand, relates to the alignment of the national legislation of a third country with the EU *acquis communautaire.*

Similar to ‘legal transplant’, however, in the case of approximation of laws, EU law is transplanted into the legal order of the candidate country. At this stage, the practice of approximation of laws does not translate into the application of every aspect of EU law at the national level, as national law reflects the substance of the *acquis communautaire* and EU law merely serves as a model law. Before EU membership, no sanctions can be imposed by the EU for the failure of approximation and implementation of the *acquis communautaire*, apart from the political pressure to delay the accession process. Therefore, in light of Turkey’s current position as a candidate to the EU and the ambiguity surrounding its progress in accession talks with the EU, for the purpose of this thesis, the notions of approximation and legal transplant bear no significant difference in terms of their legal nature and impact on Turkish competition law. In neither of these cases is the EU able to trigger a formal legal mechanism against non-compliance with the EU competition *acquis communautaire*.

Another important point is the question of whether the analysis of the suitability of the EU competition law regime to Turkey sets an example and a suitable ‘case-study’ for other developing or emerging economies with similar social, political and economic concerns to Turkey. It is observed that in practice Turkey is not alone, as many other developing jurisdictions have formed a national competition

law system based on a 'model' competition law. This practice can be attributed to various transnational developments such as: a World Bank condition for the grant of a loan[7]; a World Trade Organisation requirement as a part of its accession negotiations;[8] and, a condition stipulated in bilateral trade agreements as in the Economic Partnership Agreement between the CARIFORUM States and the EU.[9] More importantly, in this context, the EU competition law system seems to be the more common choice of developing jurisdictions as their 'model' competition law, compared to the United States competition law model.

This thesis relates to and may be insightful for other developing countries in a similar position to Turkey on the grounds that regardless of developing jurisdictions' degree of autonomy in the formulation of their national competition law, and their objectives underlying national competition rules, the EU competition law system seems to be the more 'convincing' choice of 'model law' over the alternative United States competition law model. A very recent example is the competition law system of the Common Market for Eastern and Southern Africa (COMESA) and its member states.[10] In this particular example, while the COMESA Competition Commission (CCC), which has become operational as of January 2013, resembles the EU Commission in terms of its function and mandate. Most key provisions of the COMESA Competition Regulation are modeled on the EU competition law provisions. Furthermore, COMESA member states are required to align their national competition law with community competition rules, i.e. the COMESA Competition Regulation. The CCC Director and Chief Executive Officer, George Lipimile, explicitly discussed the role and importance of the EU competition law system as a model for COMESA in an

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[7] www.worldbank.org

[8] www.wto.org

[9] ECONOMIC PARTNERSHIP AGREEMENT between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/I/3.

[10] COMESA Competition Regulations, OFFICIAL GAZETTE of the COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, Volume 17 No. 12, 20 November 2012.

interview conducted with the American Bar Association.[11] The question of how substantive rules of COMESA Competition Regulation will be applied and implemented in COMESA member states is still to be seen. It is for this reason that the study of not only the Turkish competition law example, but also other country-specific analysis on the transplant of a model competition law, may help understand the limitations of legal transplants in the competition law context and the extent to which country-specific objectives and concerns can be addressed and accommodated under national law. No competition law system is 'perfect'. However, it is important to draw lessons from existing examples of competition law transplants in order to make best use of the wealth of experience of model laws and to formulate, adopt, and implement a suitable competition law regime at home with particular attention given to national objectives at the same time.

In light of this development, the comparative legal work on the objectives of the EU and Turkish competition law systems sets a case-study for developing jurisdictions that may further the understanding of the limitations of legal transplant and demonstrate Turkish competition rules against the backdrop of external pressures of foreign jurisdictions and institutions. As stated earlier in the introduction, even if developing jurisdictions are modeled on the basis of those of developed jurisdictions, the way in which they are perceived, implemented and interpreted may differ. In this connection, the challenge and importance is to reveal unique objectives that lead to different outcomes, to which other developing jurisdictions can adhere.

The above discussion is aimed at clarifying the precise research question, how this thesis seeks to analyse this question, and why this research and its outcome is able to set an example for other developing jurisdictions who have adopted or who are seeking to adopt the EU competition law system as a model law. It has brought attention to Professor Alan Watson's detailed study on legal transplants and his

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[11] American Bar Association Interview with George Limipile, Director of the COMESA Competition Commission. <www.theantitrustsource.com>

comparative approach as a legal historian in the examination of the diffusion of Roman Law from continental Europe to Scotland, and then proposed the adoption of a similar approach for the examination of the central research question of this thesis. In this connection, the choice of comparison between the EU and Turkish competition law systems is explained with two arguments: firstly, the long-lasting and current political and bilateral relationship between the two jurisdictions, which has also lead the adoption of the EU competition law model in Turkey; and, secondly, in line with Watson's proposition in 'Legal Transplants', a comparison between the model law and the law of the borrowing jurisdiction is conducted in this thesis to examine and clarify partial 'acceptance' and partial 'non-acceptance', i.e. patterns and divergences, of EU competition law in Turkey.

Nevertheless, this comparison does not attempt to analyse every dimension or aspect of the two competition law systems but rather focuses on the objectives of the two legal systems and the implications of these objectives for the application of competition law at the Turkish national level. The focus on the objectives of competition law is based on the presupposition that national socio-economic concerns are reflected onto country-specific objectives of competition law. In this context, 'the objectives of competition law' implies the question of what competition rules aim to achieve in any particular jurisdiction. At the same time, even though the comparative legal work sets the backbone of the examination of the research question, as a whole this thesis is broader in scope. Prior to the comparison of the objectives of the two competition law systems, five fundamental points are analysed and discussed in order to understand the central research question fully and to be able to provide a coherent overall analysis of the problem question. In addition to the comparative work discussed above, the five fundamental problems which this thesis addresses are: first, a clearer understanding of what competition law is concerned with, which economic and social objectives can be pursued by competition rules, and the way in which these objectives are assessed and discussed under competition law and economics literature; second, the current context within which the central research question takes place, i.e. the current debate on developing a 'Global Framework' for competition law; third, a theoretical discussion on the transferability of law from

one jurisdiction to another; fourth, an analysis of the long-standing political bilateral relationship between the two jurisdictions and its impact on Turkish competition law; and, five, a discussion on how to critically assess the suitability of EU competition law to Turkey, i.e. a proposal on methodology.

In terms of its structure, the thesis is laid out in the following manner. In **Chapter 1**, the thesis starts with the examination of relevant terminology and a discussion on the objectives of competition law. The purpose behind this analysis is to provide a clearer understanding of the context, the objectives of competition law, and their role in the application of substantive competition rules. At this stage, the analysis does not focus on or make reference to any particular jurisdiction but rather takes place as an overall examination under the discipline of competition law and economics.

With this purpose, Chapter 1 makes an introduction with a discussion on the inter-disciplinary nature of competition and a debate on the objectives of competition law. It then continues to analyse what is understood by 'competition' as a notion and 'competition law' as a field of law and the role of competition law under the current political trend to switch from a centrally-controlled economy to a 'market-based' economic system. In this light, it carries on with the examination of economic and non-economic objectives of competition law, as discussed under competition law and economics literature, and further expounds on how welfare and efficiency standards are utilised to achieve particular objectives of competition law.

Following the analysis of relevant terminology and the examination of the objectives of competition law, the remainder of Chapter 1 continues to examine the current context within which the research question sits. Under this section, the thesis seeks to analyse and understand the recent increase in the number of jurisdictions adopting national competition law regime, and, as a result of this global development, the ongoing debate and academic discourse on the 'internationalisation of competition law' and developing a 'global framework' for competition rules. And although the internationalisation of competition law and

the adoption of a ‘global legal framework for competition’ at the national level differs from the ‘transplant’ of a legal regime of a particular jurisdiction into the legal system of a foreign jurisdiction are distinct matters, this analysis aims to understand how the two legal phenomena have come to develop against the backdrop of recent socio- economic and political developments, and the extent to which they respond to developing jurisdictions’ needs to adopt a model competition law at the national level.

Chapter 2 continues with a different problem to examine the theoretical discussion behind the general themes of ‘transferability of law from one jurisdiction to another’ and the ‘relationship between law and development’. At the beginning, Chapter 2 examines the theory of ‘law and development’ as lead by scholars such as Trubek, Galanter and Friedman, their understanding of how law is able to lead to social and economic development, and how their perception of ‘transferability of law’ applies and relates to the Turkish legal system in general.

Following law and development theory, Chapter 2 carries on with the examination of the theory of ‘law and society’ to discuss Montesquieu’s ‘mirror theory’ at one end of the spectrum and Watson’s ‘isolation theory’ at the other end. In this context, it analyses opposing views on the relationship between law and society and whether ‘law’ is separable from the society within which it exits.

The third strain of scholarship examined in Chapter 2 is ‘evolutionary theories law’ as explained by thinkers such as Main and Durkheim. This section seeks to focus on and understand how evolutionary theories of law explain the development of law in parallel to social and economic development of societies.

As a final remark, Chapter 2 analyses the debate on the relationship between competition law and development and whether and to what extent competition law is able to address concerns relating to social and economic development.

Eventually, an overall reflection on the Chapter 2 theoretical debate aims to provide the connection between theories on ‘transferability of law’ and the ‘evolutionary theories of law’, and the overarching research question.

Chapter 3, on the other hand, provides a discussion on two separate issues. The first part examines the bilateral political relationship between the EU and Turkey and how it has affected Turkish competition law. In this context, it examines bilateral legal instruments underlying the relationship between the EU and Turkey. This examination includes primarily The Association Agreement[12], Decision No.1/95 of the EU/Turkey Association Council[13], Accession Partnerships Between the EU and Turkey[14].

The second section draws upon the analysis made in earlier chapters to construct the methodology adopted for this thesis and to justify this approach. Ultimately, it provides the ‘Roadmap for Assessing the Suitability of the EU Competition Law Regime to Turkey’ (Roadmap) to establish and illustrate the overall structure and methodology followed in this thesis.

Chapter 4 is the point at which the actual comparative legal work takes off. As established and illustrated in the Roadmap submitted in the previous chapter, Chapter 4 focuses on the objectives of the EU competition law. It does so by examining the objectives of the EU competition law system under four main sections.

First, it examines the academic discourse and debate with a view to understanding the discussion surrounding the objectives of EU competition law.

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[12] (Association Agreement) n 1.

[13] (Decision No. 1/95) n 2.

[14] Council Decision (2008/157/EC) on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. (Official Journal L 051, 26/02/2008 P. 0004 – 0018) (Accession Partnership).

Second, it examines the legal and institutional framework for competition in the EU. In this context, it examines both the broader legal framework establishing the EU and policy objectives of contained therein and the particular legal framework for competition that sits within this broader scheme.

Third, it continues to analyse the case-law of EU Courts and the Commission with a particular focus on the objectives of EU competition law. This section seeks to understand how the objectives of EU competition law have been interpreted by EU Courts and the Commission and the way in which these objectives have been accommodated under substantive rules in competition.

The fourth and final section analyses an important issue that emerges under the previous sections of Chapter 4, namely the 'more economic approach' to EU competition law. It draws upon the discussion made under previous sections and examines the extent to which EU Courts and the Commission have utilised the 'more economic approach' in the interpretation of competition rules, and, in this context, what this development means for the objectives of EU competition law.

Chapters 5 and 6, on the other hand, articulate on the objectives of Turkish competition law and to carry out the second component and subject of the comparative legal analysis. In this context, while Chapter 5 mainly focuses on the legal framework for competition in Turkey and the 'economic' objectives of competition law, under a 'welfare standard' discussion in light of Turkish case-law, Chapter 6 analyses the 'non-economic' public policy objectives pursued under Turkish competition law.

Chapter 5 starts with the examination of the Turkish Constitution of 1961 and Turkish Constitution of 1982 with a particular focus on the social, economic, and legal order as stipulated under both constitutions and their implications for Turkish competition.

The following section of Chapter 5 provides a discussion on the role of the Turkish Competition Authority (TCA) in the application of competition rules in Turkey and the way in which the objectives of Turkish competition law have developed. It then continues with the analysis of the Turkish Law on the Protection of Competition (LPC)[15], the primary legislation for competition in Turkey, its substantive provisions, and the objectives of competition law articulated under the Statement of Purpose of the LPC.[16]

Finally, this chapter provides a debate on the 'social welfare' *versus* 'consumer welfare' standard as an objective of Turkish competition law – a problematic and ambiguous issue lead by Turkish case-law.

Chapter 6 continues to examine public policy objectives under Turkish competition law. This examination is conducted under five sections.

First, it provides a general discussion on industrial and public policy objectives and their accommodation under competition rules, and, in this context, it further analyses the International Competition Network Report on the Interface Between Competition Law and Public Policy.

Second, it draws upon Chris Townley's discussion and method concerning the accommodation of public policy goals under competition law, and, in line with Townley's approach, clarifies two fundamental aspects of this issue: 'how' and 'when' public policy concerns are accommodated under Turkish competition law. In relation to the first question it examines the legal basis for the consideration of

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[15] The Law on the Protection of Competition, Law No. 4054, enacted on 7 December 1994 by the Turkish Parliament (LPC).

[16] The Draft Law on the Protection of Competition, Report of the Commission for Justice, Industry, Technology, and Commerce No 1/542, the Republic of Turkey Directorate General for Law and Decrees, No: B.02.0.KKG/101-485/04689, dated 10.05.1993, 3-4 (Statement of Purpose, Draft LPC).

industrial and public policy objectives in Turkey. The question of when these objectives are accommodated is explained in the remainder of Chapter 6.

The third section examines the accommodation of public policy considerations under substantive provisions of the LPC, Articles 4, 5, 6 and 7 LPC.[17] This analysis is solely based on the case-law and the way in which the TCA has interpreted 'non-economic' objectives under these provisions of the LPC. Under the so-called exception clause, Article 5 LPC, it examines particular public policy concerns such as environmental concerns, enhancing employment opportunities, supporting and improving conditions for SMEs, and, the protecting certain industries and the promoting export revenues and the national economy. The final analysis includes the examination of how public policy goals are examined under merger control rules, i.e. under Article 7 LPC.

The fourth and final section of Chapter 6 examines how public policy objectives are considered under competition rules outside the LPC. The primary tools that are examined in this context are 'Reviews of TCA', 'Five-Year Development Programmes', 'Applicable Reports of TCA', and 'TCA Reviews on Privatisation Matters'. The question of how public policy concerns are reconciled with competition concerns is examined under the relevant legal framework and the case-law on the matter.

As a conclusion, the thesis provides concluding remarks for each chapter and an overall final anaylsis.

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[17] LPC (n 15).

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1 UNDERSTANDING THE RESEARCH QUESTION: RELEVANT TERMINOLOGY, OBJECTIVES OF COMPETITION LAW, THE CURRENT CONTEXT, ...24

1.1 INTRODUCTION..25

1.2 DEFINING RELEVANT TERMINOLOGY...26

1.2.1 The Inter-Disciplinary Nature of Competition and the Debate on the Objectives of Competition..26

1.2.2 What is 'Competition' and 'Competition Law'?...29

1.2.3 Objectives of Competition Law: Economic and Non-Economic Concerns 31

- PRODUCTIVE EFFICIENCY 32
- DYNAMIC EFFICIENCY 33
- WELFARE STANDARDS...35

1.3 IS TURKEY ALONE? THE RECENT INCREASE IN THE NUMBER OF JURISDICTIONS ADOPTING NATIONAL COMPETITION LAW REGIMES 39

1.4 CURRENT DEBATE ON DEVELOPING A 'GLOBAL FRAMEWORK' FOR COMPETITION RULES TO WHICH INDIVIDUAL JURISDICTIONS CAN ADHERE: RELEVANT LITERATURE 46

1.5 CONCLUSION..58

2 A THEORETICAL DISCUSSION ON THE TRANSFERABILITY OF LAW FROM ONE JURISDICTION TO ANOTHER AND THE RELATIONSHIP BETWEEN LAW AND DEVELOPMENT 61

2.1 INTRODUCTION..62

2.2 A THEORETICAL DEBATE ON THE 'TRANSFERABILITY' OF LAW FROM ONE JURISDICTION TO ANOTHER..63

2.2.1 The Theory of 'Law and Development' and How this Debate Relates to the Turkish Legal System in General *66*
2.2.2 The Theory of 'Law and Society' *74*
- CHARLES DE SECONDAT MONTESQUIEU 75
- ALAN WATSON 77

2.2.3 'Evolutionary' Theories on Law *82*
2.3 A REFLECTION OF THE THEORETICAL DEBATE ON 'LEGAL TRANSPLANTS', 'MODERN LAW' AND HOW THESE THEORIES RESONATE TO THE NOTION OF 'DEVELOPMENT' 86
2.4 CONCLUSION 90

3 HOW TO CRITICALLY ASSESS THE SUITABILITY OF EU COMPETITION LAW TO TURKEY **92**
3.1 INTRODUCTION 93
3.2 THE BILATERAL RELATIONSHIP BETWEEN THE EU AND TURKEY 95
3.2.1 The Association Agreement *97*
3.2.2 Decision No. 1/95 of the EU-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (Decision No. 1/95): The Establishment of a 'Customs Union' Between the EU and Turkey *103*
3.2.3 'Accession Partnership's conducted between the EU and Turkey and Turkey's EU Candidacy *110*
3.2.4 Other Legal Instruments *113*
3.3 A REFLECTION ON THE BILATERAL RELATIONSHIP BETWEEN THE EU AND TURKEY, AND ITS IMPLICATIONS FOR THE 'TRANSPLANT' OF EU COMPETITION LAW INTO THE BROADER TURKISH LEGAL SYSTEM 118
3.4 HOW TO CRITICALLY ASSESS THE SUITABILITY OF EU COMPETITION LAW TO TURKEY? -A PROPOSITION ON METHODOLOGY 121
3.5 CONCLUSION 127

4 THE OBJECTIVES OF THE EU COMPETITION LAW SYSTEM (BOX-I) **129**
4.1 INTRODUCTION 130

4.2 THE ACADEMIC DEBATE ON THE OBJECTIVES OF EU COMPETITION LAW 132
4.3 THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMPETITION WITHIN THE EU 136
4.3.1 The Broader Framework and Policy Objectives of the EU 'Scheme', and the Role of Competition Law in this Context 136
4.3.2 The Legal and Institutional Framework for EU Competition Law 140
4.4 THE CASE-LAW OF EU COURTS AND DECISIONS OF THE COMMISSION: THE OBJECTIVES OF EU COMPETITION LAW 146
4.4.1 Case-Law of the EU Courts 146
- UNDER ARTICLE 101 TFEU 149
- UNDER ARTICLE 102 TFEU 160

4.4.2 A Reflection on Relevant EU Case-Law 166
4.5 DECISIONS OF THE COMMISSION 177
4.5.1 The Legal Nature of the Commission's Decisions..177
4.5.2 Case-Law of the Commission 181
- WHAT DOES THE 'MORE ECONOMIC APPROACH' MEAN FOR THE INTERPRETATION OF COMPETITION RULES AND ULTIMATELY FOR THE OBJECTIVES OF EU COMPETITION LAW? 183

4.6 CONCLUSION...194

5 THE OBJECTIVES OF THE TURKISH COMPETITION LAW SYSTEM (BOX-II) 199
5.1 INTRODUCTION...200
5.2 THE TURKISH CONSTITUTION OF 1982 (TC 1982) AND THE OBJECTIVES OF TURKISH COMPETITION LAW 202
5.2.1 Social, Economic and Legal Order in Turkey and its Reflection on Competition Law: From the Turkish Constitution of 1961 to the Turkish Constitution of 1982..202
5.2.2 The Turkish Constitution of 1982 206
5.3 THE LAW ON THE PROTECTION OF COMPETITION (LPC) AND THE OBJECTIVES OF TURKISH COMPETITION LAW AND POLICY 219

5.3.1 The Turkish Competition Authority (TCA): Its Role in the Application of the LPC and the Objectives of Turkish Competition Law.................*221*
5.3.2 The Statement of Purpose of the LPC...*222*
5.3.3 Relevant Provisions of the LPC...*229*
5.4 A DEBATE ON THE 'SOCIAL WELFARE' VERSUS 'CONSUMER WELFARE' STANDARD AS THE ULTIMATE GOAL OF TURKISH COMPETITION LAW 232
5.5 CONCLUSION 243

6 BROADER PUBLIC POLICY OBJECTIVES OF TURKISH COMPETITION LAW (BOX-II)..247
6.1 INTRODUCTION...248
- 6.2 A DISCUSSION ON CONCEPTS OF INDUSTRIAL POLICY AND PUBLIC POLICY 249
- ICN REPORT ON THE INTERFACE BETWEEN COMPETITION LAW AND PUBLIC POLICY (ICN REPORT ON PUBLIC POLICY) 252

6.3 RE-THINKING TOWNLEY: PUBLIC POLICY GOALS UNDER THE EU TURKISH COMPETITION LAW 256
6.3.1How Industrial and Public Policy Goals are Accommodated under Turkish Competition Law: The Legal Basis for the Consideration of Industrial and Public Policy Objectives *257*
6.3.2When Public Policy Goals are accommodated under Turkish Competition Law...*259*
6.4 PUBLIC POLICY GOALS UNDER SUBSTANTIVE PROVISIONS OF THE LPC 259
***6.4.1** Under Articles 4 and 6 LPC (Under the Prohibition Clauses)*........................*259*
- A CRITICAL ANALYSIS CONCERNING PUBLIC POLICY OBJECTIVES UNDER ARTICLES 4 AND 6 LPC..262

***6.4.2** Under Article 5 LPC (The Exception Clause)* *263*
- ENVIRONMENTAL CONCERNS 264
- ENHANCING EMPLOYMENT OPPORTUNITIES 265
- SUPPORTING AND IMPROVING CONDITIONS FOR SME'S 265

• THE PROTECTION OF CERTAIN INDUSTRIES, PROMOTION OF EXPORT REVENUES AND NATIONAL ECONOMY 266
• A CRITICAL ANALYSIS CONCERNING PUBLIC POLICY OBJECTIVES UNDER ARTICLE 5 LPC 268
6.4.3 *Under Article 7 LPC 269*
6.5 PUBLIC POLICY GOALS OUTWITH THE SUBSTANTIVE PROVISIONS OF THE LPC 276
• THE LEGAL BASIS FOR INSTRUMENTS OUTWITH THE SUBSTANTIVE PROVISIONS OF THE LPC: 'TCA REVIEWS'; 'FIVE-YEAR DEVELOPMENT PROGRAMMES'; AND, 'APPLICABLE REPORTS OF THE TCA' 277
• TCA REVIEWS ON PRIVATISATION MATTERS 281
• RELEVANT CASE-LAW 288
• A CRITICAL ANALYSIS OF RELEVANT CASE-LAW AND THE LEGAL FRAMEWORK SET BY THE COMMUNIQUÉ ON PRIVATISATION 297
6.6 CONCLUSION 305

7 CONCLUSION 307
8 BIBLIOGRAPHY 335

LIST OF FIGURES

Figure 1: The Roadmap on the Goals of the EU and Turkish Competition Law Systems 126

Figure 2: The Objectives of EU Competition Law; (BELT-I → BELT-II → BELT-III) 173

Figure 3: The Constitutional Framework for Social and Economic Order in Turkey 216

Figure 4: The Broader Legal Framework for Competition in Turkey 218

1 UNDERSTANDING THE RESEARCH QUESTION: RELEVANT TERMINOLOGY, OBJECTIVES OF COMPETITION LAW, THE CURRENT CONTEXT,

‘Blueprint transplants may be fitting; they may not be fitting; they may fit well enough so that developing countries choose not to incur the cost of difference. The key point is knowledgeable choice’.[18]

1.1 Introduction

An appreciation of the broader research theme and understanding of the central research question are essential first steps not only for providing a sound groundwork for this Ph.D. thesis (thesis) in general, but also for understanding both the central research question fully and the potential and need to contribute to existing work in the field. Furthermore, the rest of Chapter 1 aims to address, what this author perceives as, the three fundamental pillars of this thesis. The first question, which also sets the central motive for this thesis, relates to the current context and broader research theme within which the central research question takes place. The second key element is the analysis of the central aim of this thesis and what it seeks to achieve against the backdrop of the current context. Finally, the third component of this chapter is the examination of existing literature concerning the broader research theme and the more specific research question.

[18] E. Fox, ‘In Search of a Competition Law Fit for Developing Countries’, February 2011, NYU Center for Law, Economics and Organisation, Law and Economics Research Paper Series, Working Paper No. 11-04.

Although all three sections, if assessed individually, may appear to be abstract at first sight, when assessed as a whole, Chapter 1 seeks to set the broader scene for the purpose of the central research question and builds the foundation for the proceeding chapters.

1.2 Defining Relevant Terminology

1.2.1 The Inter-Disciplinary Nature of Competition and the Debate on the Objectives of Competition

Before an individual inquiry into the objectives of the EU and Turkish competition law systems, as a first step it is essential to understand 'competition law' as a subject and have an overview of the 'objectives of competition law'. This analysis does not aim to address a particular jurisdiction, but seeks to provide an explanation under the common principles of law and economics. An insight into the basic theories on competition law and its objectives becomes all the more important due to the inter-disciplinary nature of 'competition' as a subject. That is to say, competition analysis incorporates both economic and legal scrutiny.

The inter-disciplinary nature of competition, the role of economics, and, the application of economic theories in competition law analysis have led to considerable debate especially among competition law scholars. Recently, under the US antitrust and EU competition law scholarship an extensive body of legal work has persistently questioned the relationship between economics and law in the context of competition law and the 'appropriate' role of economics in competition cases.[19] This debate has mainly centred on the discussion of whether

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[19] R. Posner, *The Economics of Justice* (Harvard University Press 1981); F. Easterbrook, 'Limits of Antitrust' (1984) 63 Texas Law Review 1; L. Sullivan, 'Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?' (1977) 125 U Pen Law Review

the pursuit of economics, by which is meant 'efficiency', should be the primary goal of competition law.[20]

Historically, the debate on the role of 'efficiency' and 'non-efficiency' objectives under competition law mainly relates to the escalation of the so-called 'Chicago School' in US jurisprudence during the 1980's.[21] The leading scholars of the Chicago School, such as Bork and Posner, have initiated the rigorous application of the tools of neoclassical economics for the purposes of testing the propositions of competition law and understanding the impact of business behaviour on consumer welfare.[22] Accordingly, 'maximisation of consumer welfare' is the only legitimate goal of competition law.[23] As the leading scholar of the Chicago School, Bork has persistently argued that competition law aims to achieve material prosperity and has nothing to say on the way in which prosperity is

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1214; L. Tribe, 'Constitutional Calculus: Equal Justice or Economic Efficiency?' (1985) 98 Harvard Law Review 592; H. Hovenkamp, 'Distributive Justice and the Antitrust Laws' (1983) 51 George Washington Law Review 1; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127 U Pen Law Review 1051.

[20] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress' (1987) 62 NYU Law Review 1020; K. Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 U Pen Law Review 1191; L. Sullivan and E. Fox, 'Antitrust- Retrospective and Prospective: Where are We Coming From? Where are We Going?' 1987 62 NYU Law Review 936; E. Fox, 'The Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell Law Review 1140.

[21] For 'Chicago School' see in particular: Robert H. Bork, *The Antitrust Paradox* (The Free Press, New York 1993); Frank H. Easterbrook, 'The Limits of Antitrust' (1984-1985) 63 Tex. L. Rev. 1; R. Posner and F. Easterbrook, *Antitrust: Cases, Economic Notes and other Materials* (West Publishing Co 1981); R Posner, 'The Chicago School Of Antitrust Analysis' (1979) 127 U Pa L Rev 925; Bowman, The Prerequisites and Effects of Resale Price Maintenance, (1955) 22 U. Chi. L. Rev. 825; Brozen, *Significance of Profit Data for Antitrust Policy,* in Weston and Peltmann eds, *Public Policy Toward Mergers* 1969, p 110; Stigler, A Theory of Oligopoly (1964) 72 J. Pol. Econ. 44.

[22] Robert H. Bork, *The Antitrust Paradox* (The Free Press, New York 1993) xi.

[23] Here 'consumer welfare' is used as a synonym for 'efficiency'.

'distributed'.[24] The Chicago School understanding of competition law is concerned only with increasing the collective wealth of society, to which he refers to as 'consumer welfare', and the objectives of protecting competitors or consumers are irrelevant.[25] It is, however, important to note that Bork's 'consumer welfare' is used as a synonym to represent the 'wealth of the nation' and does not associate with individual consumers in the conventional sense.[26]

On the other hand, nevertheless, the opponents of Chicago School have argued that placing economics and particularly the objective of 'efficiency' at the centre of competition law undermines other values and components inherent in competition law, such as distributive justice, equality or fairness.[27] Those in support of this view argue that economics should be considered only as a tool and guide in assessing the legality of conduct under competition law because 'economic analysis' provides merely an '...insight into why business acts the way it does, and what the probable effect of a practice will be in the marketplace'.[28] Nevertheless, as a response to both the supporters and the proponents of the Chicago School, Kerber persuasively argues that both sides of the arguments suffer from a narrowness of viewpoint.[29] Whilst, Kerber posits, those who are sceptical of the use of economics in competition law analysis tend to confine the

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[24] Bork, The Antitrust Paradox (n 22).

[25] ibid.

[26] ibid.

[27] Hofstadter, 'What Happened to the Antitrust Movement?' in Sullivan (ed) *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford University Press 1991); J. Kirkwood and R. Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008-2009) 84 Notre Dame L. Rev. 191; K. Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 U Pen Law Review 1191; L. Sullivan and E. Fox, 'Antitrust- Retrospective and Prospective: Where are We Coming From? Where are We Going?' (1987) 62 NYU Law Review 936.

[28] ibid.

[29] W. Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law', in J. Drexl, L. Idot, and J. Moneger *Economic Theory and Competition Law* (Edward Elgar: Cheltenham , 2009).

whole debate to the discussion on ‘welfare standards’, i.e. the consumer welfare standard versus the total welfare standard, and disregard a much broader set of efficiency-based arguments; others in favour of efficiency-focused objectives are inclined to overlook ‘non-efficiency’ goals such as ‘distributive justice’, ‘fairness’, and ‘economic freedom’.[30]

The academic literature and debate on whether and to what extent ‘efficiency’ should be the sole objective of competition law is much more sophisticated than its delimited analysis reflected above. However, for the purpose of this thesis the importance of this debate relates to the bifurcation of ‘efficiency’ and ‘non-efficiency’ objectives of competition law and how this division between and choice of objectives relates to differing views on welfare standards, i.e. the way in which prosperity is achieved, and, in turn, values and legal standards that are utilised in assessing the legality of conduct under competition rules.

Since the assessment of the suitability of EU competition law to Turkey is based on the ‘on the Goals of the EU and Turkish Competition Law Systems’, the existing division of efficiency and non-efficiency goals of competition law works as a crucial reference point and explains how the choice of welfare measures has an impact on values and legal standards adopted in the application of competition law. The following section focuses on fundamental terminology and welfare measures used in the application of competition law.

1.2.2 What is ‘Competition’ and ‘Competition Law’?

It is vital to have an understanding of what exactly ‘competition’ and ‘competition law’ is about, so that we are able to discuss what competition law aims to achieve and how it can achieve these goals. Since Adam Smith’s *‘Inquiry into the Nature*

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[30] ibid.

and Cause of the Wealth of Nations', competitive markets have been considered desirable on the grounds that efficiency leads to enhancing the welfare of the society and economic growth. He stated:

> 'It is the great multiplication of the productions of all the different arts, in consequence of the division of labour, which occasions, in a well-governed society, that universal opulence which extends itself to the lowest ranks of the people'.[31]

More recently, competition has been referred to as representing 'the more efficient means to achieve the higher end of human progress, namely, greater justice, higher quality of life, and a more humane ordering of social relationships'.[32] Based on this intellectual background, neoclassical economic theory envisages that competition among undertakings produces the best outcomes for society. In this respect, the ideology of the 'free market' leaves the functioning of the economy to the hands of supply and demand, i.e. the 'invisible hands' of the market.[33] However, the 'free market' does not enjoy an 'unfettered' freedom and the market-players are subject certain standards and rules on competition. In this context, 'competition law' could be described as a body of rules that deals with certain market imperfections and aims to ensure restoring competitive conditions. 'Competition policy', on the other hand, is a much broader concept and describes the way in which competition 'authorities' take measures and intervene into the market place to maintain and promote competition. The fluid nature of policy objectives allows competition policy to dictate competition law and legal change.

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[31]Adam Smith (1723-1790), *An Inquiry into the Nature and Causes of the Wealth of Nations 1789* (5th edn A. Strahan and T. Cadell, London) CHAPTER II, Of the Principle which gives occasion to the Division of Labour.

[32] Maurice E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (2010) The University of Tennessee College of Law Legal Studies Research Paper Series No. 123/2010, p 50.

[33] Adam Smith, *The Wealth of Nations* (1776), Book I, Chapter I, p. 22, para. 10.

1.2.3 Objectives of Competition Law: Economic and Non-Economic Concerns

1.2.3.1 'Efficiency' and Welfare Standards as Objectives of Competition Law

Neoclassical economic theory envisages that competition among firms produces the best outcomes for society.[34] Under this assumption concerning competition, neo-classical economic theory adopts two theoretical models concerning the competitive structure of the markets: 'perfect competition' and 'monopoly'. A perfectly competitive market occurs when there are a large number of buyers and sellers, the product in question is homogenous, there are no barriers to enter or exit the market, and all the buyers and sellers have perfect information.[35] When the conditions for perfect competition are satisfied, then 'efficiency', both 'allocative' and 'productive', is maximised and cannot be improved further. Based on their description of efficiency gains, the theory of neoclassical economics centres the goals of competition law on two fundamental standards: allocative and productive efficiencies.

Allocative Efficiency

'Allocative efficiency', which is also known as 'Pareto' efficiency, focuses on the optimal allocation of the resources of an economy. Pareto efficiency exists when the resources of an economy are allocated in such a way that no person can be made better off through a reallocation of these resources without reducing the

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[34] R. Posner, The Problems of Jurisprudence (Harvard University Press 1993); R. Posner, Divergent Paths: The Academy and the Judiciary (Harvard University Press 2016); F. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3rd edn, Houghton Miglinn Company: London 1990); D. Geradin, A. Farrar and N. Petit, EU Competition Law and Economics (OUP 2012).

[35] F. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (3rd edn, Houghton Miglinn Company: London 1990

utility of another person.[36] In other words, goods are produced in the quantities valued by society, i.e. the supplier will expand production to the point where the marginal cost (the cost of producing any additional unit of output) coincides with marginal revenue (the price that the producer would obtain for a unit of output).[37] The fact that the market price of each unit equals to marginal cost is said to lead to allocative efficiency because consumers are able to obtain the product or service they desire at the price they are willing to pay. In a perfectly competitive market, the Pareto-criterion is automatically fulfilled without the need for intervention under competition law. However, a deviation from the assumptions of 'perfect competition' leads to allocative inefficiency, which is when competition policy plays a role in correcting this 'imperfection'. In the particular context of competition law, the Pareto criterion is utilised in the case of allocative inefficiency.

- **Productive Efficiency**

Productive efficiency, on the other hand, is fulfilled when goods are produced at the lowest possible cost.[38] Every firm has to produce at minimum cost or it will lose its customers to others, make losses, and eventually will be obliged to leave the market.[39] The goal of productive efficiency implies that more efficient firms, which produce at a lower cost, should not be prevented from taking business away from less efficient ones.[40] In this case, it could be argued that the achievement of productive efficiency is not a Pareto improvement since the less efficient firms are made worse off - allocative efficiency requires that no person can be made better off without reducing the utility of another person.

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[36] Named after the Italian economist Vilfredo Pareto. See, J. Lopreato (ed), *Vilfredo Pareto: Selections from his Treatise, with an Introductory Essay by Joseph Lopreato* (Thomas Crowell Company 1965).

[37] ibid.

[38] F. Scherer and D. Ross, Industrial Market Structure and Economic Performance (n 35).

[39] ibid.

[40] B. Sufrin and A. Jones, *EU Competition Law* (5th edn, OUP 2014).

At the other end of the spectrum, the structural model of 'monopoly' takes place.[41] In this market there is only one seller, the 'monopolist'. This may be because there are barriers to entry, perhaps in the form of legal barriers such as patent or know-how. A monopolist is not constrained by any competitors and thus is able to increase the price as high as it possibly can. According to neo-classical economic theory, the main distinction between perfect competition and monopoly is that the monopoly price is higher than marginal cost, while a competitive price is equal to marginal cost.[42] In practice, however, perfectly competitive markets hardly ever exist and most markets lie somewhere between perfect competition and monopoly.[43] Nevertheless, the theory of perfect competition is a useful tool that demonstrates the concepts of allocative and productive efficiency and provides a useful reference point and a benchmark against which we can measure the competitiveness of real markets.[44]

- **Dynamic Efficiency**

Whilst allocative and productive efficiencies are 'static' notions of the neoclassical economic theory, 'dynamic efficiency' is more concerned with the process of innovation and technological progress in a market. Dynamic efficiency is achieved through invention, development, and diffusion of new products, which, together, increase the welfare of society.[45] Unlike static efficiency, however, the normative foundations of dynamic efficiency are not clear because of the uncertainty and unpredictability of innovation processes that makes it impossible to know the outcome of the process *ex ante*.[46] Due to the dynamic dimension of innovation and technological development, it is argued, dynamic efficiency cannot be precisely defined on the basis of a given set of products – i.e.

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[41] ibid.

[42] F. Scherer and D. Ross, Industrial Market Structure and Economic Performance (n 35).

[43] ibid.

[44] B. Rodger and A. MacCulloch, *Competition Law and Policy in the EU and UK* (5th edn, Routledge 2014).

[45] J. Clark, *Competition as a Dynamic Process* (2nd edn, Praeger 1980).

[46] ibid.

predefined inputs and outputs.[47] For this reason, dynamic efficiency is excluded from mainstream neoclassical economic theory. However, Schumpeter argued that innovation is necessary for economic development and he suggested the need to develop an alternative to traditional equilibrium theory based on 'innovation economics'.[48] The 'Schumpeterian rivalry' introduced new conceptions of competition such as competition as a 'dynamic process of innovation'[49] and a 'discovery procedure'.[50] Accordingly, competition is a constant race to bring new products onto the market, competition is dynamic and positions of market power are short-term because further innovation leads to advantage over competitors.[51] Innovation economics criticises 'static efficiency' analysis on the grounds that (allocative and productive) inefficiency is calculated in terms of fixed technology and a given cost situation. It is argued that, in any given market, static inefficiency is measured in terms of the actual cost of production in comparison with the minimum cost of production (productive inefficiency) and the price set above the marginal cost of supply (allocative inefficiency). This analysis has no time dimension because it looks at an equilibrium situation, and thus is unable to incorporate technological development or process innovation. It is rather concerned with efficiencies in the context of fixed technology and a given cost situation. The theory of Schumpeterian rivalry stipulates that in the real world product markets evolve over time with the introduction of new and improved products, and this innovation generates a welfare gains due to dynamic efficiency.[52] For instance, improved technology and innovation may lead to a fall in the cost of product and services.

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[47] ibid.

[48] J. Schumpeter, The Theory of Economic Development. An Inquiry into Profits, Capital, Credit, Interest, and Business Cycle (Transaction Publishers 1982).

[49] ibid.

[50] F. Hayek, Competition as a Discovery Procedure, in, F. Hayek New Studies in Philosophy, Politics, Economics and the History of Ideas (Routledge 1978).

[51] ibid.

[52] J. Schumpeter, The Theory of Economic Development. An Inquiry into Profits, Capital, Credit, Interest, and Business Cycle (n 48).

The paradox between mainstream economic theory and innovation economics lies beneath the fact that dynamic efficiency leads to static inefficiency. In a dynamically efficient market, firms will supply the product above the short-run marginal productions cost (leading to productive inefficiency) to recoup their initial losses caused by research and development investments. This is why, innovative economics argue, in a perfectly competitive market there would be no incentive to make investment and develop new products.[53] Product innovation only occurs if firms earn just more than enough to offset their investment and this is only possible through pricing above short run minimal cost (allocative inefficiency). As argued above, in some cases one efficiency goal may conflict with another. This is because in some cases the Pareto-criterion is satisfied neither with productive efficiency nor with dynamic efficiency. The goal of productive efficiency means that firms that produce at lower costs may lead to others leaving the market. Similarly, the goal of dynamic efficiency is to achieve innovation and diffusion of new products - which in turn lead to welfare gains- and during this 'dynamic process of innovation' less efficient firms are made worse-off.

The issue of trade-offs between efficiency goals relates to the adopted 'welfare standard', which is a matter of competition 'policy'. The next sub-section will analyse welfare standards and their role under the objectives of competition law.

- **Welfare Standards**

Welfare standards represent a particular efficiency criterion under which prosperity is measured. As pointed above, allocative and productive efficiencies proposed under the theory of neoclassical economics are critical in this context because standards of welfare are measured through the way in which efficiencies are achieved. In the particular context of competition law analysis, nonetheless,

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[53] J. Clark, Competition as a Dynamic Process (n 45).

welfare standards become all the more important when they are used as the legal criterion in the assessment of whether the conduct under legal scrutiny is unlawful under competition law or not.

In essence, the crux of the discussion on the appropriate welfare standard relies on the question of whether competition law should be concerned with the redistribution of welfare or if it should only be concerned with the overall welfare of a society: What is the appropriate welfare standard under competition law analysis, a 'consumer welfare' standard or a 'total welfare' standard?[54]

The total welfare objective aims for the maximisation of the sum of 'consumer surplus' and 'producer surplus' in a particular market.[55] In this respect, whilst producer surplus represents the profit that a producer makes by selling goods above the cost of production, consumer surplus corresponds to the difference between what consumers would be prepared to pay for goods or services and what they actually pay. Based on this theoretical proposition, it is generally accepted that if any given competition law regime allows redistribution between consumer and producer surplus under its competition rules, it is then concerned with the 'consumer welfare standard'. This welfare measure, which is also referred to as the 'consumer welfare objective', relies on the understanding that the redistribution of wealth in the form of wealth transfer from consumers to producers is incompatible with the goal of competition law and should therefore be held unlawful. The total welfare standard, on the contrary, allows the transfer of surplus between consumers and producers as it is primarily concerned with 'total' surplus. Accordingly, as long as the sum of consumer and producer surplus is maximised, the total welfare standard will be satisfied. In this case, it is clear that redistribution of wealth is irrelevant. Relating back to the link between efficiency goals and welfare standards, it is apparent that the total welfare

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[54] W. Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law' (n 29).

[55] ibid

standard is not entirely compatible with the Pareto-criterion discussed earlier as the former allows for redistribution between consumers and producers (one side is made worse off with the transfer of surplus). Another remarkable example in this context is the Chicago School, under which the sole goal of competition law is allocative efficiency, and, therefore, identity of 'gainers' and 'losers' in a market is irrelevant so long as efficiency is achieved. Nevertheless, at this point, it is crucial to note the distinction between Bork's 'consumer welfare' under the Chicago School and the consumer welfare standard discussed above, since Bork's consumer welfare is measured in terms of overall efficiency, i.e. the sum of allocative efficiency and productive efficiency, as opposed to consumer welfare standard in the traditional sense.

The above theoretical framework presented under the neo-classical economic school reveals the relationship between welfare standards and static efficiency goals. In this context, the example of the Chicago School of law has also established that welfare objectives, i.e. one's perception and understanding on the welfare of society, dictates the way in which the tools of neo-classical economic theory, particularly efficiency standards, are used in the application competition law. For example, the adoption of a consumer welfare standard instead of a total welfare standard, or *vice versa*, could lead to different outcomes for the very same conduct in question in the assessment of competition cases. If, as a result of any given conduct, productive efficiency gains were larger than allocative inefficiencies (transfer of consumer surplus to producer surplus) a consumer welfare standard would lead to a negative assessment under competition law. Even though there may be a maximisation of total welfare. This is because a consumer welfare standard may not allow total efficiency gains due to distributional concerns. Under the consumer welfare standard, what matters is whether consumer surplus after the conduct is bigger or smaller than before the transaction.

The issue of trade-off between conflicting efficiency goals also relates directly to the objectives of competition law. The 'Kaldor-Hicks' criterion examined in the earlier section is the best example to illustrate this trade-off between different

efficiency goals and how this relates to objectives pursued by the relevant competition law regime. Markedly, the Kaldor-Hicks 'standard' allows for a trade-off between efficiencies to the extent that efficiency gains are more than inefficiency losses, for example when the increase of producer surplus is larger than the reduction of consumer surplus.[56] The theory behind this trade-off is that 'the central value judgement is that an exchange of money has a neutral impact on aggregate well-being'.[57] This argument can be held under a total welfare standard, for instance, when dynamic efficiency gains have the potential to outweigh allocative inefficiencies. Most importantly, this means that under the 'Kaldor-Hicks' criterion the increase in producer surplus is allowed at the expense of a loss in consumer surplus. But, again, the issue of trade-off between competing efficiency goals and welfare standards depends on how the objectives of competition law are perceived in a particular legal regime and is significantly important because of its direct impact on the application and interpretation of substantive rules on competition.

The discussion above on efficiency objectives and welfare standards provided a general understanding of the economic theories underpinning the assessment of cases under competition law. Most importantly, it is understood that policy objectives and views on how society ought to achieve prosperity and welfare dictate the choice for welfare standards and, in turn, efficiency objectives, in assessing the legality of cases under competition law. This observation supports the hypothesis of this thesis that despite the adoption of identical substantive rules, by virtue of country-specific legal, economic, and social backgrounds, and thus policy objectives, the application of competition rules may diverge from one jurisdiction to another.

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[56] Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 Hofstra Law Review 487; A. Feldman, 'Kaldor-Hicks Compensation' in P Newman, *The New Palgrave Dictionary of Economics and the Law, Vol. II* (1998) 417-421.

[57] R. Van den Bergh and P. Camesasca, European Competition Law and Economics: A Comparative Perspective: A Comparative Perspective (Sweet and Maxwell, 2006) 64.

1.2.3.2 Non-Economic Concerns under Competition Law

The inter-disciplinary nature of competition allows the accommodation of non-economic objectives, as well as the 'economic', under competition law assessment. The non-economic goals of competition law discussed in relevant literature, such as fairness, the protection of individuals' rights, economic freedom, and public policy objectives, however, cannot be precisely defined like the economic theories of competition. These objectives are left to each jurisdiction and the analysis conducted under BOX-I and BOX-II individually.

1.3 Is Turkey alone? The recent increase in the number of jurisdictions adopting national competition law regimes

A comprehensive study by Corwin Edwards illustrates that, on the global scale, after the end of World War II and until 1964 there were only twenty-four jurisdictions with an enforceable competition law.[58] At the time of the adoption of the Treaty of Rome in 1957, which established the then European Economic Community, Germany was the only member state of the union with a national competition law regime in force and an independent administrative authority to enforce this legal framework, the *Bundeskartellamt*, that was established in 1958.

[58] C. Edwards, *Control of Cartels and Monopolies: An International Comparison* (Oceana Publications: Dobbs Ferry, New York 1967) p. 25-26.

However, further empirical research conducted by Palim identifies seventy countries with national competition laws as of the end of 1996.[59] For instance, only between 1990 and 1996 twenty-two 'transition' economies of the Central and Eastern European (CEE) and the former Soviet Union states adopted a legal framework for competition.[60] While India has announced that the Competition Act 2002 has come into force with effect from May 2009,[61] China has adopted its anti-monopoly law effective as of August 2008[62], both of which have the potential to affect world trade significantly as these two states together comprise almost ten per cent of world's total output.[63] As of April 2016, the International Competition Network (ICN), a virtual independent platform open to any competition authority worldwide with responsibility for enforcing competition rules at the national level, is known to have a hundred and four member competition authorities from ninety-two individual jurisdictions.[64] It is now anticipated that over 120 jurisdictions have adopted a legal framework for competition law.[65]

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[59] M. A. Palim, 'The Worldwide Growth of Competition Law: An Empirical Analysis' (1998) 43 Antitrust Bulletin 105.

[60] The Eastern and Central European states consist of Albania, Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovenia, and the Slovak Republic. See, Mark A. Dutz, Maria Vagliasindi, 'Competition Policy Implementation in Transition Economies: An Empirical Assessment' (2000) 44 European Economic Review 762; William E. Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (1996) 11 AJIL 437.

[61] There had been a delay with the implementation of 'The Competition Act 2002', since some of the provisions were challenged before the Supreme Court of India. It was eventually subject to some amendments by 'The Competition (Amendment) Act, 2007. See, <http://www.cci.gov.in/>.

[62] The Anti-Monopoly Law of the People's Republic of China was adopted by the Standing Committee of the 10th National People's Congress, on 30th August 2007. For full text of the Anti-Monopoly Law in English, see <http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=85714>.

[63] Calculation based on the data on gross domestic product 2009 provided by the World Bank. See, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

[64] The International Competition Network (ICN) is a specialised network of competition agencies that aims to address competition policy and enforcement issues and provide a forum for national

These developments in the field of competition law prompt questions as to the reason(s) behind the rise in the number of jurisdictions adopting competition rules and the implications of these developments for the recent debate on developing a 'one-size fits all' style competition law 'model' and the 'internationalisation' of competition law. In relation to the first question, although several reasons may be associated with this development, there are two predominant factors that initiated many jurisdictions to introduce a legal framework for competition for the first time: first, a shift in the prevailing socio-economic ideologies of sovereign States; and, second the political objective to become a part of regional or global institutions and communities. Both factors are interlinked to each other.

In the broader socio-economic context, particularly after the fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union by 1991,[66] heavy state control and planning as an economic policy has been abandoned by many states in favour of a more 'liberal' thinking. This 'move' in the ideological thinking, in turn, brought a new approach to States' role in economics and the operation of the market place. In principle, the new socio-economic perspective shifted the task of 'the allocation of resources in a society' from the hands of government to the 'invisible hand' of the market.[67] This perception of 'allowing' the market to work in its own is one of the founding principles of the 'free market' ideology. It is fundamentally based on the thinking that the 'invisible hand' of the market and competition between firms in the marketplace, rather than a market governed and

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and multinational competition authorities to enhance convergence and co-operation in the field of competition law. <www.internationalcompetitionnetwork.org>.

[65] M. Dabbah, International and Comparative Competition Law (CUP, Cambridge 2010) 290.

[66] The dissolution of the Former Soviet Union led to the formation of fifteen independent states; Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Among all these newly formed states Turkmenistan is the only jurisdiction that still has not adopted a system of competition law.

[67] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations 1789* (n 31).

controlled by the State, leads to better outcomes for society. As a part of this ideology a legal framework governing principles of competition is required to ensure that firms do not restrict or distort competition in a way that prevents the free market mechanism from functioning properly. Therefore, jurisdictions abandoning state-control as their economic policies are in need to adopt a legal framework for competition to enable the functioning of their 'free market economy'.

In the broader context, nonetheless, States shifting from a state-planned economic system to a free market economy, i.e. economies in 'transition', appear to adopt legal principles on competition not as stand-alone rules but together with various other legal measures. In many transition jurisdictions, including Turkey, these legal measures put together form a comprehensive 'modernisation package' in order to ensure the implementation of new economic and legal measures simultaneously. This set of legal measures and their successful enforcement are seen as providing the required 'infrastructure' for a successful transition as well as for establishing the new socio-economic system in the long term. For instance, legal rules and principles on the privatisation of government-owned entities, lowering barriers to international trade, de-regulation of specific sectors, and easing foreign direct investment laws to enhance incentives for foreign investors represent only a few of these legal measures.

In most cases, even though legal measures adopted under modernisation packages aim to facilitate the transition period and establish new socio-economic policies at the national level, the broader objective behind this move is to ensure accession to regional communities or to comply with the standards of certain international organisations. This relates to the second motive behind the adoption of competition laws at the national level. The adoption and enforcement of rules on competition and many other fields of economic law are required as a 'pre-condition' to ensure adherence to the standards and principles of regional and international organisations and communities. For example, in the specific context of competition law, the EU has made the accession process of EU candidate countries conditional upon, among other things, the adoption of a legal framework

for competition at the national level. International organisations such as the World Trade Organisation, the World Bank, and the International Monetary Fund have required the adoption of a competition law system from countries seeking financial aid.[68] Either way, a great deal of jurisdictions have been assisted by authorities with significant experience in the field of competition law and policy.[69] Most notably, the United States (US) Federal Trade Commission and the EU Commission (Commission) have provided a 'model framework' for competition law to which the 'assisted' jurisdictions could adhere and formulate a competition law system for domestic purposes. For instance, the Commission has assisted former candidate countries, most of which are the current Member States, in adopting the EU competition law model during their accession process to the EU.[70] This has been the case with the 'Europe Agreements' when the EU had required former candidates Bulgaria, the Czech Republic, Slovakia, Hungary,

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[68] For instance, the World Trade Organisation, the World Bank, and the International Monetary Fund have required the adoption of a competition law system from Syria and Sudan. See, M. Dabbah, *International and Comparative Competition Law* (n 65).

[69] For instance, among others, Georgia, Russia, Ukraine, Mongolia, Zimbabwe, Nepal have secured technical assistance from the United States Agency for International Development (AID). See, W. Kovacic, 'Luck Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical Assistance' (2007) 3 European Competition Journal 319; W. Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chicago-Kent Law Review 265; W. Kovacic, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies Symposium: Creating Competition Policy for Transition Economies' (1998) 23 Brooklyn Journal of International Law 403; W. Kovacic, 'Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe Symposium: Cultural Conceptions of Competition' (1995) 44 DePaul Law Review 1197.

[70] Particularly, during the accession of the ten new Member States to the EU: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

Poland, and Romania to harmonise their competition laws with EU competition law before joining the EU as a Member State.[71]

In this context, Turkey provides a striking example particularly for the way in which the competition law regime was adopted and how it has developed over the years. In Turkey, the move to an economic system based on the principles of a free market started by the beginning of 1980's.[72] This shift in the socio-economic approach was reflected onto the Turkish Constitution of 1982 (TC), which can be easily observed through provisions on 'free market economy' and 'monopolies and cartels'.[73] Although for more than a decade several attempts were made to formulate and adopt a legal framework for competition, none of the draft laws were in fact enacted.[74] It was not until 1995 when 'Decision No. 1/95 of the EU-

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[71] 'The Europe Agreements' provided the legal framework of relations between the EU and Bulgaria, the former Czechoslovakia, Hungary, Poland, and Romania.

See: W. Kovacic, 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (1996) 11 AJIL 437.

[72] For further discussion, see p. 202-206.

[73] The Constitution of the Republic of Turkey, Law No. 2709 (TC). The Constitution was enacted by the Parliament on 18 October 1982, and published on the Official Gazette, Number 17844, on 20 October 1982. After the Constitutional referendum, which was held on 7 November 1982, it was published on the Official Gazette, Number 17863, on 9 November 1982.

Section 2, Chapter 3, Article 48 (paragraph 2) of Turkish Constitution provides: 'The State takes necessary measures to ensure that private enterprises operate in a secure and stable environment, and in accordance with national economic requirements and social objectives.'

Under Section 4, Chapter 2, Article 167 of the Turkish Constitution, it is provided that 'The State shall take necessary measures in order to assure the orderly and healthy functioning of the markets for goods and services, and to prevent the formation of monopolies and cartels arising from agreements or decisions'.

[74] Some of the draft laws submitted but failed pass through the Turkish Parliament: The 'Draft Bill on the Governance of Domestic and Foreign Trade' of 1978; 'Draft Bill on the Protection of Business Integrity' of 1980; 'Draft Bill on the Governance of Commerce and the Protection of Consumers' of the late 1970's; 'Draft Bill on the Control of the Markets for Goods and Services and on the Protection of Competition' of 1982; 'Draft Bill on the Protection of Consumers' of 1984; 'Draft Bill on Agreements and Practices Restricting Competition' of 1985.

Turkey Association Council on the Customs Union' (Decision No. 1/95) required Turkey to adopt relevant legislation based on the EU competition law 'model' as a condition for establishing the customs union (CU) between the EU and Turkey.[75] In accordance with this requirement, Turkey adopted its first legal framework for competition in 1994, the Law on the Protection of Competition (the LPC), and established the Turkish Competition Authority (TCA) in 1997 to enable the enforcement of the LPC.[76] Shortly after, Turkey's recognition as an EU candidate after the European Council Presidency Conclusions in 1999 and the Accession Partnership of 2001 issued by the European Council (Accession Partnership) explicitly required further harmonisation of Turkish competition law with the relevant EU *acquis communautaire*.[77] Even though bilateral legal instruments between the EU and Turkey will be examined in detail in Section 3, appreciation of the CU, Decision No. 1/95 and the Accession Partnership alone at this stage reveals the weight given to political objectives compared to achievement of socio-economic objectives at the national level.

To conclude, the above analysis suggests that the increase in the number of jurisdictions with a legal framework for competition is neither a regional

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[75] Decision No. 1/95 (n 2).

[76] LPC (n 15).

[77] Accession Partnership (n 14).

Helsinki European Council, 10-11 December 1999, Presidency Conclusions can be reached at <http://www.europarl.europa.eu/summits/hel1_en.htm>.

The European Council adopted its first Accession Partnership with Turkey on 8 March 2001. Since then the Accession Partnership has been revised three times (in 2003, 2006 and in 2008).

The Accession Partnership is not a legally binding document for Turkey. It constitutes a framework of unilateral measures stipulated by the EU, and comprises of priorities and issues on which Turkey's accession preparation must concentrate. However, the conditions imposed by the EU in the Association Agreement are country specific requirements and they are thought to complement the 'Copenhagen Criteria' rendering the latter a 'quasi-legal' nature.

'*Acquis Communautaire*' is the term used to reflect the entire body of EU laws and includes *inter alia* the founding Treaties of the EU, primary and secondary legislation adopted pursuant to the Treaties as well as the case-law of EU Courts.

development nor a trend observed in certain types or sizes of economies. Jurisdictions with a significant economic output, such as China and India, and smaller economies alike from various geographic locations have all been driven by one common motive, namely a socio-political objective with an ultimate economic goal. Turkey is no exception to this legal trend and sets an example with its political motive to introduce its first competition law regime at the national level. For this reason, its is proposed that the Turkish competition law system sets an important example and provides a useful case-study for the debate concerning the suitability of a 'model' competition law system for jurisdictions with no prior legal and institutional background in the field.

In parallel to this development, the recognition by states that the adoption of a competition law regime is vital to satisfy bilateral and multilateral political commitments at the international level, coupled with the understanding that these rules work as a mechanism to promote the economic view of 'free market' at the national level, have led to an expanding body of legal scholarship and research by international bodies. The following section seeks to examine and draw upon relevant literature and, albeit not considered as academic work, the efforts of international bodies in this context.

1.4 Current Debate on Developing a 'Global Framework' for Competition Rules to which Individual Jurisdictions can Adhere: Relevant Literature

In parallel to the rise in jurisdictions adopting a competition law system, there has been an increasing debate in competition law and policy discourse on developing internationally accepted norms and principles in the field of competition law. This debate has been centred on the question of whether a 'global framework' or, in other words, a 'model framework' on competition rules can be formed, ideally

under the roof of an international platform, to be then followed by individual jurisdictions.[78] In this context, among other initiatives, the Organisation for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) have formed groups of experts with a view to providing a platform for developing 'internationally recognised' principles on competition.[79] Under these institutions, numerous soft-law instruments have been adopted in the form of 'Best Practices', 'Recommendations', and 'Guidelines'.[80] Most notably, the UNCTAD's recent 'Model Law on Competition' of 2010 is quite broad in terms of its scope and incorporates guidance on, *inter* alia, substantive elements of a competition act, the objectives and purposes of competition law, procedural law, the administering authority for the application and enforcement of substantive and procedural rules of competition, and, the organisation, function and powers of this authority.[81] Although this legal instrument is non-binding in nature, it is specifically designed

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[78] For the role of international organisations in developing an international dimension to competition law and policy, see: M. Dabbah, *The Internationalisation of Antitrust Policy*, (CUP, Cambridge 2003); M. Dabbah, *International and Comparative Competition Law* (CUP, Cambridge 2010); D. Gerber, *Global Competition: Law, Markets, and Globalization* (OUP, Oxford 2010).

[79] UNCTAD is an international body that aims at promoting the 'integration of developing countries into the world economy' and shaping current policy debates and thinking on development to ensure sustainable development in these countries. It also provides an intergovernmental forum to address competition law and policy issues in jurisdictions with less experience in the application of competition law. <www.unctad.org>

The OECD is an international forum under which States work together to share experiences, seek solutions to common problems, and, to ultimately set international standards on a wide range of economic, legal, social and environmental matters. <www.oecd.org>

[80] For example, the 'OECD Competition Assessment: Checking-up on Policies and Regulations' 2007 and 2010; the OECD 'Experiences with Competition Assessment' 2015.

< http://www.oecd.org/competition/>

[81] UNCTAD, 'Model Law on Competition, Substantive Possible Elements for a Competition Law: Commentaries and Alternative Approaches in Existing Legislation', TD/RBP/CONF.7/8, 2010. < http://www.unctad.org/en/docs/tdrbpconf7d8_en.pdf>

to guide jurisdictions as a source of reference during the formulation, adoption and amendment of their domestic competition laws.[82] Similarly, the 'ICN Report on the Objectives of Unilateral Conduct Laws' states that the report '… distils themes that may assist in promoting convergence in these areas (of competition law).'[83] The ICN document, although not as comprehensive as the UNCTAD 'Model Law', mainly focuses on two things: first, the objectives of competition law, the relationship between these objectives, and, their role in the analysis of competition cases and in assessing the legality of conduct under competition rules; second; the assessment of conduct under relevant economic theories and legal doctrines of competition.

In essence, albeit recognising divergent economic, social and political objectives pursued by individual jurisdictions, international agencies argue that due to the significant increase in cross-border transactions, the diversity in policy objectives may ultimately lead to conflicting outcomes in competition analyses.[84] It has been therefore suggested that further convergence of competition laws may help eliminate potential conflicts due to the plurality of competition policy objectives, ensure certainty among the business community, and provide public

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[82] UNCTAD, 'The United Nations Set of Principles and Rules on Competition: *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*', UNCTAD/RBP/CONF/10/Rev.2. < http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>

[83] Unilateral Conduct Working Group, International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 6 (2007) 1. See < http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> (ICN Report on Goals 2007)

[84] This typically happens in a situation where the relevant conduct has an effect on trade in more than one country, the relevant agreement transaction is subject to scrutiny under the competition laws of multiple jurisdictions.

accountability.[85] However, even though the eradication of potential conflicts due to diverging national rules on competition may be desirable for the sake of practicality and cross-border business transactions, it is questionable whether the elimination of possible collisions is a legally sound reason for the 'imposition' of a 'model' competition law to jurisdictions with no prior experience in this field.

Nevertheless, the central theme of this thesis is not the outright rejection of academic and institutional proposals on developing a global or regional model framework on competition, but essentially to argue that this debate requires a broader perspective than the general existing approach on the matter. A 'broader perspective' in the context of developing a 'global legal framework for competition' means the recognition of country-specific objectives that are related to national social and political concerns, as well as a focus on commonly agreed norms and principles on competition. Contrary to the existing approach that mostly overlooks possible divergences between national objectives, a broader approach would address potential departure from 'commonly accepted' goals and provide guidance on what this means for the application of the model law at the national level. Fundamentally, an emphasis on the link between public policy and industrial goals and the objectives of competition law can be provided with a broader approach concerning the debate on formulating 'global competition rules'.

Admittedly, drawing lessons from the experiences of the more 'mature' and sophisticated competition law systems provides a solid groundwork for framing the general principles of a 'model' competition law. The long-standing case-law and established practices of the US antitrust and the EU competition law systems, coupled with a sophisticated body of English-written literature, serve as invaluable reference points to institutions and academics that are interested in

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[85] OECD Global Forum on Competition, Note by the Secretariat, 'The Objectives of Competition Law and Policy' CCNM/GF/COMP(2003)3, 3. <http://www.oecd.org/dataoecd/57/39/2486329.pdf>

promoting this initiative. This has been the case with the relevant work of the ICN, OECD and the UNCTAD discussed above. Nevertheless, this thesis focuses on one particular dimension of this much broader 'international' trend and assesses the feasibility of model competition laws from the perspective of jurisdictions that adopt the model law, i.e. the specific case study of the EU competition law 'model' *vis-à-vis* the Turkish competition law system. At its core, it suggests that in order to enable a more profound and rational debate on the matter, the feasibility and applicability of a model competition law in the global or regional scale should also be examined from the perspective of jurisdictions that seek to follow the model legal framework.

The importance of the link between the social, economic, and legal contexts and competition rules has indeed been discussed under competition law scholarship. Taken as an important reference, the American antitrust law discourse and academic literature, recognised as one of the most sophisticated competition law traditions, support the view that competition rules in general are an expression of socio-political and economic values of societies and should not be treated as stand-alone rules. For instance, Bork, a heavily influential scholar and judge on American antitrust legal thinking, describes his perception of competition law and policy as 'more than merely a set of economic principles utilized to assess the legality of business conduct; (but) rather an expression of social policy, an educative force, and a symbol of political powers'.[86]

Sullivan, albeit disputing Bork on other tenets of competition law and policy, argues that '(American) antitrust law is not only about "law" but is also a socio-political statement about our society'.[87] In a similar manner, Fox, who has written extensively on the internationalisation of competition rules, argues that

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[86] R. H. Bork and W. S. Bowman, 'The Goals of Antitrust: A Dialogue on Policy' (1965) 3 Col. L.R. 369.

[87] T. Sullivan, *The Political Economy of the Sherman Act: The First One Hundred Years* (1991) Oxford: OUP, 3.

‘competition cases are ultimately concerned with the sort of society we are to be (and) ... they are decisions about priorities among values concerning society.’[88] Gerber, who is particularly focused on competition law with an international and comparative dimension, argues that ‘... responding both to economic and political developments the ... (thinkers of the ordoliberal school) sought a new way of thinking about the society … (and) were concerned with laying the foundations for a different kind of society’.[89]

More recently, in his work on the quest for the goals of competition law Stucke asserts that ‘competition law serves different purposes for different constituents’ depending on the social, economic and legal context surrounding the relevant competition law regime in a given jurisdiction.[90]

While these views mark the general position of American scholars concerning the link between competition rules and its contextual setting, other legal academics have drawn attention to problems of suitability, legality and accountability associated with the convergence on competition rules at the global scale and the ‘injection’ of model competition laws into the legal systems of developing countries. Leading scholars in this context are Dabbah and Fox, both of whom have written extensively on competition law with a particular focus on the relation between these rules and its contextual setting. For instance, in his work ‘International and Comparative Competition Law’ Dabbah points out *inter alia* that in practice the rules and traditions of mature competition law systems -mainly the US and the EU legal systems- have been ‘forced down the throat’ of developing countries without a careful assessment of domestic circumstances, and

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[88] E. Fox, ‘The Modernisation of Antitrust: A New Equilibrium’ (1991) 66 Cornell L. Rev. 1140.

[89] D. J. Gerber, ‘Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the ‘New’ Europe’, (1994) 42 Am. J. Comp. L 25-35 (emphasis added).

[90] M. E. Stucke, *Reconsidering Competition and the Goals of Competition Law* (n 32).

this has eventually led to significant difficulties for the latter.[91] Similarly, Fox criticises the 'transplant' of EU competition rules into the Central and Eastern European Countries (CEEC) on the grounds that this imposition confines the freedom of the CEEC's to tailor their competition laws in accordance with their needs, and further argues that there might be parts of the EU competition model which are not optimal for CEEC' domestic circumstances.[92] This approach of Dabbah and Fox has found support from economists alike. Sign, a Cambridge University economist whose work focuses specifically on the topic of competition law and emerging markets, argues from an economist's point of view that 'donor' jurisdictions' competition laws and policies are not always suitable for the level of economic development of most developing countries.[93] More importantly, he suggests, it is not enough to simply suggest that all developing countries need is a longer time frame to 'properly' implement the model competition laws that have been 'imposed' upon them.[94] The more complicated and distinct nature of economies of developing countries may require the application of a unique and 'domestically grown' competition policy that takes into account their level of economic development and the objective of long-term economic growth.[95]

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[91] Dabbah does not provide a definition for the term 'developing country'. However, he argues that in describing countries which are 'not developed' international organisations and governments use the terms 'less developed countries', 'economies in transition', and 'emerging economies' interchangeably. M. Dabbah, *International and Comparative Competition Law* (n 65).

[92] E. Fox, 'The Central European Nations and the EU Waiting Room-Why Must the Central European Nations Adopt the Competition Law of the European Union?' (1997-1998) 23 Brooklyn J. Int'l L. 353.

See, also: O. Budzinski, 'Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity' (2003) University of Marburg Working Paper, No. 14-2003; O. Budzinski, 'Monoculture Versus Diversity in Competition Economics' (2008) 32(2) Cam. J. Econ. 295.

[93] A. Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, ESRC Centre for Business Research, University of Cambridge, Working Paper No. 246, 2002.

[94] ibid.

[95] A. Singh and R. Dhumale, 'Competition Policy, Development and Developing Countries' South Centre Working Papers, November 1999.

Among all existing literature, Dabbah and Fox's work stand out in terms of their scope, methodology, and relevance for the purpose of this thesis.[96] The first example in this context is Fox and Trebilcock's most recent, and, again, most relevant, project for the purpose of this thesis: 'Design of Competition Law Institutions: Global Norms, Local Choices' (Design of Competition Law Institutions).[97] This work is indeed the part of a broader 'parent' project called the 'Global Administrative Law', also known in the literature as GAL, and sets one of the few valuable examples in existing literature for the purpose of this research. The GAL, similar to this thesis, arose against the backdrop of the internationalisation of legal norms and the emergence of international systems of governance. This 'new' field of law, as referred to by Fox, aims to question, *inter alia*, the accountability and legitimacy of international legal systems of governance, the fairness of procedures and final outcomes under these transnational legal settings. More importantly, it asks how these systems can be assessed and whether any benchmarks can be formulated to evaluate these new institutions of legal governance. Design of Competition Law Institutions represents the competition law segment of this work and seeks to answer these questions particularly in the context of competition law. The Design of Competition Law Institutions and its precursor the GAL set valuable examples for the purpose of this thesis because they stand out from similar work in literature and instead of engaging with the problem by invoking rules from 'above', they attack the problem from 'below'.[98] In terms of methodology, both the GAL and

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[96] M. Dabbah, International and Comparative Competition Law (n 65); M. Dabbah, The Internationalisation of Antitrust Policy (CUP, Cambridge 2003); E. Fox and M. J. Trebilcock, The Design of Competition Law Institutions: Global Norms, Local Choices (OUP, Oxford 2012) (The Design of Competition Law Institutions). See also, E. Elhauge and D. Geradin, Global Competition Law and Economics (2nd edn, Hart Publishing: Oxford 2010); D. Gerber, Global Competition: Law, Markets and Globalisation (OUP: Oxford 2010); M. Taylor, International Competition Law: A New Dimension for the WTO (CUP: Cambridge 2009)

[97] Fox and Trebilcock, The Design of Competition Law Institutions (n 96) 28.

[98] ibid.

Design of Competition Law Institutions examine how norms are formulated and applied, and how systems and their legal norms in individual jurisdictions interact with culture and context. This methodology is akin to what this author's approach as suggested earlier in the Statement of Purpose and supports the view that careful consideration should first be given to how competition law is applied at the national level, to be in a position to assess whether and to what extent a 'model' competition law fits the relevant jurisdiction.[99] Design of Competition Law Institutions scrutinises the competition law systems of, *inter alia*, the EU, the United States, Japan, China, South Africa, and Chile. Brazil and India, although not examined as a separate 'country study', are examined briefly in the county summaries. In terms of structure, it divides each country study into four parts that examines the institutional structure, role and tasks of competition authorities, due-process norms in decision-making, and institutional performance in individual jurisdictions. Another important feature of Design of Competition Law Institutions and its relevance to this thesis relate to the outcome of country studies. Based on the above study of ten individual competition law systems, Fox and Trebilcock draw the following concluding remarks. First, they observe that all jurisdictions aim to be perceived as legitimate and accountable regardless of their institutional structure for competition law and whether they are all able to achieve these ends. Second, differences are observed among jurisdictions concerning specific requirements of due process. Third, national competition authorities strike a different balance concerning effectiveness and right of defence in the application of competition rules. In relation to the lack of effectiveness, they criticise national competition authorities for prolonged proceedings and lack of sufficient expertise in competition law investigations and judgment. On the other hand, and as a final note, the authors of Design of Competition Law Institutions suggest that increasing scholarship in the field, work of global institutions, published peer reviews, and country studies may put pressure on these jurisdictions and help address these shortcomings.

[99] ibid.

How do these concluding remarks reflect on and relate to the proposed hypothesis that a ‘one-size fits all’ approach in competition law is not feasible, both in theory and practice? Firstly, it is evident from the scope, methodology and outcome of ‘Design of Competition Law Institutions’ that it neither aims to promote nor seeks to formulate a ‘single best’ model competition law. Instead, it carefully and cautiously analyses individual competition law systems to understand whether and to what extent convergence on competition rules is feasible, and, following this observation, addresses shortcomings, in terms of problems of legality and accountability that some jurisdictions face. This author argues that the use of term ‘global competition’ instead of ‘model competition’ is an intentional choice of the authors’ and reflects their central argument in favour of a ‘bottom to top’ approach. Secondly, country studies clearly reveal that although all competition law systems ultimately aim for legitimacy and accountability, significant differences between jurisdictions are observed in the application of the three central pillars of competition law. Finally, it is suggested that these differences stem from the country-specific institutional, legal, and economic setting of each jurisdiction, and that understanding this deviation and its implications for the application of the model competition law at the national level plays a vital role in the examination of the suitability of the model competition law to that particular jurisdiction. It is for these reasons that Design of Competition Law Institutions as a whole, but its final reflections in particular, is taken as an important reference for this research and plays an important role for future scholarship. It demonstrates that when examining problems of suitability, legitimacy and accountability in the application of model competition laws at the national level, an in-depth examination of national laws, i.e. the adoption of a ‘bottom-to-top’ approach is a feasible and reliable method.

As important as Design of Competition Law Institutions is Maher Dabbah's 'The Internationalisation of Antitrust Policy'.[100] One of the striking features of Dabbah's work is the way in which he perceives competition as a discipline and his emphasis on the multi-disciplinary nature of competition law, which, in turn, shapes his understanding and approach to the study of competition as a scholar. In this regard, Dabbah draws attention to how political science has been neglected as an influential force in the development and application of competition rules and he points out the lack of exposition in literature of this aspect of competition as a discipline.[101] He develops the proposition that the socio-political component of competition is as equally important and influential as its legal and economic dimension, and continues to suggest that any work focused on the subject of 'internalisation' of competition rules needs to consider insights from all three disciplines, i.e. political science, law and economics.[102] The reference to term 'policy' in his work 'The Internationalisation of Antitrust Policy' is therefore an intentional choice to place emphasis on the multi-disciplinary characteristic of competition and also to reflect the interdisciplinary nature of his work. With his 'recognition' of all the three dimensions of competition, Dabbah introduces a paradigm-shifting approach that differs from 'mainstream' scholarship and sheds light on the political dimension of competition law. In terms of the objectives of 'The Internationalisation of Antitrust Policy', it is clear that Dabbah's central aim is not to propose a relentless and unconditional 'internationalisation' of competition law and policy. He explicitly recognises existing problems 'inherent in the territorial nature of competition rules', and, as a response to these issues, argues the need in relevant literature to seek effective ways to overcome these jurisdictional hurdles.[103] As a response, Dabbah introduces and suggests the concept of 'internationalisation' of competition law and policy. His understanding of 'internationalisation' of competition law and policy, to which he

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[100] Dabbah, M. Dabbah, *The Internationalisation of Antitrust Policy* (n 96) 28

[101] ibid.

[102] ibid.

[103] ibid.

refers as a process rather than a static state of law, is much broader in scope compared to the legal problems of 'convergence' or the adoption of 'model competition law' as referred to earlier in this thesis. He asks, against the backdrop of increasing international disputes on competition and differences in national systems of competition law, whether and to what extent an international framework for competition law and policy can be proposed.

Dabbah outlines four categories of legal mechanisms through which the internationalisation of competition law and policy has been carried out so far: bilateral agreements; convergence and harmonisation of law; an international competition statute; and, multilateral agreements on competition.[104] He examines *inter alia* these instruments of internationalisation and eventually proposes the creation of a 'Global Antitrust Framework' under the supervision of the World Trade Organisation.[105]

Nevertheless, 'The Internationalisation of Antitrust Policy' and Dabbah's propositions therein are centrally important and relevant for this thesis for the following reasons. Firstly, Dabbah's emphasis on the relevance of political science to competition rules is clearly evident at least in the context of Turkish competition law. In the Turkish legal context, although the formulation and adoption of a legal framework for competition had been on the table for decades, it was 'Decision No. 1/95 of the EU-Turkey Association Council' establishing the 'Customs Union' between the EU and Turkey which actually led to the adoption of Turkey's first competition law regime.[106] Simulated by Dabbah's exposition on the political dimension of competition law, the political and bilateral relationship between the EU and Turkey, and its impact on Turkish competition law will be examined in detail in the following section.

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[104] ibid.

[105] ibid.

[106] Decision No. 1/95 (n 2).

Secondly, although Dabbah points out problems perennial to competition law at the international level and submits these as the motive for his work, he recognises that these issues are deeply rooted in divergent perceptions on the 'institutions' of competition law and the application and enforcement of its rules at the national level. This proposition directly relates to the 'case-study' of the EU *vis-à-vis* Turkish competition law systems and prompts further analysis of the 'institutions' of Turkish competition law to understand how the 'model' competition law system is perceived at the national level in Turkey.

Thirdly, Dabbah's proposition that a study on the internationalisation of competition rules without an initial enquiry into the *raison d'etre* and objectives of competition law would be a fruitless exercise, prompts for the analysis of the fundamental theories of competition, how the doctrines of competition law have evolved, the structure and functions of the institutions of competition law, and the relationship between economics, politics and competition law.

1.5 Conclusion

In light of the analysis provided in Chapter I, the concluding part focuses on two critical questions: What does the above analysis expose in relation to the current context, both in terms of practice and legal scholarship, and how can we relate these findings both to the central research question, the assessment of whether the EU competition law system is suitable for Turkey and to the problematic reception that a 'one-size' fits all approach under competition law is unquestionably feasible.

First of all, detailed research conducted by scholars like Palim and precise numbers provided by the ICN reveal the significant rise in the number of jurisdictions to introduce and adopt a competition law system at the national level. The ICN, UNCTAD and OECD reports discussed above, while explicitly confirm

that this trend mainly relates to national political commitments and economic choices, reveal, at the same time, the growing attention to this trend by international organisations and increasing body of legal scholarship on this particular issue. This observation supports the argument that Turkish competition law is not the only example and the practice of the adoption of a model competition law has been followed by many jurisdictions regardless of their social, economic, legal and political circumstances.

Secondly, Dabbah demonstrates that the 'internationalisation of competition law' has developed in various forms such as convergence or harmonisation of laws, or through the adoption of bilateral or multi-national agreements between States. In this respect, the Turkish competition law system sets an example for the 'internationalisation' of competition law in its own unique social, economic, political and legal context.

The third point relates to insights into methodology that is feasible and suitable for a comparative legal study in the particular context of competition law. In this regard, the work of Fox and Trebilcock, the 'Design of Competition Law Institutions', prove that a 'bottom-to-top' approach is feasible method for the comparison of the Turkish *vis-à-vis* EU competition law systems to assess divergences and patterns between the two legal systems. On the other hand, Dabbah successfully illustrates the multidisciplinary dimension of competition and points out, although having been much neglected in literature, the political dimension of competition law and its implications for the formulation, adoption, application and enforcement of competition law at the national level. Another key point, as demonstrated by legal scholarship and work of international bodies, is the particular attention drawn to the 'objectives' of competition law. The observation that while the 'internationalisation' of competition law has been embraced by a vast majority of jurisdictions in one way or another, the objectives of competition law appear to remain as a controversial topic due to apparent divergences between individual jurisdictions is key indicator for this thesis. In this context, the objectives of competition law are used as a key proxy to reflect country-specific political, legal, economic and social objectives and help assess

patterns and divergences between different legal systems. The two observations above, i.e. the political dimension of competition law and the 'objectives of competition law' that are seen in literature as a proxy for country-specific social economic and political objectives, are considered as key markers for this thesis, and, particularly, for the analysis of the central research question.

The above conclusion has not only set the scene for the central research question and awareness of the current legal context, but has also provided an insight into feasible options for methodology and revealed critical issues that need to be addressed for the purpose of this thesis. Markedly, it prompts the necessity to analyse the bilateral relationship between the EU and Turkey as an important part of the political dimension of Turkish competition law and informs that both a bottom-to-top approach and a focus on the objectives of competition law are reliable methods for assessing the suitability of a 'model' competition law regime to another jurisdiction.

2 A THEORETICAL DISCUSSION ON THE TRANSFERABILITY OF LAW FROM ONE JURISDICTION TO ANOTHER AND THE RELATIONSHIP BETWEEN LAW AND DEVELOPMENT

'No work is possible without some ruling concepts or propositions. These concepts and propositions do exist as assumptions, superstitions, half-formed notions. There was an implicit theory of law and development, or part of one, in Ataturk's mind when he imported the Swiss Civil Code into Turkey… There is some sort of theory, disguised or implicit, in the work done by law schools and legal professionals in underdeveloped countries all over the world- probably also in law reform projects at home (in America).'[107]

2.1 Introduction

This chapter seeks to provide a theoretical debate on the transferability of law from one jurisdiction to another. It does not aim to focus on the particular field of competition law, but wants to analyse theoretical explanations for the practice of transferring law, in general, from a 'foreign' jurisdiction into national legal systems, and understand how these theories relate to the Turkish legal system in general and to the Turkish competition law in particular.

[107] L. Friedman, 'Legal Culture and Social Development' 1969 4(1) Law and Society Review 29.

2.2 A Theoretical Debate on the 'Transferability' of Law from One Jurisdiction to Another

Among all plausible theories concerning the 'transferability' of law, there is one theoretical explanation that submits the Turkish legal system as the best existing example in practice. This is Friedman's 'law and development' theory.[108] In his work 'Legal Culture and Social Development' he states:

There was an implicit theory of law and development, or part of one, in Ataturk's mind when he imported the Swiss Civil Code into Turkey… There is some sort of theory, disguised or implicit, in the work done by law schools and legal professionals in underdeveloped countries all over the world- probably also in law reform projects at home (in America).[109]

As Freidman stipulates, there is a theory, whether implicit or explicit, underlying the transplant of foreign laws from 'donor' to 'receiving' jurisdictions.[110] The Turkish legal system, and the competition law regime of Turkey, is no exception to this proposition. Nonetheless, in order to understand this proposal and put it into the context, one must first have an insight into how legal transplants occur. The adoption of the Turkish competition law regime, which the CU agreement requires to be based on the EU competition law model, is not the first example of the injection of a foreign legal system into the Turkish context.[111] Historically, it can be observed that the injection of foreign laws into the Turkish legal system has taken place since the abolition of the Ottoman Sultanate on 1st November 1922 as a part of a switch from the system of sharia law to the 'European' civil law system in Turkey.

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[108] ibid.

[109] ibid at 29.

[110] ibid.

[111] For the purpose of this PhD thesis, the term 'injection' shall be used specifically to refer to the introduction of law that had no previous existence in the Turkish legal system.

Almost every Turkish history book, textbook or academic work alike, notes that after the foundation of the Republic of Turkey on 29th October 1923 a wide array of reforms were introduced at the national level under the leadership of Mustafa Kemal Ataturk. This reform process, also known as 'Ataturk reforms', the 'Kemalist revolution' or 'Turkish revolution', led to the rapid transformation of, *inter alia*, legal and administrative institutions, socio-economic policies and traditions, and the legal system in Turkey within the period between 1922 and 1933. The Kemalist revolution, at its core, aimed to terminate the autocratic regime based on sharia law, i.e. the end of the Ottoman legacy, and introduce a secular and *laïcité* regime in Turkey. Many historians, social theorists and academics in Turkey tend to categorize the Kemalist revolution and divide this reform package into individual sections such as the institutional, social, economic, legal, cultural, educational reform etc.[112] In essence, however, the 'Kemalist revolution' was a societal reform process as a whole and comprised various specific and individual reform packages in particular fields. Each reform package was tightly interwoven with all other reform packages, and, at the same time, complemented others to attain the ultimate goal of the revolution process. For instance, the move to the 'western' Gregorian calendar from the Islamic calendar works, to this date, hand in hand with the social reform on the dates of public and

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[112] Turkish Literature: Hifzi Veldet Velidedeoglu, *Turkiye'de Uc Devir* [The Three Eras in Turkey] (Sinan Yayinlari: Ankara Series I-1972, Series II-1973, Series III-1974); A. Mumcu, *Turk Devriminin Temelleri ve Gelisimi* [The Foundations and Evolution of the Turkish Reforms] (Inkilap Yayinevi: Istanbul 1996); E. Kongar, *Ataturk ve Devrim Kuramlari* [Ataturk and Theories on (Turkish) Reforms] (Turkiye Is Bankasi Kultur Yayinlari: Istanbul 1981); G. Bozkurt, *Bati Hukukunun Turkiye'de Benimsenmesi- Osmanli Devletinden Turkiye Cumhuriyeti'ne Resepsiyon Sureci: 1839-1939* (Turkish Institution for History: Ankara 2010); Z. Hafizogullari, Ataturk ve Laiklik (2008) Ankara University Law Review; G. Onkal and A. Sili, *Yasalarin Toplumsal Kokeni: Ithal Dayatmacilik/Yerel Pratikler* (Istanbul Bar Association Publications: Istanbul 2012) English Literature: B. Lewis, *The Emergence of Modern Turkey* (OUP: Oxford 1968); F. Ahmad, *The Making of Modern Turkey* (Routledge: Abingdon 1993); Erik-Jan Zurcher, *Turkey: A Modern History* (Tauris: 3rd edn, London 2004).

religious holidays in Turkey. This applies to the reform on the Turkish legal system too. The change of substantive law would only be effective and meaningful with the transformation of other constituents such as legal education, legal institutions, legal proceedings and adjudication. Nevertheless, the most radical change under the reform of the Turkish legal system was the introduction of, for the first time, a set of national legislation modeled on continental European civil law.[113] This meant the withdrawal of a legal system based on sharia law that had prevailed in the country for centuries and the transplant of a 'western' civil law system instead. Albeit all substantive law injected during the Kemalist revolution has been subject to change over time, this transformation is in line with the change in European civil law. In any event, after the adoption of the CU between the EU and Turkey, and particularly following Turkey's recognition as an EU candidate, the focus has been on the convergence of Turkish laws with the EU *acquis communautaire*.[114] Turkish competition law represents one of the many fields of law introduced to the Turkish legal system, and thereafter developed, in accordance with this political dialogue.

In Friedman's view, the motive behind Ataturk's legal reform process and the replacement of sharia law with the European civil law system in Turkey relies on one premise, this is the theory of 'law and development'.[115] In this particular

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[113] For instance, Turkish Civil Code, Law No: 743, Dated: 17.02.1926 was based on the Swiss Civil Code of 1907; Turkish Code of Obligations, Law No: 818, Dated: 22.04.1926, was based on the Swiss Code of Obligations of 1911; Turkish Criminal Code, Law No: 765, Dated: 01.03.1926 was based on the Italian criminal code of 1889; Turkish Commercial Code, Law No: 865, Dated: 29.05.1926 was based on Italian, German and French commercial laws of the time; Turkish Commercial Code (opus II, Maritime Law), Law No: 1440, Dated: 13.05.1929 was based on the German maritime law of the time; Turkish Code of Execution and Bankruptcy, Law No: 1424, Dated: 18.04.1929, was based on the Swiss Federal Code of 1889.
See, 'Introduction to Turkish Law', edited by Tugrul Ansay and Don Wallace Jr. (6th edn, Kluwer Law, 2011).

[114] Decision No. 1/95 (n 2), Accession Partnership on Turkey's EU candidacy (n 14).

[115] Friedman, 'Legal Culture and Social Development' (n 107) 29.

example, he posits, the replacement of sharia law with the civil law system served as a critical component in structuring and designing the Kemalist revolution and the political revolution in Turkey in the broader sense. While, he argues, diffusion of laws and legal systems has been witnessed in the last few centuries through colonialism, the Turkish experience sets a good example of the 'borrowing of law' by way of law 'reform' or 'modernisation' which has been perceived recently as a common practice by many jurisdictions.[116]

2.2.1 The Theory of 'Law and Development' and How this Debate Relates to the Turkish Legal System in General

The 'law and development' movement differs from other theories and schools in that it is an institution-led initiative with a view to attaining a designated objective. The problem question appointed to law and development scholars was clear and evident right from the start: Is it possible to establish an academic platform to initiate and develop an academic debate and discussion, and eventually generate a body of legal scholarship, on the link between law reform and economic development in transition economies? With this particular purpose in mind, in the 1960's, the United States Agency for International Development, the Ford Foundation, and several other private and public American institutions, pioneered the so-called 'law and development' project to promote academic work that may assist as guidance during law reform process in transition countries in Asia, Africa and Latin America. Seemingly, Turkey was not alone in seeking to enhance its legal, social and economic development through the 'borrowing' of foreign law and this has been a common practice in many jurisdictions. In only a few years following the initiation, the contribution of many leading American law schools, and key academic participants David Trubek, Mark Galanter, and John

[116] ibid.

Henry Merryman, led to the publication of a vast body of scholarship and reports on the assistance of law reform in economic development.[117]

Markedly, in an attempt to set the link between law reform and economic development, Trubek and Galanter center the law and development movement on three set of theories concerning: law and society; society and economic development; and, economic development and legal systems in transition countries.[118] In this context, most importantly, Trubek and Galanter provide a 'map' on the interaction between law and society. Essentially, their perception of 'law and society' is based on a web of relationship between the three segments of society: individuals; intermediate groups; and, the state.[119] In their view, societies operate through a mechanism that is based on the 'individuals-intermediate groups-state' triangle.[120] Under this mechanism, individuals are described as those who have access to one or more of the 'intermediate groups' mainly through memberships.[121] With the participation of individuals, intermediate groups then have the mandate to adopt legal rules in accordance with individuals' interests.[122] The last segment, state, on the other hand, functions as a process by which individuals formulate rules for mutual self-governance.[123] According to this

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[117] D. Trubek and M. Galanter 'Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 Wis LR 1062; D. Trubek, 'Max Weber on law and the rise of capitalism' (1972) 3 Wis LR 720; D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972-1973) 82 Yale LJ 1; J. Merryman, 'Comparative and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' (1977) 25 Am J Comp L 457; E. Burg, 'Law and Development: A Review of the Literature & a Critique of 'Scholars in Self-Estrangement' (1977) 25 Am J Comp L 492.

[118] D. M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 Yale Law Journal 1.

[119] ibid.

[120] ibid.

[121] ibid.

[122] ibid.

[123] ibid.

mechanism, neither intermediary groups nor the state are ends in themselves but they work merely as instruments through which individuals pursue their own welfare.[124] Albeit recognizing intermediate groups and the state as an essential part of the social mechanism they picture, the law and development theory puts particular emphasis on the role of individuals in the formation of legal rules. The relationship between individuals and law is based on the assumption that individuals have direct influence on the formation of legal rules. Therefore, if society seeks social change or economic development individuals are able to shape law accordingly and attain this objective through legal rules. In other words, their guiding assumption is one that recognizes the instrumentality of law in the transformation of society and economic development: law can be consciously designed to achieve particular social purposes and works as both an instrument and element of social change. Under this assumption, their definition of 'economic development' is not limited to progress merely in terms of financial or monetary means but reflects a broader view of the term that incorporates, *inter alia*, greater equality, enhanced freedom, fuller participation in the community, and the increase of individuals' ability to improve their material well-being.

Nevertheless, while the above presumption sets their understanding of how law may be used as an instrument to follow certain social and economic goals, law and development theorists fail to present a direct and plausible mechanism between law and development and the role of law in this context. Their fundamental proposition concerning the link between law and development does not go beyond the view that some legal systems are better than others with respect to a particular aspect described as 'modernity' because they reflect the most advanced ideals and values and this will be reflected on the jurisdiction borrowing this legal system. Accordingly, importing the more sophisticated and 'modern' legal systems of developed countries, from where these legal systems most commonly originate, to 'host' jurisdictions will automatically enhance

[124] ibid.

modernisation and development in the latter. The legal system that is borrowed, they assume, is rational, general, universal and free of local influences and that the society will grow towards the law, but not the other way around.

The propositions submitted by law and development theorists clearly apply to jurisdictions such as Turkey, have implicitly aimed for when borrowing foreign law. As stipulated by Friedman, the ideology behind the borrowing of law is based on the assumption that it will open the pathway to development. Jurisdictions that borrow foreign law assume that legal clarity, legal order, and system brought by borrowed law will in themselves lead to important social and economic changes. Even though an argument can be made that the law and development theory correlates to the borrowing of foreign competition law systems that we observe in practice, Trubek and Galanter's work leaves unaddressed an array of important questions. For example, although Trubek and Galanter's 'formula' on law and society puts emphasis on and explains the role of individuals, the more important questions of the meaning and role of 'law' in society; and how 'law' interacts with and, if ever, changes society is left unaddressed. To put this problem into the context of the Turkish legal setting discussed above, the law and development movement provides no explanation to the question of whether and to what extent Ataturk's legal reform process and the 'Kemalist revolution', a part of which was conducted through the borrowing of foreign laws, have led to development of society, economics and the Turkish legal system in general. These unanswered questions therefore lead to an 'incomplete' theory of 'law and development' that is based on half explicit and half-formed notions and assumptions. Its presumptions, albeit explaining how legal rules are formed and adopted to reflect certain objectives, do not analyse and demonstrate the way in which law works in the attainment of these goals.

In essence, therefore, problems associated with the law and development theory mainly relate to two reasons: the ambiguity with the meaning and scope of 'law' for the purpose of this theory; and, the lack of an analytical explanation of how law leads to social and economic development. On one end of the spectrum lies the problem of how one defines 'law'. This author posits that for the purpose of

the theory of law and development, and more generally for this thesis, 'law' should be understood as a system and process on its own, and as an actual operating unit of the broader social system within which it is situated. This proposition suggests that the broader the understanding of law, the more likely it interacts with social and economic development. Based on this definition and understanding of law, it is suggested that any given legal system is comprised of three fundamental components: the substantive, institutional and cultural aspects of a legal system. The substantive aspect of law refers to the body of legal rules themselves and incorporates *inter alia* legal doctrines, statutes or codes and secondary legislation, and soft-law instruments. The institutional element of law includes primarily legislative and administrative institutions, and judiciary. It is these institutions that adopt, enact, apply and enforce substantive rules. The final component, the cultural aspect of law, represents the way in which substantive rules are applied. The cultural dimension of law can be described as the standards, beliefs, values and consciousness of society, and perhaps the political aspect of law, all of which give 'life' to substantive rules and shape and unite together the three components of any given legal system. For this reason, it is suggested that the cultural component of law is inherently regional and jurisdiction-specific, and may therefore differ significantly from one jurisdiction to another even though it is associated with similar or even identical substantive rules.

Furthermore, according to this broader description, 'law' it is more likely to be intertwined with the economic, political, and social system of the given jurisdiction and to have a considerable impact on society as a whole. If, on the contrary, law is defined narrowly it may then be considered as a more independent 'unit' of society and perhaps to have less impact on social and economic change. The definition and understanding of law and how it operates clearly correspond to the current legal and institutional settings that exist in many jurisdictions. In today's societies almost all jurisdictions have an institutional framework comprising of national first instance courts, appellate courts, administrative authorities, and enforcement agencies through which national substantive rules are applied and enforced. Although these institutions may differ from one jurisdiction

to another in terms of their role, mandate, and competence, in general they operate through a variety of specialists such as economists, lawyers, and public administrators etc. Furthermore, with the emergence of new fields of law (i.e. law and economics, internet law, patent and copyrights law, and competition law), the increasingly sophisticated use of internet, speedy development of technology, progress in innovation, and the rise in complex and cross-border business transactions, 'law' has increasingly been scrutinized under and articulated together with other disciplines like economics or information technology. In this case, it is difficult to describe 'law' as a 'stand-alone' unit of society isolated from other components or a discipline that is under the auspices of legal academics, lawyers or judges exclusively. In light of the current context, the understanding that there is a rigid division between individual units of the broader social system, i.e. legal-economics-politics, seems to have unraveled in the past decades and to have left its place to the awareness that legal systems co-exist and co-extend with the rest of the public process. Therefore, there is strong evidence to support the proposition that, in any given jurisdiction, there exits an obvious and clear link between its legal system on the one hand and its social, economic, and political system on the other.

On the other end of the spectrum is the other shortcoming of the law and development theory, i.e. the problem of providing an analytical discussion on the connection between law and development. According to Friedman, obstacles in the way of developing a general theory on the link between law and development relate to three central issues: difficulties associated with cross-disciplinary work; complexities lead by cross-cultural work; and, difficulties in reaching law-related empirical data in non-Western jurisdictions.[125] The limited number of multi-disciplinary analytical and empirical work with a view to setting the link between 'law' or 'law reform' and 'economic development' confirms difficulties related to

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[125] Friedman, 'Legal Culture and Social Development' (n 107).

this particular issue.[126] Existing academic work in search for reasons of development has been mostly conducted by either economists or sociologists, and by very few lawyers.[127] To the knowledge of this author, there exists no single multidisciplinary work that analyses and explains whether and to what extent law leads to social, economic, cultural and institutional development. Therefore, conclusions in this respect may only be drawn through synthesizing existing individual work conducted by lawyers, economists, and sociologists separately. The examination of economic literature on development is neither the focus nor within the scope of this thesis.

Nonetheless, in 'Getting Interventions Right', Harvard economist Dani Rodrik provides such a compelling argument concerning the critical debate on whether and to what extent economic development relates to local 'jurisdiction-specific' social and cultural factors, that he is able to explain and redress the shortcomings of the law and development theory.[128] During his analysis of Korea and Taiwan's exceptional economic performance witnessed in the 1960's, Rodrik asks one

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[126] ibid.

[127] One of the few examples: A. Singh and R. Dhumale, 'Competition Policy, Development, and Developing Countries' (n 95).

[128] D. Rodrik, 'Getting Interventions Right: How South Korea and Taiwan Grew Rich' (1994) National Bureau of Economic Research Working Paper Series, Working Paper No. 4964.

See also: R. Baldwin ed, '*Trade Policy Issues and Empirical Analysis'* (Chicago University Press: Chicago 1988), D. Rodrik 'Imperfect Competition, Scale Economies, and Trade Policy in Developing Countries', p 109-144; D. Rodrik, 'Globalisation, Social Conflict and Economic Growth', Preisch Lecture delivered at UNCTAD, Geneva, October 24, 1997; D. Rodrik, 'Rethinking Growth Policies in the Developing World', Luca d'Agliano Lecture in Development Economics, delivered at Torino, Italy, October 8, 2004; M. McMillan and D. Rodrik, 'Globalisation, Structural Change and Productivity Growth (2011) National Bureau of Economic Research Working Paper Series, Working Paper No. 17143; O. Blanchard, D. Romer, M. Spece, J. Stiglitz ed, '*In the Wake of Crisis: Leading Economists Reassess Economic Policy'* (The MIT Press: Cambridge, Massachusetts 2012), Chapter 17, D. Rodrik 'Do we Need to Rethink Growth Policies?' p 157-167; D. Rodrik and M. Rosenzweig, 'Development Policy and Development Economics', introduction to Handbook of Development Economics, vol 5 (North-Holland, 2009)

crucial question: Why have so many developing countries with similar legal and economic reform programmes failed miserably, while South Korea and Taiwan's have flourished? Although mainstream economists explain Korea and Taiwan's economic success with export-led economic growth, Rodrik challenges this view and replaces their economic theory with a multi-disciplinary approach. In explaining South Korea and Taiwan's outstanding economic progress, to which he refers as the 'Asian miracle', Rodrik emphasizes the importance of 'social indicators' in the broader scheme of things.[129] The 'Asian miracle', in his view, mainly relates to the unique 'social infrastructure' of South Korea and Taiwan, such as school enrolment and literacy rates, the abundance of relatively skilled labour, and exceptionally high degree of equality in income and wealth, and its affect on these countries' economic and legal reform programme. This theory posits that many developing economies adopt some sort of national legal and economic reform framework in order to enhance development, but, nonetheless, lack highly educated, skilled and competent labor force, i.e. the 'culture', to enable honest and efficient administration of measures taken under the reform programme. The missing element in jurisdictions that failed in legal and economic reform programmes, Rodrik asserts, is the lack of necessary social and cultural pre-conditions of societies that binds law and economics together to then ultimately enhance development, both economically and socially.

Rodrik's work is compelling in that he is able to present, from an economist's perspective, a plausible argument on the pathway to development and the role of law, economics and culture in this context. He successfully links the social, legal and economic components of society together and implies that development is more likely when these elements co-exist and work simultaneously. Most importantly, he draws attention to the three aspects of law discussed above, particularly to the importance of the cultural dimension of law and its binding effect on the three separate elements of a legal system as defined by the author

[129] D. Rodrik, Getting Interventions Right (n 128).

previously. Clearly, this is something that the law and development theory fails to provide. Even though the law and development theorists attempt to present assumptions underlying the 'borrowing' of foreign laws, they do not define the fundamental notions of the theory or address the theoretical mechanism that links law to development.

Alternatively, however, assumptions underlying the law and development theory, the borrowing of foreign laws, and the development of law in general are examined under two further strains of scholarship: the theory of law and society; and, evolutionary theorists. These set of scholarships are the focus of the following sub-sections.

2.2.2 The Theory of 'Law and Society'

The particular question of the role of society on the formulation, adoption and amendment of legal rules, and the matter of transferability of laws between jurisdictions have been subject to debate primarily among *inter alia* comparative lawyers, social theorists, sociologists and philosophers. Nevertheless, the analysis of the relevant literature indicates that most influential work on this subject, and those particularly relevant to the purpose of this PhD thesis, is discussed centrally under two central strains of legal scholarship: first, Montesquieu's work on the 'transferability of laws'; and, second, Alan Watson's set of assumptions on 'transplant' of laws. Montesquieu and Watson can be referred to as the two most influential scholars who worked on the theory of law and society. The discussion on 'law and society', which has a longer history compared to the law and development movement, is relevant to the current discussion in that it sheds light on the question of whether and to what extend law is a part of the society and how the two interact with each other. This question, in turn, provides a theoretical platform for the discussion of 'transferability' of law from one jurisdiction to another, which is the central theme of this section.

At the outset, theories on law and society revolves around and belong to one of the two main categories: first, theories that attempt to relate this discussion to the

‘origins’ of law, i.e. theories concerned with where law comes from and how it became what it is today; and, second, theories that aim to relate the debate to the ‘effect’ of law, i.e. those who relegate law to an effect of other causes. Nonetheless, the most notable division among the proponents of ‘origins’ of law derives from their view on the relationship between law and society: on one side, those who assert that law is nothing more than a reflection of social forces and values and that law has no value on its own; and, on the other, thinkers who argue that law is relatively insulated from and independent of the outside forces, and impervious to pressures flowing from the rest of the social system. The school of ‘origins of law’ has stimulated many sociologists and philosophers, but in the legal field is best represented by Montesquieu and Alan Watson.

- **Charles de Secondat Montesquieu**

The first scholar who discussed in depth the ‘transferability’ of laws between individual jurisdictions was Montesquieu.[130] In essence, Montesquieu’s argument relies on the proposition that laws of each nation should be closely tailored to the people for whom they are made.[131] He emphasizes repeatedly that law neither possesses an autonomous existence nor exists in a vacuum, but is a part of societal values and socio-economic dynamics and institutions in any given society. According to Montesquieu, change in law is a natural response to dynamics of the society such as the way in which markets work, the preferred political and economic ideology and the judiciary system. As he states in his seminal work *The Spirit of the Laws* there is an inseparable connection between characteristics of national governance, i.e. the states, and the nature of law implemented.[132] Accordingly the two are interwoven, and, for this reason, culture and law are not readily transferable between nations with different institutional, governmental and economic structures. Essentially, Montesquieu’s central premise is that law

[130] Charles de Secondat Montesquieu, *De l’esprit des lois* (*The Spirit of Laws)* 1750.

[131] ibid.

[132] ibid.

cannot be separated from the purposes for which it is made and from the social and economic environment within which it is implemented.[133] Many other social, political and legal theorists, such as Karl Marx, Friedrich Hegel, Friedrich Carl von Savigny, Rudolf Jhering, followed Montesquieu's theory, in one way or another, in that they all argue for the connections among law and constitutions, cultures, customs, commerce and even the geography of relevant jurisdictions.[134] Furthermore, decades following the *The Spirit of the Laws*, another distinguished law and society theorist Lawrence Friedman encapsulates Montesquieu's proposition through his conception of law: 'Law is not merely a set of autonomous rules and concepts but rather a mirror of society and economics'.[135] Friedman's harsh criticism towards the law and development theorists, as alluded to above, may be associated with his adherence to Montesquieu's view on the topic. Nevertheless, despite Montesquieu's contribution to the field of comparative law and to the law and society movement, no work followed or challenged his theories on the particular theme of 'legal transplants' in the nineteenth century. In the 1970's, however, Alan Watson and Otto Kahn-Freund, in non-related works, presented competing theories on the issue of legal transplants.[136] While Kahn-Freund's work presented only a revised version of

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[133] ibid.

[134] Friedrich Carl von Savigny, *Das Recht des Besitzes* (The Law of Possession) 1803; Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Elements of the Philosophy of Rights) 1820; Karl Marx, *Philosophische Manifest der historischen Rechtsschule* (The Philosophical Manifesto of the Historical School of Law) 1842; Rudolf Jhering, *Geist des römischen Rechts* (The Spirit of the Roman Law) 1852-1865.

[135] Lawrence Friedman, '*A History of American Law*' (2nd edn, Touchstone 1985) 12.

[136] Alan Watson's most relevant work in this context: A. Watson, *Legal Transplants: An Approach to Comparative Law* (n 3).

See also: A. Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79; A. Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal; A. Watson, 'Two-Tier Law: A New Approach to Law Making' (1978) 27 International and Comparative Law Quarterly 552; A. Watson, 'Society's Choice and Legal Change' (1981) 9 Hofstra Law Review 1473.

Montesquieu's presumption,[137] Alan Watson, a Scottish comparative lawyer, for the first time in legal literature, argued against Montesquieu's 'mirror theory' of law and his proposition that law is a reflection of external factors.[138]

- **Alan Watson**

From the outset, one might link the originality of Watson's work to how he challenges Montesquieu's view on 'law and society' and his reflection theory. In essence, however, two individual characteristics define his research and differentiate his work from other scholars. The first feature is his main area of interest. Watson's principal areas of research are 'growth of law', 'legal development', the examination of how legal systems grow and develop over time, what factors lead to this change, and whether and to what extent society's needs influence this development.[139] 'Legal transplants', as a particular area of research, became Watson's 'specialty' after the findings of his initial research prompted Watson to further examine the relationship between legal transplants and legal development. Secondly, it is clear from Watson's work that his research methodology goes hand in hand with his conception and understanding of 'comparative law' as a legal discipline. The methodology he adopts, his perception of the theory of 'law and society', the way in which he introduces 'legal transplants' as a legal study on its own, and his proposition on 'legal development', all rely on his definition of comparative law.

Somewhat different from other scholars in the field, Watson posits that comparative legal work is concerned with two fundamental questions: first, the nature of the relationship between society and legal rules that operate within it; second, factors that cause law to change.[140] Accordingly, regardless of the

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[137] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Mod LR 1.

[138] A. Watson, 'Legal Transplants and Law Reform' (n 136).

[139] ibid.

[140] ibid.

particular research theme, these two questions are the groundwork of any research conducted within the realm of comparative law.[141] In this context, Watson severely criticizes the way in which academics treat and understand 'comparative law' as an academic discipline on its own. He criticizes 'traditional comparative law' on the grounds that it lacks a systematic explanation of differences and similarities between legal rules and legal approaches in various legal systems, and is limited to providing merely 'incidental descriptive work'.[142] This form of comparative law, according to Watson, is bound to suffer from shortcomings because almost all work conducted under this tradition reveals very little about features of legal change or the direction of legal change even when they deal with sources of law and even when they require much legal history.[143] In Watson's view, 'comparative law' as an academic discipline in its own right is more than merely the study of a foreign legal system or a comparison of individual rules of two or more legal systems but rather a broader study of the relationship and influences between rules of separate legal systems.[144] His theory articulates that most effective way of tracing the relationship between separate legal systems is to examine 'actual influences' that have taken place between one legal system and another. Since, he argues, actual influences on any legal system take place over a period of time, comparative law will have a large historical component. If the purpose of any comparative legal study is to understand the relationship between law and society, it is necessary to examine relevant legal systems and the changes in them over a period of time. For Watson historical dimension is necessary in order to provide a solid assessment of whether or not law responds to changed circumstances.

Watson's understanding of 'comparative law' has a direct impact on the nature of his work. He tries to understand the *raison d'être* of law through historical

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[141] ibid.

[142] ibid.

[143] ibid.

[144] ibid.

examination of the legal system in question.[145] His initial inquiry into 'growth of law' and 'legal development' resulted in four related pieces of work, all of which rely considerably on historical research.[146] According to Watson, his research and work on 'growth of law' and 'legal development' reveals this outcome: the most common form of 'legal change' in history, by which he means 'legal development' observed over a period of time, has been the 'borrowing' of laws from other legal systems. This conclusion prompted Watson to inquire into a separate area of research, i.e. 'legal transplants'. Based on his proposition that 'legal borrowing' has been the main source of legal development and legal change, in his work '*Legal Transplants*' Watson went on to investigate and understand how the phenomenon of legal transplants has occurred in practice.[147] His main goal was to understand the contribution of legal transplants to the development and growth of law. Watson's particular focus was on the influence of the *Corpus Juris Civilis* on the development of civil law in continental Europe. He observes how certain parts of Roman law spread over from continental Europe to Quebec, Louisiana, South America, South Africa and Japan. In a similar vein, he analyses the spread of English common law to the larger parts of Canada, the United States, Australia, New Zealand, and India. His extensive study on the dispersion of Roman law throughout continental Europe reveals not only the spread of substantive rules of Roman law, but also the influence of legal institutions of the Roman law system on continental Europe. For example, he explains how Roman law has influenced legal education in continental Europe

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[145] ibid.

[146] A. Watson, 'The Definition of Furtum and the Trichotomy' (1960) 28 REVUE D'HISTOIRE DU DROIT 197; A. Watson, 'The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law' (1963) 79 LAW Q. REV. 275; A. Watson, 'Some Cases of Distortion by the Past in Classical Roman Law' (1963) 31 REVUE D'HISTOIRE DU DROIT; A. Watson, 'The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership' (1981) 97 Law QR 275.

[147] A. Watson, The Definition of Furtum and the Trichotomy; The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law; Some Cases of Distortion by the Past in Classical Roman Law (n 146).

and the way in which civil law systems compartmentalize legal sub-disciplines.[148] This finding, according to Watson, leads to the following conclusion: if the link between law and society had been an inseparable one, just as Montesquieu and others argue, the dispersion of Roman law and English common law, in practice, would have occurred only with great difficulty and their power of survival would have been severely limited.

Although Watson's '*Legal Transplants*' is much more comprehensive than its limited resume in this chapter, in essence, his most significant contribution to the discipline of comparative law is his introduction of the theory of 'legal transplants' as a subject on its own and a separate area of research. He centers his discussion on the specific theme of legal transplants in order to understand and explain 'growth of law', 'legal development', and the theory of 'law and society'. Instead of focusing on the traditional question of 'whether and to what extent law is a reflection of society', he tries to understand how legal transplants facilitate growth of law and legal development. In other words, he discusses the theory of 'law and society' through the lens of 'legal transplants'.

Four principal strains of propositions, *inter* alia, encapsulate Watson's theoretical claims in his work '*Legal Transplants*'.[149] The first one relates to Watson's proposition on how one should examine legal transplants. Accordingly, the study of 'legal borrowing' is centrally concerned with the examination of how, when, why, and from which legal system(s) the 'transplant' has been made, the examination of circumstances under which the 'model law' has succeeded and failed, and the impact on the transplanted rules of their new environment.[150] Watson's second thesis is concerned with the theory of law and society. Under this proposition he argues that, from a legal point of view, if one wants to

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[148] ibid.

[149] A. Watson, Legal Transplants: An Approach to Comparative Law (n 3); Legal Transplants and Law Reform (n 136).

[150] ibid.

understand the relationship between law and society, it is necessary to examine how law changes in response to 'non-law' elements, such as economics, politics etc., but not the other way around.[151] Watson's 'formula' suggests that when X represents external 'non-law' factors and Y refers to law: one recognises and is aware of X but allows X to vary; nevertheless, focuses on and examines how Y, over a period of time, evolves and changes.[152] This study of comparative law, according to Watson, best reveals the dynamics of the relationship between X and Y at the national level and enables an assessment of the transplant of foreign laws.[153]

Watson's third theory relates to his perception of 'legal development'. In this context, he associates legal development to both legal transplants and 'non-law' societal concerns.[154] To begin with, as discussed above Watson relies on the premise that legal transplants have been the most fertile source of 'legal development' because most changes in legal systems have been the result of borrowing of laws from other jurisdictions.[155] For this reason, he argues, if one wants to understand the extent to which law has changed and developed in any given jurisdiction the focus should be on the examination of legal transplants conducted over a period of time.[156] Therefore, Watson puts the theory of legal transplants in an equal footing with 'legal development' and suggests that a study on the former sheds light on the latter. In this context, he strongly emphasizes that legal transplants examined in the form of patterns and divergences over a period of time best reveals, social concerns and how law responds accordingly.[157]

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[151] ibid.

[152] ibid.

[153] A. Watson, *Legal Transplants and Law Reform* (n 136).

[154] ibid.

[155] ibid.

[156] ibid.

[157] ibid.

In his fourth thesis, Watson puts forward the theory of insulation against Montesquieu's mirror theory.[158] In essence, he links legal change and legal development to the nature of legal profession as opposed to linking legal change to society and its needs. Watson argues that academics, legislators, practitioners, or judges, form the law-making group of the society who are primarily entitled to adopt, implement, interpret and transform legal rules.[159] This law-making group, to which he refers as the 'ruling legal elite', due to its distinctive characteristics, treats law as existing in its own right rather than a reflection of societal concerns.[160] In his view, although the legal elite might have been driven by economic or political reasons for borrowing laws, in essence law is seen as functioning on its own. Watson relies on his observation in '*Legal Transplants*' of the history of the civil law system and nature of legal profession in continental Europe, and concludes that law is, to a great extent, insulated from social change as it mainly reflects the interest of the ruling elite. [161]

2.2.3 'Evolutionary' Theories on Law

The two fundamental sets of scholarship analysed above has shown that while the theory of 'law and development' is based on the hypothesis that the borrowing of 'modern' law plays a key role in enhancing legal clarity and legal order, and this eventually leads to fundamental social and economic changes in society; the school of 'law and society', presents theories, most notably Montesquieu's theory on the 'transferability' and Watson's understanding on the 'transplant' of laws, relation to the connection between law and the society. Theories on the evolution of law, on the other hand, attempt to examine the relationship between law and development from a different perspective. In their core, evolutionary theories of

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[158] ibid.

[159] ibid.

[160] ibid.

[161] A. Watson, Legal Transplants: An Approach to Comparative Law (n 3).

law discuss whether law has an element of 'plasticity'. Social theorists and legal anthropologists such as Henry Maine, Emile Durkheim and Max Weber have analysed and discussed whether law contains within itself the ability to grow into 'modernity' and if 'modern law' is a result of, and develops hand in hand with, 'modern society'.[162] This school of thought centrally aims to provide a theoretical explanation for how law naturally and organically progresses from a lower, or less complex, state to a higher and more sophisticated level in parallel to the development of society. Its relevance to the current discussion relies on the insight it provides on the question of whether law does 'grow' adapt to social change and if the practice of transplants law relates to this ability.

Under the revolutionary theories of law one of the most remarkable assertions belong to Maine who argues that the pattern unfolding in the long history of law reveals one fundamental observation: 'legal systems have changed in a definite sequence and this tells much about the evolution of law'.[163] Maine's evolutionary theory of law relies on the argument that the movement of progressive societies has one common characteristic, namely the growth and recognition of individuals' rights and obligations.[164] The crux of Maine's theory is the recognition that 'individual' as an independent unit of society is the primary determinant in progressing from primitive cultures to modern societies and to modern law.[165] Accordingly, while during 'early law' in primitive cultures it was individuals' status that determined his/her place against law in terms of his/her rights and obligations against society, later in the era of modern civilisation and modern law status had been steadily substituted for individuals themselves. In essence,

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[162] H. Maine, *Ancient Law* 1861; E. Durkeim, *De la division du travail social* (The Division of Labour in Society) 1893; M. Weber, *Economy and Society* (Bedminster Press: New York 1968); T. Parsons, *Social Systems and the Evolution of Action Theory* (The Free Press: New York 1977); M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 J Legal Pluralism 1.

[163] H. Maine, *Ancient Law* (n 162).

[164] ibid.

[165] ibid.

Maine's theory encapsulates the theory of 'evolution of law' as 'from status, to contract'. Its premise is based on the idea that with the recognition of 'individual' as a separate unit of society, 'contract' has become the central constituent of law as opposed to family and 'status'. In essence, Maine's assertion on modern society and modern law follows Emile Durkheim's theory on the 'division of labour', according to which the essence of modern law and modern society is based on the interdependence of various units of society.[166] Durkheim's emphasis on individuals' role as a vehicle in the creation of modern law and society implicitly puts forward another theory on legal development. Under this assertion, all three strains of scholarships discussed in this chapter, theories on law and development, evolutionary theories of law, and, law and society, are intrinsically connected to each other, just as much as individual units of society are intertwined.[167] Clearly influenced by Montesquieu's reflection theory, Durkheim lays down the fundamental thesis that law cannot be perceived as a stand-alone unit of society and has to be elaborated and examined in connection with development, be it economic, social or cultural.

On the other hand, German sociologist Max Weber follows Maine and Durkheim's thesis on the evolution of law.[168] Weber's work mainly unravels the main characteristics of sophisticated and 'modern' legal systems, which, according to him, have been the main cause for the distinctive social organisations of the 'modern' Western society and its economic order. Weber proposes that the separation between modern legal systems *vis-à-vis* other 'non-modern' systems of law lies beneath the presence of what he refers to as 'rationality'.[169] 'Rational law', by which Weber means 'modern law' is: based on general legal principles

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[166] H. Maine, *Ancient Law*; E. Durkeim, *De la division du travail social* (The Division of Labour in Society) (n 162)

[167] E. Durkeim, *De la division du travail social* (The Division of Labour in Society) (n 162).

[168] M. Weber, *Economy and Society* (Bedminster Press: New York 1968); T. Parsons, *Social Systems and the Evolution of Action Theory* (The Free Press: New York 1977)

[169] ibid.

and norms; controlled by the intellect; universalistic –but not particularistic-; and, has an abstract approach to law.[170] Weber, when defining modern law, not only describes the characteristics of a modern legal system in terms of its form and content, but also relies on the way in which law is applied. Accordingly, modern law is different from non-modern law in that it formulates and then applies 'fixed legal norms and concepts in the form of highly abstract rules' only to the 'unambiguous general characteristics of the facts of the case'.[171]

Nevertheless, among all evolutionary theorists, Talcott Parsons is the scholar who takes one step further and suggests developing a universalistic legal system with a view to furthering economic and societal evolution.[172] By a universalistic legal system Parson means developing a general legal system that is 'an integrated system of universalistic norms, applicable to the society as a whole rather than to a few functional or segmental sectors, highly generalized standards and principles, relatively independent of both the religious agencies ... and vested interest groups'.[173] And although these characteristics may be perceived as variations of Weber's concept of formal rationality, Parson's universalistic and 'rational' legal system, under his proposition, is the backbone of 'a complex societal structure and process, the development of which increases the long-run adaptive capacity of living systems and enables to attain higher levels of general adaptive society.[174]

Reflections of Maine, Weber and Parsons work are clearly observed in Marc Galanter's 'The Modernization of Law', in which he illustrates an open list of the traits of 'modern law'.[175] Galanter's 'model' of modern law, despite having much

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[170] ibid.

[171]ibid.

[172] T. Parsons, *Social Systems and the Evolution of Action Theory* (n 168).

[173] ibid.

[174] ibid.

[175] M. Galanter, 'The Modernization of Law', in M. Weiner, *Modernization: The Dynamics of Growth* (Basic Books: New York 1966).

in common with Weber and Parson's propositions, re-synthesizes and encapsulates early theories. The characteristics of Galanter's 'modern legal system' are described as: uniform; transactional; universalistic; rational; amendable; and, political. In support of Galanter's description of 'modern' legal system, Friedman explains the role of each trait of modern law: uniform, because it is unvarying in its application and same rules apply to everyone; transactional, because rights and responsibilities arise only out of transactions but not status; universalistic, as it is reproducible and predictable; rational, because it can be learnt and its rules are valued because of its instrumental utility in producing consciously chosen ends; political, because it is amendable.[176] Nonetheless, Friedman emphasises that legislative, executive and judicial powers are separate and distinct in modern law, and, the modern legal system, as a more complex setting compared to 'non-modern' legal systems, is run by intellectuals i.e. lawyers.[177]

2.3 A Reflection of the Theoretical Debate on 'Legal Transplants', 'Modern Law' and How These Theories Resonate to the Notion of 'Development'

Section 1 of this current chapter aimed at providing a theoretical debate on 'legal transplants', a concept that relates directly to the central research question of this thesis. Based on this objective, it presented the 'Kemalist reform', the far-reaching 'legal reform' process of Turkey that was heavily based on the borrowing of foreign laws, as a 'live' and existing example of what is referred to

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[176] ibid.

[177] L. Friedman, 'On the Legal Development' (1969) 24 Rutgers Law Review 11; L. Friedman, 'Legal Culture and Social Development' (n 107); H. Merryman, D. Clark, and L. Friedman, 'Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal Indicators for Comparative Study' (Stanford Studies in Law and Development, Stanford, 1979); L. Friedman, *General Theory of Law and Social Change*, in Law and Social Change, J. Ziegel, (York University, Toronto, 1973) p 17-35.

in socio-legal literature as a ‘legal transplant’, and, in this connection, submitted potential theories, both implicit or explicit, behind the borrowing of foreign laws under the Kemalist ‘law and development movement’ in Turkey.

The ‘Kemalist legal reform’ provided a ‘live’ example against which we were able to assess legal theories analysed in the specific context of ‘legal transplants’, from Friedman’s ‘law and development’, Harvard economist Rodrik’s propositions, to comparative legal theorist Alan Watson’s premises and evolutionary theories of law.

The ‘law and development’ thinkers, as the first group of theorists to discuss transplants of law, theories behind ‘legal reform process’ based on the borrowing of foreign law, and the extent to which this borrowing relates to social and economic development, have successfully provided a theoretical debate in response to the current legal context where countless jurisdictions have transplanted foreign laws with a view to ‘modernising’ their national legal systems. Nevertheless, even though they present a theory on the three segments of society and emphasise the instrumental role of law on the pathway to social and economic development, the law and development thinkers leave unattended the question of conditions necessary for attaining social and economic development in addition to and following the ‘transplant’ of foreign laws. Undoubtedly, all jurisdictions, including Turkey, transplant foreign law into their national legal systems with the assumption that, either implicit or explicit, this borrowing will lead to development. What is much needed, in terms of theoretical input, is theories that further and foster the debate on how this transplant relates to development. As a response to the shortcomings of the law and development movement, Section 1 made to concluding remarks: it submitted a proposition on the meaning of ‘law’ for the purposes of this thesis and the connection between law and development more generally; and, to provided an example of how, from a socio-economic perspective, Rodrik has successfully related law to social and economic development. Most remarkably, both discussions exposed and highlighted the importance of the ‘cultural’ element of law and its role in terms of how it ‘binds together’ and ‘gives life’ to all three components of a legal system,

and to the broader social and economic systems for that matter. As the examples of South Korea and Taiwan illustrate, culture seems to be the fundamental component in the operation of legal, economic and social systems of individual jurisdictions, and play an important role in 'assimilating' the borrowed foreign law, and, in turn, facilitating social and economic development. The theory behind the 'transplant of foreign law' and development, therefore, can be constructed on 'the proper functioning of the three fundamental pillars of a legal system in connection with the healthy relationship and harmony between the legal system of a jurisdiction on the one hand, and the social, political and economic systems on the other. It is based on the understanding that legal systems, although functioning as a separate institution on their own, co-exist and co-extend with the rest of the public process. Accordingly, the borrowed foreign law not only takes place within the domestic legal system, but, at the same time, functions as a part of the national legal, economic, social, and political process. Drawn from Rodrik's analytical examination of the South Korean and Taiwanese experiences and law and development theorists' discussion on the issue, this theory relates to at least jurisdictions seeking to enhance social and economic development through law reform and the borrowing of foreign laws: from the early stages of the Kemalist revolution, to the 'transplant' of the EU competition law system to Turkey.

Be that as it may, the discussion on the 'transferability' of laws from one jurisdiction to another, the central focus of Section 1, started from the analysis of the 'law and development' movement and stretched, unexpectedly yet informatively, all the way to the discussion on, first, theories on 'law and society' and, then, to evolutionary theories on law. This was mainly lead by what has been and posited by legal scholarship and academics in the field and how this has been reflected on literature on the 'transferability' of laws.

Alternatively, it is examined, 'evolutionary theorists' have attempted to explain whether and to what extent 'modern' society can be explained with and is a reflection of 'modern law'. Whilst many thinkers under this strain of scholarship have presented the main features of 'modern law', the important question of

whether modern law is the cause or the result of social and economic development, which is referred to as ‘modern society’, has been mostly neglected. Parsons, however, sets an exception among the evolutionary theories of law and relates ‘complex societal structure’ and the attainment of ‘higher levels of general adaptive society’ to the presence of a functioning ‘modern law’ at the national level.

Competition Law and Development

While the relationship between ‘law and development’ and ‘law and modernity’ have been the main subject and research area of sociologists, legal theorists and historians for a considerable period of time, the particular subject of ‘law and development’ is a relatively new research area with a growing number of papers and books recently contributed to literature.[178] Overall, there is widespread agreement among competition law academics that, if appropriately implemented, competition law principles improve consumer welfare, enhance growth and aid those with low income in developing economies.[179] Econometric analysis supports this view of competition lawyers and suggests that active enforcement of competition law contributes not only to static but also to dynamic economic benefits.[180] For example, in their empirical study Dutz and Vagliasindi display the link between competition law enforcement and improvement in allocation of resources.[181]

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[178] D Sokol, T Cheng, and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press, 2013); E Fox and A Mateus, *Economic Development: The Critical Role of Competition Law and Policy* (eds) (Edward Elgar, 2011); J Drexl, M Bakhoum, E Fox, M Gal, D Gerber (eds), *Competition Policy and Regional Integration in Devloping Countries*; J Drexl, M Bakhoum, E Fox, M Gal, D Gerber, *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015).

[179] ibid

[180] A Hayri and M Dutz, ‘Does More Intense Competition Leed to Higher Growth’, World Bank Policy Research Paper, November 1999.

[181] M Dutz and M Vagliasindi, ‘Competition Policy Implementation in Transition Economies: An Empirical Assessment’, 47 European Bank for Reconstruction and Development (2002).

The more pressing problem, however, is the question of how competition law is able to contribute to 'developmental' goals of transition economies. What is the 'prescription' for enhancing growth and development through the principles of competition law? Similar to the earlier discussion on 'law and modernity' and how modern law leads to modern societies, competition lawyers rely on the existence of certain preconditions and determinants which allow the success of competition law in developing countries.[182] In this connection, the required institutional, legal and political infrastructure involves *inter alia* the following dimensions: A state and political system with a democratic regime that retains the separation of powers, and checks and balances among the three branches of state; an efficient and independent public administration and regulatory system; a strong and independent judiciary system with respect to the rule of law; consistent and coherent application of competition rules.[183]

The discussion above concludes that for a model competition law system to be successful in advancing growth and development, it needs to be placed within a strong legal, political and social infrastructure. A model competition law without an autonomous competition authority to provide consistent and coherent application of the law, an independent judiciary founded on the principle of the rule of law, clear procedures, and competition advocacy throughout the country, will fall short in addressing developmental objectives.

2.4 Conclusion

In light of the above theoretical discussion four fundamental conclusions are drawn. Firstly, as posited by the 'law and development' theorists as well as Parsons, the general assumption behind the borrowing of foreign laws, either implicit or explicit, relies on the understanding that incorporating 'modern law' and its traits shall open the pathway to economic and social development in

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[182] n 179.

[183] n 179.

jurisdictions 'hosting' the borrowed law. Based on the evidence that the EU competition law system has been adopted as a part of Turkey's 'integration' to the wider EU legal, economic and political system, and ultimately with the objective to further economic and social development in Turkey, it is argued that the Turkish example clearly relates to 'law and development's fundamental presumption.[184] Secondly, whilst Rodrik's analytical experiment of the Taiwanese and South Korean experience and Parson's proposition set a clear link between law on one side and social and economic development on the other, both theories expose that the cultural element of law stands out as a critical factor in attaining social and economic transformation through the 'borrowing' of foreign laws. Ultimately, the cultural component of law reveals itself as an essential determinant in the way in which foreign law is perceived at the national level by the 'host' jurisdiction and in facilitating social and economic development through the 'borrowing' of foreign law. Thirdly, it is suggested that among all theories examined in Chapter II, Watson's understanding of 'comparative law' as a discipline and study on its own and his proposition on how to examine legal transplants reconcile best with the current legal context under the EU and Turkish competition law systems and also with the central research question of this thesis. Fourthly, in light of the evolutionary theorists' propositions, it is suggested that for the purpose of the examination and assessment of the suitability of EU competition law to Turkey, i.e. the borrowing of the foreign 'EU competition law', this thesis shall adopt a methodology that embraces in principle the connectedness, relatedness and the integration of the Turkish competition law system with the broader economic, political and social system of Turkey.

[184] Decision No. 1/95 (n 2); (Accession Partnership) n (14).

3. HOW TO CRITICALLY ASSESS THE SUITABILITY OF EU COMPETITION LAW TO TURKEY

'...Antitrust ... (is not) merely a set of economic prescriptions applicable to a sector of the economy. But it is much more than that; it is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency'.[185]

2.5 Introduction

The analysis conducted in Chapters I and II has led to two fundamental observations in relation to assessing the suitability of EU competition law to Turkey. Firstly, this assessment requires an element of comparison; secondly, nonetheless, an initial understanding of key issues is necessary in order to provide a legally sound and robust comparative work. In light of these fundamental conclusions, Chapter III aims to shed light on the following questions: What are the key issues that this thesis needs to address; and what is the methodology, i.e. the 'roadmap', adopted under this comparative legal work?

In respect to the first question, the observation that the political dimension of competition law has been largely neglected in literature, despite its implications for application competition rules at the national level, is addressed under this chapter with a particular focus on the political bilateral relationship between the EU and Turkey. Chapter III analyses this bilateral relationship between the EU and Turkey in order to clarify and understand the legal basis for the 'transplant' of

[185] R. H. Bork and W. S. Bowman, *'The Goals of Antitrust: A Dialogue on Policy'* (n 86).

the EU competition law 'model' to Turkey and the implications of this relationship for the Turkish competition law regime in general. Furthermore, as inferred from scholarship and work of international bodies analysed in Chapter I, another marker in the assessment of the suitability of EU competition law to Turkey, is the necessity to have initial understanding of key economic and legal principles.[186] The clarification of fundamental economic and legal terminology in Chapter III lays the foundation of, and serves as a reference point for, the deeper analysis conducted at a later stage under the comparative legal work.

As regards to the second issue of the methodology and how to construct the 'roadmap' for this thesis, the key marker is the observation that the objectives of any given competition law regime are strongly related to country-specific social, economic, and institutional determinants, and that the objectives of competition law are considered as a guide in this context.[187] However, in addition to the 'objectives of competition law' as an important guide in assessing the suitability of EU competition law to Turkey, there are five other markers also inferred from the conclusions of previous chapters, which this author considers as fundamental for the central research question and in the construction of the methodology for this thesis.

These presumptions, inferred from earlier observations, are put in the particular context of Turkish competition law in the following manner: The general assumption underlying the theory of the 'transplant' of EU competition law to Turkey relies on the understanding that incorporating the modern competition law system of the EU into the national legal systems of Turkey will lead to social, economic and legal development in the latter.[188] As drawn from the work of Dabbah and Rodrik, in the application of competition law in Turkey, the cultural

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[186] See p. 26-38.

[187] ibid.

[188] See p. 63-66.

element of law stands out as a critical determinant in attaining social, economic, and legal development.[189]

Furthermore, Watson's understanding of comparative legal studies and his proposition on the examination of 'legal transplants' demonstrates a viable method for the assessment of whether and to what extent the EU competition law 'model' is suitable for Turkey, a jurisdiction with no or little competition law experience prior to the transplant.[190] As important as Watson's understanding and definition of 'comparative legal work' is the work of 'evolutionary theorists' on 'modern society' and 'modern law', which suggests and supports an approach for this thesis that embraces the connectedness, relatedness and the integration of the competition law systems with the broader economic, political and social system of individual jurisdictions.[191]

It is these key markers that guide the scope of this chapter, and help construct a viable methodology for the assessment of whether the EU competition law is suitable for Turkey.

2.6 The Bilateral Relationship between the EU and Turkey

The bilateral relationship between the EU and Turkey not only sets the political dimension of Turkish competition law but also emerges as the legal basis for 'transplanting' the EU competition law 'model' into the broader Turkish legal system. Therefore, this affiliation transcends beyond setting a 'symbolic' political relationship between the two jurisdictions and seems to have significant implications for the adoption and development of Turkish competition law. For these reasons alone, as well as the lack of literature examining this topic, the

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[189] Dabbah, (p. 56-58); Rodrik (p. 72-74).

[190] Watson (p. 77-82).

[191] Evolutionary Theories of Law (p. 82-86).

political dimension of Turkish competition law merits a detailed analysis for the purpose of this thesis.

Despite several earlier attempts by Turkish legislators to formulate and adopt a legal framework for competition in Turkey,[192] it was in fact the CU established between the EU and Turkey under Decision No. 1/95 that led to Turkey's first competition statute,[193] the Law on the Protection of Competition (LPC).[194] Nevertheless, a *prima facie* analysis of the history of the bilateral relationship between Turkey and the EU reveals that this political relationship had been initiated as early as in 1963 with the 'Agreement Establishing an Association Between the European Economic Community and Turkey', long before the CU was established.[195]

This section of Chapter III aims to put this relationship under scrutiny in light of three legal instruments that construct the legal basis for this relationship and mark the development of Turkish competition law: the 'Association Agreement';[196] 'Decision No. 1/95;[197] and, the 'Accession Partnership(s)'.[198] This examination, however, is not conducted with the particular intention or primary purpose to provide a legal assessment under the principles of public international law, but rather to understand the implications of this bilateral legal arrangement for the 'transplant' of the EU competition law 'model' in Turkey, and thereafter its application and enforcement at the national level in Turkey, as a fundamental part of assessing the suitability of the former to the latter.

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[192] For draft laws that were presented in Turkish Parliament but did not pass, see (n 74).

[193] (LPC) (n 15).

[194] Decision No. 1/95 (n 2).

[195] Association Agreement (n 1).

[196] ibid.

[197] Decision No. 1/95 (n 2).

[198] Accession Partnership (n 14).

2.6.1 The Association Agreement[199]

Following the adoption of the Treaty of Rome on 25 March 1957, which established the 'European Economic Community' (EEC), Turkey made an official application in 1959 to join the 'community'.[200] Correspondingly, the five founding members of the then EEC and Turkey signed the 'Agreement Establishing an Association between the European Economic Community and Turkey' (AA), also referred to as the 'Ankara Agreement' in practice, on 1 September 1963 in Ankara.[201]

Annex 1 to the AA explicitly defines the 'Parties' as Turkey on one side and the then EEC (or) the EEC Member States separately, (or) the then EEC and the EEC Member States collectively on the other. On this basis it can be argued that the relationship between the Parties could be accepted as 'bilateral' in the legal sense, therefore granting equal rights to each side of the agreement.[202]

From the very beginning of the AA one can observe then EEC's concerns over the weakness of and problems related to the Turkish economy and how this issue has been stipulated as an obstacle to Turkey's accession to the community. In this regard, the Preamble reads:

> '(The parties) are '(RESOLVED) to ensure a continuous improvement in living conditions in Turkey and in the (EEC) through accelerated economic progress and the harmonious expansion of trade; and to reduce the disparity between the Turkish economy and the economies of the Member States (of the EEC)'; and are '(MINDFUL) both of the special problems presented by the development of the

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[199] Association Agreement (n 1).

[200] The Treaty Establishing the European Economic Community, 25 March 1957 (Treaty of Rome).

The founding members of the EEC were Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, and Holland.

[201] Association Agreement (n 1).

[202] Association Agreement (n 1) Annex 1.

> Turkish economy and of the need to grant economic aid to Turkey during a given period; and also (RECOGNISE) that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date'.[203]

Following the consideration of the prevailing economic hardship in Turkey at the time, Article 2(1) articulates the objectives of the AA as:

> '...while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people', '…to promote the continuous and balanced strengthening of trade and economic relations between the Parties.'[204]

Following this, Articles 2(2) and 2(3) continues:

> 'In order to attain the objectives set out in paragraph 1, a customs union shall be progressively established in accordance with Articles 3, 4 and 5.'[205] (The) 'Association shall comprise: (a) a preparatory stage; (b) a transitional stage; (c) a final stage.'[206]

In the specific context of competition law, on the other hand, TITLE II, IMPLEMENTATION OF THE TRASITIONAL PHASE, Article 16 stipulates:

> '…(Parties) recognise that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the … (*Treaty of Rome*) … must be made applicable in their relations within the Association'.[207]

In relation to the successive stages and the final establishment of the CU, while Article 3 of the AA stipulates that the preparatory stage shall not exceed five years following the start of the agreement,[208] Protocol No. 1, Article 1 states that within four years following the entry into force of the agreement an additional 'Protocol',

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[203] Association Agreement (n 1) Preamble.

[204] Association Agreement (n 1) Article 2(1).

[205] Association Agreement (n 1) Article 2(2).

[206] Association Agreement (n 1) Article 2(3).

[207] Association Agreement (n 1) Article 16.

[208] Association Agreement (n 1) Article 3.

marking the end of the preparatory and the start of the transitory stage, shall be adopted.[209] Accordingly, this protocol shall aim at laying down the conditions, detailed rules on and implementation of the principles of the transitional stage.[210] In accordance with this requirement '*The Additional Protocol and Financial Protocol ... annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force*' (the 'Additional Protocol'), which marks the end of the preparatory stage, was signed on 23 November 1970.[211] The Additional Protocol openly requires, within six years of its entry into force i.e. during the 'transition phase', the adoption of conditions for the application of rules on competition laid down in the Treaty of Rome.[212] Nevertheless, the 'implementing rules' for the application of the competition rules of the then EEC between the Parties have been excluded from the 'Additional Protocol' and no relevant legal document has been adopted up to this date.

Based on the Preamble of the AA in conjunction with Articles 2, 3, 4, 5 and 16, and the Additional Protocol annexed to the same agreement, the following legal analysis and conclusion is made. To begin with, it is suggested that what the AA

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[209] Association Agreement, Protocol No. 1, Article 1: 'Four years after the entry into force of this agreement, the Council of Association shall consider whether, taking into account the economic situation of Turkey, it is able to lay down, in the form of an additional Protocol, the provisions relating to the conditions, detailed rules and timetables for implementing the transitional stage referred to in Article 4 of the Agreement.'

[210] ibid.

[211] The Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and to measures to be taken for their entry into force - Final Act - Declarations (Additional Protocol) (OJ L 293, 29.12.1972, p. 3–56).

[212] Additional Protocol, TITLE III, CLOSER ALIGNMENT OF ECONOMIC POLICIES, CHAPTER I, COMPETITION, TAXATION AND APPROXIMATION OF LAWS, Article 43(1): 'The Council of Association shall, within six years of the entry into force of this Protocol, adopt the conditions and rules for the application of the principles laid down in Articles 85, 86, 90 and 92 of the Treaty establishing the Community.

argues for is the establishment of an 'economic association' or a 'common economic unit' between the Parties based on a closer coordination of economic policies. It is fundamentally based on the objective to enhance economic co-operation but not 'economic integration', as it was with the then EEC, and aims to achieve this through the 'alignment' and 'approximation' of economic policies of Turkey, such as competition and taxation, with that of the then EEC. The AA requires that this economic co-operation is established through the gradual establishment of a customs union between the Parties, i.e. namely with the completion of the: preparatory, transitory, and a final stages.

In relation to the particular context of social rights and the rights of workers, although the AA requires in Article 9 that 'any discrimination on grounds of nationality shall be prohibited' and in Article 12 that 'Parties agree to be guided by (the relevant provisions of the Treaty of Rome) for the purpose of progressively securing freedom of movement for workers between them', these clauses have been interpreted narrowly by the Member States of the EU and the European Courts.[213] At least not in the sense that Articles 48, 49 and 50 of the Treaty of Rome, which deal with the free movement of workers, and the corresponding articles of the succeeding European Treaties, have been understood and interpreted by the Member States of the EU and by the European Courts.[214] It has been established by the case-law of European Courts' that Turkish workers need to make individual applications to each Member State when they intend to reside as a 'worker' under Articles 9 and 12 AA, and, following this application, Member States shall assess this application on a case-by-case basis.[215]

To the contrary, albeit its ultimate purpose was to establish and strengthen economic integration between Member States, the Treaty of Rome incorporated

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[213] Association Agreement (n 1) Articles 9 and 12.

Case C-371/08 *Nural Ziebell v Land Baden-Württemberg* [2012] 2 CMLR 35, para 46.

[214] Treaty of Rome (n 195).

[215] Case C-371/08 *Nural Ziebell* (n 214).

clauses on matters relating to employment, labour law and working conditions, social security, prevention of occupational accidents, and, the right of association, all of which strongly relate to social policy. Moreover, many, if not all, principles on social policy under the European Treaties following the Treaty of Rome have seemed to evolve and develop around the freedom of movement for workers. This feature of the AA is critical because it affirms the 'pure economic nature' of the AA as recently endorsed by Advocate General Bot in *Ziebell v Land Baden Wurttemberg* (Ziebell).[216] In *Ziebell*, upon preliminary reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the German administrative court 'Verwaltungsgerichtshof Baden-Württemberg' asked the European Court of Justice (ECJ) whether Turkish workers residing within the EU are entitled to enjoy the strengthened position granted to EU workers under EU Directive 2004/38/EC.[217] With reference to existing case-law, Advocate General Bot reiterated that international agreements need to be interpreted not only in light of the text of the agreement but also in light of its objectives.[218] Having referred to the three stages of the CU stipulated in the AA, Advocate General Bot emphasized the 'exclusive economic purpose' of the AA and concluded that EU Directive 2004/38/EC goes beyond this 'pure economic context', and lays down the conditions of the right of free movement and residence granted within the territory of the Member States granted to EU nationals.[219] Thus, the scope of workers' rights as alluded to by the AA has been interpreted by EU Courts' and Member States in light of the 'pure economic objective' of the AA.

Secondly, although the AA states that Turkey's progress in improving national economic conditions shall facilitate the 'accession of Turkey to the Community at

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[216] ibid

[217] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[218] Directive 2004/38/EC, para 43.

[219] Opinion of Advocate General Bot delivered in, Case C-371/08 *Nural Ziebell* (n 214).

a later date', it is made clear that the final stage of the Customs Union between the Parties will not automatically lead to Turkey's EU membership. This may also be related to the pure economic nature of the AA and its limitations in terms of setting political and social collaboration between the Parties. Therefore, it is suggested that the AA, in essence, does not primarily aim for Turkey's 'immediate' or 'automatic' accession to the EU following the establishment of a customs union, but, perhaps, argues for a *sui generis* arrangement between the Parties.[220]

Thirdly, again, by virtue of the 'purely economic nature' of the AA, rules on competition are seen as a fundamental part of the agreement. Article 16 of AA requires not only the approximation of competition rules of Turkey to that of the Treaty of Rome, i.e. Articles 85-90, but also stipulates that these principles are made applicable between the Parties.[221] For this purpose, Article 8 AA also requires the Council of Association to determine the conditions, rules and timetables for the implementation of the provisions relating to the particular fields of competition and taxation.[222]

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[220] Article 28 of the Association Agreement stipulates: 'As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.'

[221] Article 16 of the Association Agreement stipulates: 'The Contracting Parties recognize that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable in their relations within the Association.'

[222] Article 8 of the Association Agreement stipulates: 'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the Provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.' See Additional Protocol, TITLE III, CLOSER ALIGNMENT OF

2.6.2 Decision No. 1/95 of the EU-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (Decision No. 1/95): The Establishment of a 'Customs Union' Between the EU and Turkey[223]

While the Additional Protocol to the AA initiated the transitory stage of the 'economic union' between the then EEC and Turkey, Decision No. 1/95 of 1995 marked the end of this transitional phase and the establishment of the final element of this process, i.e. the 'Customs Union' between the Parties.[224]

At the outset, it is clear that Decision No. 1/95 aims to establish a customs union between the Parties with a view to providing the free movement of goods within the geographical territory comprising of EU Member States and Turkey[225] through the removal of customs duties[226] and quantitative restrictions[227] on imports and

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ECONOMIC POLICIES, CHAPTER I, COMPETITION, TAXATION AND APPROXIMATION OF LAWS, Article 43(1).

[223] Decision No. 1/95 (n 2).

[224] ibid.

[225] The free movement of goods under Decision No. 1/95, however, excludes agricultural products. Decision No. 1/95, CHAPTER I 'FREE MOVEMENT OF GOODS AND COMMERCIAL POLICY', Article 2: 'This Chapter shall apply to products other than agricultural products as defined in Article 11 of the Association Agreement. The special provisions relating to agricultural products are set out in Chapter II of this Decision.'

[226] Decision No. 1/95 (n 2), Section I 'Elimination of customs duties and charges having equivalent effect', Article 4: 'Import or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of this Decision. The Community and Turkey shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect from that date. These provisions shall also apply to customs duties of a fiscal nature.'

[227] Decision No. 1/95 (n 2), Section II 'Elimination of quantitative restrictions or measures having equivalent effect', Article 5: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Parties'; Decision No. 1/95, Article 6: 'Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between the Parties.'

exports of goods between the EU and Turkey, and the removal of charges having equivalent effect as such. At the same time, however, Decision No. 1/95 further requires the alignment of the national law of Turkey with that of the EU in the particular fields of intellectual, industrial, and commercial property rights, state aid and competition law.[228] Decision No. 1/95 explicitly rules that the approximation of Turkish legislation and implementing policies concerning these fields of law is 'compatible with the proper functioning of the Customs Union'.[229] In this context, Decision No. 1/95 Chapter IV specifically deals with the 'Approximation of Laws'.[230] Under Chapter IV, while (Section I) Article 31 accommodates the approximation of national rules on the 'protection of intellectual, industrial and commercial property rights'[231], (Section II) Article 39 deals with the alignment of Turkish rules on competition specifically.[232]

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[228] Decision No. 1/95 (n 2), CHAPTER IV, 'APPROXIMATION OF LAWS', Section I, 'Protection of intellectual, industrial and commercial property', Article 31. Article 31(1): 'The Parties confirm the importance they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property right.' Article 31(2): 'The Parties recognize that the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights are provided in both constituent parts of the Customs Union. Accordingly, they undertake to meet the obligations set out in Annex 8.'

[229] Decision No. 1/95 (n 2), CHAPTER IV, 'APPROXIMATION OF LAWS', Section I, 'Protection of intellectual, industrial and commercial property', Article 31 (2); Decision No. 1/95, CHAPTER IV, 'APPROXIMATION OF LAWS', Section II, ''Competition', Article 32 (1).

[230] ibid.

[231] Decision No. 1/95 (n 2), CHAPTER IV, 'APPROXIMATION OF LAWS', Section I, 'Protection of intellectual, industrial and commercial property', Article 31. Article 31(1): 'The Parties confirm the importance they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property right.' Article 31(2): 'The Parties recognize that the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights are provided in both constituent parts of the Customs Union. Accordingly, they undertake to meet the obligations set out in Annex 8.'

[232] Decision No. 1/95 (n 2), CHAPTER IV 'Approximation of Laws', Section II, 'Competition', B. 'Approximation of legislation', Article 39(1): 'With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.'

Essentially, the way in which Decision No. 1/95 deals with rules on competition is twofold: first, Chapter IV, Section II (A) on 'Competition rules of the Customs Union' lays down the rules on competition which shall be applied between the Parties;[233] second, Section II (B) on 'Approximation of legislation' requires Turkey to adopt at the national level a legal framework for competition based on the EU competition law 'model'.[234] Furthermore, in relation to the first limb, Decision No. 1/95 Article 37 requires that within two years following the entry into force of the Customs Union, the EU-Turkey Association Council shall, based upon those already existing in the EU, adopt by decision 'implementing rules' on competition to be applied between the Parties and specify the role of each jurisdiction in this respect.[235] Until the 'implementing rules' are adopted, Article 37 further requires that each jurisdiction shall rule on the admissibility of conduct in accordance with the competition rules of the EU.[236] This approach is similar to the one taken in the AA, which also requires the application of the EU competition law 'model' both at the national level in Turkey and between the two jurisdictions themselves.[237]

In effect, corresponding to the requirement set forth in Section II (B), Turkey adopted its first national legal framework for competition, the Law on the Protection of Competition (the LPC), in 1994 and thereafter established the Turkish Competition Authority (the TCA) in 1998, an administrative authority entitled to apply and enforce the LPC and relevant secondary legislation and soft-

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[233] Decision No.1/95 (n 2), CHAPTER IV 'Approximation of Laws', Section II, 'Competition', A. 'Competition rules of the Customs Union', Article 32.

[234] Decision No. 1/95 (n 2), Article 39.

[235] Decision No. 1/95 (n 2), Article 37: The Association Council shall, within two years following the entry into force of the Customs Union, adopt by Decision the necessary rules for the implementation of Articles 32, 33 and 34 and related parts of Article 35. These rules shall be based upon those already existing in the Community and shall inter alia specify the role of each competition authority.

[236] ibid.

[237] Association Agreement (n 1).

law instruments.[238] Nonetheless, to date, there seems to exist a lack of clarity concerning the legal nature and form of Section II (A) on 'Competition rules of the Customs Union', and on the applicability of these rules within the Customs Union territory. And although Decision No. 1/95 clearly prohibits anti-competitive conduct that '*affect trade between the Community and Turkey …as incompatible with the proper functioning of the Customs Union...*',[239] and stipulates that such anti-competitive practice '*…shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation*'[240] the absence of relevant 'implementing rules' has led to legal ambiguity and uncertainty concerning the application of competition rules among the Parties.

Although there exists a lack of clarity on the legal nature and implications of 'decisions' taken by the EU-Turkey Association Council, Article 22 AA explicitly grants authority to the EU-Turkey Association Council to adopt decisions for the

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[238] LPC (n 15).

[239] Decision No. 1/95 (n 2), Article 32(1): 'The following shall be prohibited as incompatible with the proper functioning of the Customs Union, in so far as they may affect trade between the Community and Turkey: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which…'

Article 33(1): 'Any abuse by one or more undertakings of a dominant position in the territories of the Community and/or of Turkey as a whole or in a substantial part thereof shall be prohibited as incompatible with the proper functioning of the Customs Union, in so far as it may affect trade between the Community and Turkey.'

Article 34(1): 'Any aid granted by Member States of the Community or by Turkey through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Community and Turkey, be incompatible with the proper functioning of the Customs Union.'

[240] (Articles 101,102 and 108 TFEU)

Article 36: 'The Parties shall exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy.'

purpose of attaining the objectives of the AA.[241] As observed earlier, the AA was signed with a view to forming an economic union and finally establishing the CU between the Parties. In this case, it is argued, similar to the Additional Protocol to the AA, any further decision or agreement adopted for the purpose of Decision 1/95 and establishing the CU between the Parties is founded on the legal basis of Article 22 AA.[242] Nevertheless, despite this open and clear competence granted to the EU-Turkey Association Council, there seems to exist a legal lacuna in relation to competition rules applicable between the EU and Turkey.

The ambiguity concerning 'implementing rules' on competition applicable between the Parties coupled with the implications of Decision No. 1/95 for the Turkish legal system as a whole (i.e. Turkey's obligation to introduce legal rules on competition; intellectual, industrial, and commercial property rights; and, commercial and customs tariff policies in relation to third parties) have led to much debate under Turkish academic scholarship concerning the legal nature of Decision No. 1/95.[243] In this context, the entire debate on this issue seems to have led to a division among academics: those who reject the view that Decision No. 1/95 constitutes a bilateral agreement on its own;[244] and, those who hold the legal

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[241] Association Agreement (n 1), Article 22 (1): 'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken. The Council of implement the decisions taken. The Council of Association may also make appropriate recommendations.'
On contrary, however, 'Association Agreements' conducted between EU-Bulgaria, EU-Poland, EU-Lithuania, EU-Latvia, EU-Croatia clearly stipulate that relevant 'Association Council' decisions shall take the form of an 'Agreement' between the parties. Similarly, the European Economic Area (EEA) Agreement, forming the EEA Council, clearly states that decisions of the EEA Council shall take the form of an 'Agreement' between the parties.

[242] Association Agreement (n 1), Article 22 (1).

[243] E. Camlibel and A. Tutucu 'An Assessment of Direct Applicability of Decision No. 1/95 in EU law and Direct Effect of its Competition Rules' (2010) 11 Rekabet Dergisi 2.

[244] H. Can 'Das Assoziationsverhältnis zwischen der Europäischen Gemeinschaft und der Türkei' (Peter Lang, Frankfurt am Main 2002); Z. Usal 'Avrupa Birligi ve Turkiye-AB Iliskileri Hakkinda

view that Decision No. 1/95 does constitute an international agreement under Public International Law and therefore has the legal effect and implications of primary legislation in Turkey.[245]

The first strain of scholarship posits that there exist two central reasons why Decision No. 1/95 cannot be considered as a separate agreement.[246] Firstly, in line with Advocate General Bot's reasoning in *Ziebell*, they argue that every international and bilateral agreement concluded between separate jurisdictions needs to be assessed in relation to its very purpose and motive.[247] In their view, Decision No. 1/95 was adopted in order to achieve the goals stipulated in the AA and its Additional Protocol, i.e. to establish the final phase of the CU between the EU and Turkey, and, for this reason, it changes neither the legal nature of the AA nor the *status quo* between the Parties. Tekinalp, a distinguished Turkish academic with extensive scholarly publications in public international law, goes on to further argue that Decision No. 1/95 does not even constitute a conclusive text, as it only establishes the final phase of the customs union between the EU and Turkey, and is subject to modification through further EU-Turkey Association Council decisions.[248] Moreover, scholars who refuse to consider Decision No. 1/95 as a separate international agreement rely their argument non-compliance with Article 90(1) of the Turkish Constitution of 1982 (TC 1982).[249] According to this provision of TC 1982, international agreements signed between Turkey and other jurisdictions are required to be 'endorsed' by the Turkish Parliament and

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Dogru Bilinen Yanlislar' (Ikitisadi Kalkinma Vakfi Yayinlari, Istanbul 2005); K. Recber, Turkiye Avrupa Birligi Iliskileri' (Alfa Aktuel, Bursa 2009); U. Tekinalp, 'Gumruk Birligi'nin Turk Hukuku Uzerindeki Etkileri' (1996) 1-2 Istanbul Universitesi Hukuk Fakultesi Mecmuasi 28.

[245] S. Toluner, '6 Mart 1995 Tarihli Ortaklik Konseyi Karari: Milletlerarasi Hukuk Acisindan bir Degerlendirme' (1996) 1-2 Istanbul Universitesi Hukuk Fakultesi Mecmuasi 3.

[246] Can, Usal, Recber, Tekinalp (n 184).

[247] Case C-371/08 *Nural Ziebell* (n 214).

[248] U. Tekinalp, 'Gumruk Birligi'nin Turk Hukuku Uzerindeki Etkileri' (1996) 1-2 Istanbul Universitesi Hukuk Fakultesi Mecmuasi 28.

[249] TC (n 73).

addressed by a particular national legislation.[250] Following this legal procedure, international and bilateral agreements become legally effective and binding at the national level in Turkey, having the equivalent legal effect of any other national primary legislation.[251] In relation to Decision No. 1/95, however, neither of these two requirements has been fulfilled. This noncompliance with ‘procedural law’ therefore casts a shadow on the legality of Decision No. 1/95, at least in the Turkish legal context. Based on these two arguments above, they argue that Decision No. 1/95 does not go beyond an ‘inter-governmental decision’ concluded between the EU and Turkey for the purpose of attaining the objectives of the AA.

The second strain of scholarship, on the other hand, supports the legal view that, despite non-compliance with procedural law, Decision No. 1/95 has in effect led to the establishment of a closer economic union between the Parties and ultimately to the CU between the EU and Turkey. More importantly, they suggest, as required by Decision No. 1/95 all relevant legislation in Turkey has been harmonised, i.e. formulated, adopted and put into force in Turkey and this renders Decision No. 1/95 *ipso facto* legal.[252]

Nonetheless, regardless of whether Decision No. 1/95 is accepted as a bilateral agreement under public international law or merely an intergovernmental document signed between the EU or Turkey, the formulation and adoption of the LPC in 1994 Decision No. 1/95 has led to the ‘transplant’ of EU competition law into the Turkish legal system.[253] The next sub-section seeks to examine the political and legal development concerning the ‘European’ and Turkish bilateral co-operation following Decision No. 1/95, the formation of the CU between the

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[250] TC (n 73), Article 90(1).

[251] ibid.

[252] S. Toluner, ‘6 Mart 1995 Tarihli Ortaklik Konseyi Karari: Milletlerarasi Hukuk Acisindan bir Degerlendirme’ (1996) 1-2 Istanbul Universitesi Hukuk Fakultesi Mecmuasi 3.

[253] LPC (n 15).

two jurisdictions, and how this relationship has been reflected onto the Turkish competition law regime in general.

2.6.3 'Accession Partnership's conducted between the EU and Turkey and Turkey's EU Candidacy

Following the establishment of the CU with the EU, the European Council recognised Turkey as a 'candidate' for EU membership during the Helsinki summit of 1999. Turkey's EU candidacy was declared under the Helsinki European Council Presidency Conclusions (Helsinki Conclusions). [254] In accordance with the Helsinki Conclusions, the first 'Accession Partnership' to be conducted between the EU and Turkey (AP) was issued by the European Council in 2001.[255]

Association Partnerships, in general, are bilateral legal arrangements that incorporate a political, legal, economic framework for unilateral measures stipulated by the EU to candidate countries. In the technical legal sense, Association Partnerships are not legally binding in nature, but in principle candidate countries are expected to meet the requirements stipulated in this framework to progress their accession to the EU.[256] Furthermore, conditions imposed by the EU in Association Partnerships are country specific requirements and they complement the EU 'Copenhagen Criteria' rendering the former a 'quasi-legal' nature.[257]

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[254] Presidency Conclusions, Helsinki European Council, 10-11 December 1999, point 12. Full text of Helsinki Conclusions can be reached at <http://www.europarl.europa.eu/summits/hel1_en.htm> Accession Partnership (n 14).

[255] Accession Partnership (n 14).

[256] Accession Partnership (n 14).

[257] European Council, Conclusions of the Presidency, Copenhagen, June 1993 (Copenhagen Criteria).

The APs of the EU and Turkey in particular lay down priorities and issues on which Turkey shall concentrate during its accession process to the EU.[258] As opposed to Decision No. 1/95, which requires the harmonisation of only certain areas of law in Turkey, the APs explicitly require further and 'up-most' harmonisation of the Turkish legal system with relevant EU law, namely the adoption of the *acquis communautaire* (*acquis*) by Turkey.[259] That is to say, the APs calls for the approximation of Turkish domestic laws with the entire body of EU laws, which includes, but is not limited to, the founding Treaties of the EU, primary and secondary legislation adopted pursuant to EU Treaties, and the case-law of the Union Courts.[260] As per this requirement stipulated in the APs, the Turkish Council of Ministers of the time have issued three separate 'Council of Ministers' Decisions' which then led to the adoption of three individual 'National Programme Concerning the Adoption of the *Acquis Communautaire*' (Turkish National Programmes on Convergence) of 2001, 2003, and 2008 respectively.[261] Each National Programme on Convergence breaks down the process of approximation of national law into blocks of 'chapters' and sets forth the time frame and scope for the harmonisation of domestic laws with the EU *acquis*. 'Competition Policy' is dealt with under Chapters 6, 7 and 8 respectively.[262] In

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[258] Accession Partnership (n 14).

[259] '*Acquis Communautaire*' is the term used to reflect the entire body of EU laws and includes *inter alia* the founding Treaties of the EU, primary and secondary legislation adopted pursuant to the Treaties as well as the case-law of the Union Courts.

[260] Accession Partnership (n 14).

[261] The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2001/2129, 19 March 2001; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2003/5930, 23 June 2003; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No:2008/14481, 10 Nov 2008.

[262] The 2001 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with adoption of EU competition policy in Chapter 7; The 2003 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with the adoption of EU competition policy in

correspondence with national procedural law, all three Turkish National Programmes on Convergence have been approved and issued by the Turkish Council of Ministers of the time and have been published in the Official Gazette, which means they all are on an equal footing with Turkish primary legislation and are treated as any other legally binding Turkish legislation.[263]

More importantly, once Turkish National Programmes on Convergence have become legally binding the legislative bodies of the Turkish Grand National Assembly (Turkish Parliament) and relevant administrative authorities were required to formulate, draft, enact and ensure enforcement of legal rules accordingly.[264] In this context, the 'instrumental' role of the APs in terms of integrating and harmonising Turkish national legislation with that of the EU has been far greater and wider in scope compared to Decision No. 1/95. Following compliance with procedural law at the national level, the obligation to harmonise Turkish laws with the EU *acquis* spurred the formulation, adoption and further harmonisation of not only competition rules but also wide range of legal instruments in Turkey.[265]

Chapter 6; The 2008 'Turkish National Programme on the Adoption of the *Acquis Communautaire*' deals with adoption of EU competition policy in Chapter 8.

[263] Official Gazette of the Republic of Turkey, 24 March 2001, No: 24352; Official Gazette of the Republic of Turkey, 24 July 2003, No: 25178; Official Gazette of the Republic of Turkey, 31 December 2008, No: 27097.

[264] In accordance with the Accession Partnership(s) and the National Programmes on Convergence, the LPC has been further harmonised with the EU competition law regime. Thence, the Draft Law on the Protection of Competition (Draft LPC), Law No. 1/636, has been submitted to the Department of Justice of the Turkish Parliament on 06.10.2008 and is currently under debate.

[265] The Law Changing the Intellectual Property Act, Law No: 4630, enacted on 21 February 2001 by the Turkish Parliament; The Energy Market Law, Law No: 4628, enacted on 20 February 2001 by the Turkish Parliament; The Foreign Direct Investment Act, Law No: 4875, enacted on 5 June 2003 by the Turkish Parliament; The Law Changing the Act on Consumer Protection, Law No: 4822, enacted on 6 March 2003 by the Turkish Parliament; The Law on Energy Markets, Law No: 4628, enacted on 18 April 2007 by the Turkish Parliament; The Law Changing the Act on the

2.6.4 Other Legal Instruments

The analysis of the scope of harmonisation required from EU candidate countries is fundamental in that this examination shall help determine the extent to which the EU competition law system constitutes a 'model law' for candidate countries to be transplanted into their national legal system. Nonetheless, country specific Association Partnerships conducted between the EU and candidate countries are not the only legal instruments that define the scope of harmonisation required at the national level in candidate countries of the EU. A closer inspection of unilateral legal instruments issued by the EU itself reveals the importance of three key EU legal documents particularly in relation to the harmonisation of competition rules by the EU candidate countries: the European Council Presidency Conclusions of Copenhagen,[266] the 'White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union,[267] and the 'Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*'.[268]

Implementation of Privatisation and other Relevant Laws, Law No: 5398, enacted on 21 May 2005 by the Turkish Parliament; Banking Law, Law No: 5411, enacted on 19 October 2005 by the Turkish Parliament; Insurance Law, Law No: 5684, enacted on 3 June 2007 by the Turkish Parliament; Turkish Commercial Code, Law No: 6102, enacted on 13 January 2011 by the Turkish Parliament.

[266] Copenhagen Criteria (n 258).

[267] Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95) 163 (White Paper); Annexe to White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95)163 final/2.

[268] (EU) The Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*, 2005. Chapter 8 deals with the competition *acquis*. <http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en.pdf>.

In the first instance, the European Council Presidency Conclusions of Copenhagen, declared in 1993, stipulates that the associated countries of Central and Eastern Europe '...shall become members of the European Union... as soon as… (they)… assume the obligations of membership by satisfying the economic and political conditions required'.[269] Commonly referred to as the 'Copenhagen Criteria' in relevant literature, this unilateral legal document requires from candidate countries, as an economic condition, to provide '…the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union'.[270] In particular, the European Council underlines '…the importance of approximation of laws in the associated countries those applicable in the Community, in the first instance with regard to distortion of competition…'[271] The economic condition of providing a functioning free market economy is strongly emphasised in the Copenhagen Criteria as it is seen essential for the integration of each candidate country's economy to the broader European 'economic union' and indispensable for the effective

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[269] Copenhagen Criteria (n 258).

According to the European Council Presidency Conclusions of Copenhagen, the membership criteria which candidate countries must have achieved are: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and, the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union.

[270] European Council, Conclusions of the Presidency, Copenhagen, June 1993, 7. A. iii.

[271] European Council, Conclusions of the Presidency, Copenhagen, June 1993, 7. A. iv.

The high priority given to competition law in the approximation of national laws could be attributed to the instrumental role of competition law during the enlargement of the EU, as it has been the case in furthering market integration among existing Member States. For the instrumental role of competition law in furthering market integration in the EU, see: Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] ECR 1875.

For competition law utilized as a tool for market integration in the EU, see: R.B. Bouterse, *Competition and Integration-What Goals Count?* (Kluver Law and Taxation Publishers, The Netherlands 1994.

application of competition rules by candidate countries at the national level. Comparable to the position of the EU in Copenhagen Criteria, as examined previously, emphasis on competition rules and establishing a suitable economic system for this purpose was made both in the AA and Decision No. 1/95.[272]

Shortly after the Copenhagen Criteria was adopted, the European Council issued the 'White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (White Paper) in 1995.[273] In a similar manner, the White Paper emphasises the significance of establishing competition rules in candidate countries as a means of: facilitating accession to and the maintenance of the 'internal market'; reinforcing economic freedom and industrial re-structuring; and stimulating trade and commerce in candidate countries.[274] Again, the instrumental role of competition rules in terms of strengthening the economic union between future and existing Member States and the establishment of the European 'market' in general emerges as a fundamental feature of EU competition law. Additionally, the White Paper requires that a mere 'transposition' of legislation on competition will not suffice and candidate countries will have to ensure that their existing and future legislation on competition is aligned continuously with the EU competition law regime, and also that the 'key elements' of EU competition law are reflected into domestic legislation to secure an effective application of competition rules.[275] The 'key elements' of EU law competition to be considered during harmonisation by candidate countries are then defined as EU competition law instruments such

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[272] Copenhagen Criteria (n 258).

[273] White Paper (n 262), Annexe to White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95)163 final/2

Although the White Paper draws upon the conditions for integration into the internal market of the EU, this thesis refers to this legal instrument on the premise that both the 'internal market' and the 'customs union' require same level of harmonisation in the context of competition law.

[274] White Paper (n 268), Executive Summary.

[275] White Paper (n 268).

as ‘Regulations’ and ‘Notices’.[276] This clearly brings the requirement to consider, in addition to primary laws, relevant EU ‘secondary legislation’ and ‘soft-law instruments’ in the course of harmonising national competition law with the former legal regime.

On a different note, the ‘Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*’ (Guide to Implementing the *Acquis*) draws attention to the evolving nature of ‘harmonisation’ of competition rules.[277] Although the Guide to Implementing the *Acquis* is broader in terms of its scope, for the purpose of this thesis the significance of this legal instrument lies beneath its emphasis on the recent development of ‘modernisation of EU competition law’ and, more importantly, its implications for substantive and procedural rules on EU competition law.[278] In essence, the Guide to Implementing the *Acquis* underlines the enhanced role of National Competition Authorities and National Courts of

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[276] Annexe to Commission White Paper on Preparation for Integration, point 59.

The legal framework for EU competition law contains various legal instruments. In addition to the provisions on competition provided in the Treaty on the Functioning of the European Union (TFEU) -Articles 101 and 102, a number of <u>secondary legislation</u> and <u>soft law instruments</u> have been established over time. Secondary legislation, which has a binding effect, is adopted either by the European Council or by the Commission and takes the form of a ‘Regulation’. Soft law instruments, on the other hand, are adopted by the Commission and may be adopted in various forms such as ‘Notices’, ‘Guidelines’, or ‘White Paper’. Soft law instruments are non-binding in nature and aim to explain in more detail the policy of the Commission on a number of competition law issues.

[277] (EU) The Guide to the Main Administrative Structures Required for Implementing the EU *Acquis*, 2005. Chapter 8 deals with the competition *acquis*. <http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en.pdf> (The Guide to Implementing the *Acquis*).

[278] The Guide to Implementing the *Acquis*, Chapter 8.

Particular emphasis on the direct applicability of EU competition rules under Regulation 1/2003.

The impact of the changes in substantial and procedural competition law on the goals of EU competition law is further discussed in Chapter II.

existing Member States led by the 'modernisation' movement under the EU competition law system and requires candidate countries' relevant administrative, legal and enforcement agencies and institutions to follow these new procedural and substantive rules.[279]

Albeit not a unilateral legal document issued by the EU, the 'Negotiating Framework' of the EU and Turkey Association Council is the final legal instrument examined in this context.[280] The Negotiating Framework somewhat reiterates the substantive and institutional requirements set forth in the previous three documents and further clarifies Turkey's obligations in terms of harmonising domestic laws with the EU *acquis* in the following manner. First, it reiterates that Turkey's EU candidacy requires the recognition and adoption at the national level of the rights and obligations enshrined under the EU Treaties and its institutional framework under which the legal, political, economic, and social objectives of the EU are pursued.[281] Second, it is stipulated, the *acquis* includes *inter alia* political objectives of the Treaties on which the EU is founded. Third, the Negotiating Framework stipulates, legally binding or not, other legal instruments adopted within the EU institutional framework such as statements, recommendations or guidelines are a fundamental part of the *acquis,* as are primary legislation and EU case-law.[282] Fourth, Turkey, in the course of its harmonisation process, will have to consider that the EU *acquis* is constantly evolving and will have to adopt the *acquis* as it stands at the time of the accession.[283] Finally, the Negotiating Framework strongly emphases that in

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[279] ibid.

[280] The 'Negotiating Framework', Luxembourg, 3 October 2005, The Negotiating Framework. The Negotiating Framework can be reached at: < http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf>.

[281] The Negotiating Framework, point 10.

[282] The Negotiating Framework (n 281).

[283] ibid.

addition to legislative and institutional alignment, accession to the EU implies timely and effective implementation of the *acquis*.[284]

2.7 Reflection on the Bilateral Relationship between the EU and Turkey, and its Implications for the 'transplant' of EU competition law into the broader Turkish legal system

Despite legal uncertainty and the lacuna concerning certain bilateral legal arrangements, the entirety of bilateral legal instruments and other unilateral legal instruments of the EU examined above sets the legal basis for the transplant of EU competition law into the national legal system of Turkey. Despite many previous attempts by Turkish parliamentarians and law-makers since the 1970's, the bilateral political relationship between the EU and Turkey seems to have lead to the adoption of a legal framework for competition in Turkey.[285] This emphasises and reiterates one of the crucial points made in Chapter I, that the political dimension of competition law, although having been much neglected in the relevant academic literature, has a significant weight in the formulation, adoption, application and enforcement of competition law at the national level in many jurisdictions.

Nonetheless, when scrutinised individually, the two fundamental legal instruments, the AA and Decision No. 1/95 differ from one and another in terms of their legal implications for the 'borrowing' of EU competition law. For instance, although the AA and its Additional Protocol incorporate provisions on socio-political issues, such as the 'freedom of movement of workers', it is clear from the interpretation of the AA by the Council of Association for the EU and Turkey and also by the case-law of the EU Courts that the AA is intended to carry

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[284] ibid.

[285] See (n 74).

out a 'sole economic purpose'. Despite this sole economic objective of the AA and the explicit requirement imposed upon Turkey to adopt a national competition law regime, it was, in effect, Decision No. 1/95 that led to the adoption of Turkey's first legislation on competition law i.e. the LPC of 1994.[286] In any case, however, both the AA and Decision No. 1/95 lack to date the 'implementing rules' on competition to be applied on competition related legal matters between the EU and Turkey.

Secondly, on the other hand, the most significant feature of the APs and the unilateral legal instruments of the EU examined above is the role they play in defining the nature and scope of legal 'borrowing', which is referred to as the 'harmonisation' of national laws with that of the EU. In this context, the continuous approximation of national laws in parallel to the development of institutional and substantive legal standards under EU competition law is strongly emphasised in both the APs the unilateral legal instruments of the EU. Accordingly, the EU competition law 'model' to be adopted by Turkey is construed in a broad manner to incorporate, *inter alia*, the relevant primary law of the Treaties on which the EU is founded, i.e. EU Treaties; secondary law and decisions of the EU Courts and EU administrative bodies adopted in pursuant to EU Treaties; relevant soft law instruments (such as 'Guidelines' or 'Recommendations'); and, relevant policy documents (such as 'Policy Statements'). Furthermore, these legal instruments will have to be considered as a part of the broader EU framework and must be read in conjunction with the wider content, main principles and political objectives of the EU Treaties.

Thirdly, notwithstanding conflicting views in the academic literature concerning the legal nature of Decision No. 1/95, i.e. whether it constitutes an 'intergovernmental decision' or a 'bilateral agreement' between two sovereign nations, it is also questionable whether it can be referred to as a customs union

[286] LPC (n 15).

agreement in the traditional legal sense. In addition to provisions typically found in customs union arrangements, i.e. the removal of customs duties and quantitative restrictions on imports and exports of goods between the parties of a customs union agreement and charges having equivalent effect as such, Decision No. 1/95 also incorporates legal provisions that require Turkey to apply similar rules and implementing measures to those of the EU's commercial and customs tariff policies in relation to third countries,[287] and particularly to align its domestic law with those of the EU in the fields of intellectual, industrial and commercial property rights, and competition and state aid law.[288] The latter requirements, without a doubt, go beyond any arrangement necessary for the purpose of establishing a customs union in the traditional sense, and renders Decision No. 1/95 a *sui generis* character.

The final reflection in this context is the observation made in relation to the instrumental role of competition law at the EU level *vis-à-vis* the instrumental role of competition law under the legal domain of the EU and Turkish economic union. As far as the analysis of the Copenhagen Criteria and the White Paper informs, at the EU level competition law and policy are seen as a part of the broader social, economic and political EU 'scheme' and therefore are considered not only as an instrument in terms of facilitating economic integration but also as a tool for reinforcing socio-political integration among EU Member States. And although competition rules constitute a fundamental part of the EU and Turkish

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[287] Decision No. 1/95 (n 2), SECTION III 'Commercial Policy', Article 12(1): 'From the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are substantially similar to those of the Community's commercial policy set out in the following Regulations...'. Section IV 'Common Customs Tariff and preferential tariff policies', Article 13(1): 'Upon the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, align itself on the Common Customs Tariff'

[288] Decision No. 1/95 (n 2), CHAPTER IV, 'APPROXIMATION OF LAWS', Section I, 'Protection of intellectual, industrial and commercial property', Article 31 (2); Decision No. 1/95, CHAPTER IV, 'APPROXIMATION OF LAWS', Section II, ''Competition', Article 32 (1).

economic co-operation under the AA, Decision No. 1/95, and successive APs, under the current state of legal affairs between the Parties and particularly in light of the perennial problem of the lack of 'implementing rules' on competition, economic co-operation between the EU and Turkey does not extend to include competition law as a legal tool to further reinforce this relationship, neither economically nor politically. In light of the narrow interpretation given to socio-economic provisions of the AA by EU Courts, it is questionable whether this nuance on the instrumental role and objective attributed to competition law would still have persisted even if implementing rules on competition had been adopted under the AA or Decision No. 1/95.

2.8 How to Critically Assess the Suitability of EU Competition law to Turkey? -A Proposition on Methodology

The importance and key role of the 'objectives of competition law' in the broader context of competition law analysis has not only occupied the agenda of recent scholarship, academic conferences and international organisations but has also been articulated in scholarship on competition law. [289] The most powerful

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[289] Academic Conferences: The Robert Schuman Centre for Advanced Studies of the European University Institute, 3rd Annual EC Competition Law and Policy Workshop, *The Objectives of Competition Policy*, 1997, European University Institute, Florence, Italy; The Competition Law Scholars Forum (CLaSF), *'Competition First? Reconciling Competition Law with other Norms in Modern Competition Law'*, 2009, Strathclyde University Law School, Glasgow, UK; The 5th ASCOLA Conference, *Goals of Competition Law*, May 27-29, 2010, University of Bonn, Bonn, Germany.
Academic work: Maurice E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (2010) The University of Tennessee College of Law Legal Studies Research Paper Series No. 123/2010, 1; Ehlermann and Laudati, *Objectives of Competition Policy* (Hart Publishing, Oxford 1998); R. B. Bouterse, *Competition and Integration-What Goals Count* (Kluwer 2004); Cristopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009).
Work of International Organisations: The Unilateral Conduct Working Group, International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of

example of earlier work in this context is Bork's seminal work *The Antitrust Paradox*, in which encapsulates the rationale for clarifying the goals of an individual competition law regime. He states:

> 'Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law-what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.'[290]

In more recent work, furthermore, Stucke emphasises a unique feature of the objectives of competition law and states that '*competition law serves different purposes for different constituents*' depending on the circumstances surrounding the relevant competition law regime in a given jurisdiction.[291]

Nevertheless, Bork and Stucke's emphasis on the importance of the 'objectives of competition law' further relies on a set of propositions. First, unlike many other fields of law, policy goals and objectives of competition law are closely related to the application of the substantive rules on competition.[292] 'Objectives' of

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Dominance/Substantial Market Power, and State-Created Monopolies 6 (2007) 5; OECD Global Forum on Competition, Note by the Secretariat, 'The Objectives of Competition Law and Policy' CCNM/GF/COMP (2003) 3; UNCTAD, Objectives of Competition Law and Policy: Towards a Coherent Strategy for Promoting Competition and Development, (2003) 2.

[290] R.H. Bork, *The Antitrust Paradox* (n 22).

'Antitrust law' is terminology used in the United States (US) jurisprudence equivalent to the term 'competition law' as in the EU context.

[291] M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (n 32).

[292] D. Zimmer (ed.), *Goals of Competition Law* (Elgar 2012); Ehlermann and Laudati, *Objectives of Competition Policy* (Hart Publishing, Oxford 1998); R. B. Bouterse, *Competition and Integration-What Goals Count* (Kluwer 2004); Cristopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009); D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001); M. Stucke, 'Re-Considering Antitrust's Goals' (2012) 53 Boston College Law Review 551; L. Warlouzet, 'The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere' EUI Working

competition law are not abstract in nature but have a direct relationship with the way in which competition rules are applied.[293] This is because competition rules, in any given jurisdiction, are applied in such a manner as to achieve the objectives pursued by that particular jurisdiction.[294] In other words, different objectives pursued by individual jurisdictions may lead to different conceptions of competition law, and different standards in the application of competition rules, even if the substantive rules on competition are similar. For example, a jurisdiction with a 'developing economy' may be concerned with the high income inequality among its citizens and thus emphasise 'distributive' goals in its competition policy; whereas another jurisdiction with a more homogenous economic structure may prefer to discard distributive goals of its competition policy and leave it to be dealt with other legal measures such as tax law.[295] Similarly, a jurisdiction from a more 'liberal' socio-economic and political background may hold different views on the accommodation of certain values such as 'fairness' in the application of competition rules, compared to a jurisdiction from a more 'conservative' background. In essence, each jurisdiction may adopt different economic and legal standards in the application of competition rules, which, in turn, may lead to different outcomes in terms of the analysis of cases under substantive competition rules. Second, related to the first point, the objectives of competition law shape the legal methods and standards for

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Papers RCAS 2010/80; P. Colomo, 'Article 101 TFEU and Market Integration' LSE Law, Society, and Economy Working Paper Series, 07/2016; A. Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?' (2012) 49 Common Market Law Review, Issue 1, 217; A. Chirita, 'Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) World Competition Law and Economics Review 415; S. King, 'The Object Box: Law, Policy or Myth?' (2011) 7 European Competition Journal 269; A. Chirita, 'A Legal-Historical Review of the EU Competition Rules' (2014) (63(2) International and Comparative Law Quarterly 281.

[293] ibid.

[294] ibid.

[295] J. Drexl, M. Bakhaum, E. Fox, M. Gal, D. Gerber (ed.), *Competition Policy and Regional Integration in Developing Countries* (Edwar Elgar 2012)

assessing the legality of conduct under substantive rules on competition. Therefore, examination of the goals of a particular competition law regime clarifies the way in which legal assessment is conducted under that competition law system. Third, the analysis of the objectives of competition law clarifies the extent to which public intervention through competition law is seen necessary within that particular jurisdiction. This means that examination of the objectives of competition law may reveal public policy objectives pursued through competition rules. Again, these objectives may vary from one jurisdiction to another depending on national socio-economic and political objectives. Fourth, an examination of the objectives of competition law may also be considered as a timely response to the expanding body of academic debate and work of international bodies with a particular focus on this issue, both in the global context and at the national level.[296] Lastly, and more importantly, it is suggested that an inquiry into the objectives of a 'younger' competition law system, such as in the case of Turkey, will significantly contribute to the existing academic debate on the internationalisation of competition law and the 'transplant' of model competition law from the standpoint of an individual jurisdiction. Furthermore, this analysis shall answer the question of the limits of model competition laws against the backdrop of country-specific socio-economic and political objectives?

For these reasons alone this author proposes to critically assess the suitability of EU competition law to Turkey through the examination and comparison of the objectives of competition law of the EU *vis-à-vis* Turkish competition law systems, in this very order. First the objectives of the EU competition law system will be analysed, then, followed by the examination of the goals of the Turkish competition law system. At this point, the second critical observation comes into play, i.e. Watson's methodology and perception on 'comparative legal studies'. Although the very nature of the central research question entails a 'comparative' legal study, the EU competition law system will be examined only insofar as

[296] Academic scholarship and Academic conferences (n 290).

providing an understanding of the basic tenets of this competition law system and its fundamental objectives, which, in turn, enables the assessment of whether and to what extent the EU competition law system is suitable for Turkey.

Moreover, as examined in Chapter I, in addition to its pure political aspect, Turkish competition law aims at facilitating an economic transition from central planning and government control to privatisation and liberalisation. As a reflection of this socio-economic objective, Turkish competition law, along with a series of other legislative measures,[297] constitutes the part of a broader economic reform programme adopted for the purposes of liberalising the Turkish economy. Therefore, it is argued, a legal study that aims to examine the objectives of Turkish competition law needs not be confined to the mere examination of substantive rules on competition; but should adopt an integrative approach and consider Turkish competition law as a part of the broader national legal framework which aims to transform Turkey's industrial and socio-economic policy, as well as to fulfill political goals by virtue of its EU candidacy. [298]

In light of the above analysis, the following 'roadmap' is formulated and proposed as the blueprint in the examination of the central research question hereafter. This 'roadmap' is based on the *prima facie* examination of legal instruments on competition under the broader Turkish legal system. The legal basis for the relationship between the EU and Turkish competition law systems has already been established earlier in this Chapter. The objectives pursued under each jurisdiction (BOX-I and BOX-II) shall be examined in the following chapters.

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[297] See (n 266).

[298] For Turkey's industrial policy, see: Republic of Turkey Ministry of Industry and Trade, '*Turkish Industrial Strategy Document (2011-2014): Towards EU Membership*'; Prime Ministry of the Republic of Turkey, the State Planning Organisation, '*Industrial Policy of Turkey, Towards EU Membership*' (August 2003); Republic of Turkey Ministry of Industry and Trade, '*Turkish Industrial Strategy Document (2011-2014): Towards EU Membership*'; Guidelines on Certain Types of Custom Manufacturing Agreements Between Non-Competitors, No: 08-05/56-M.

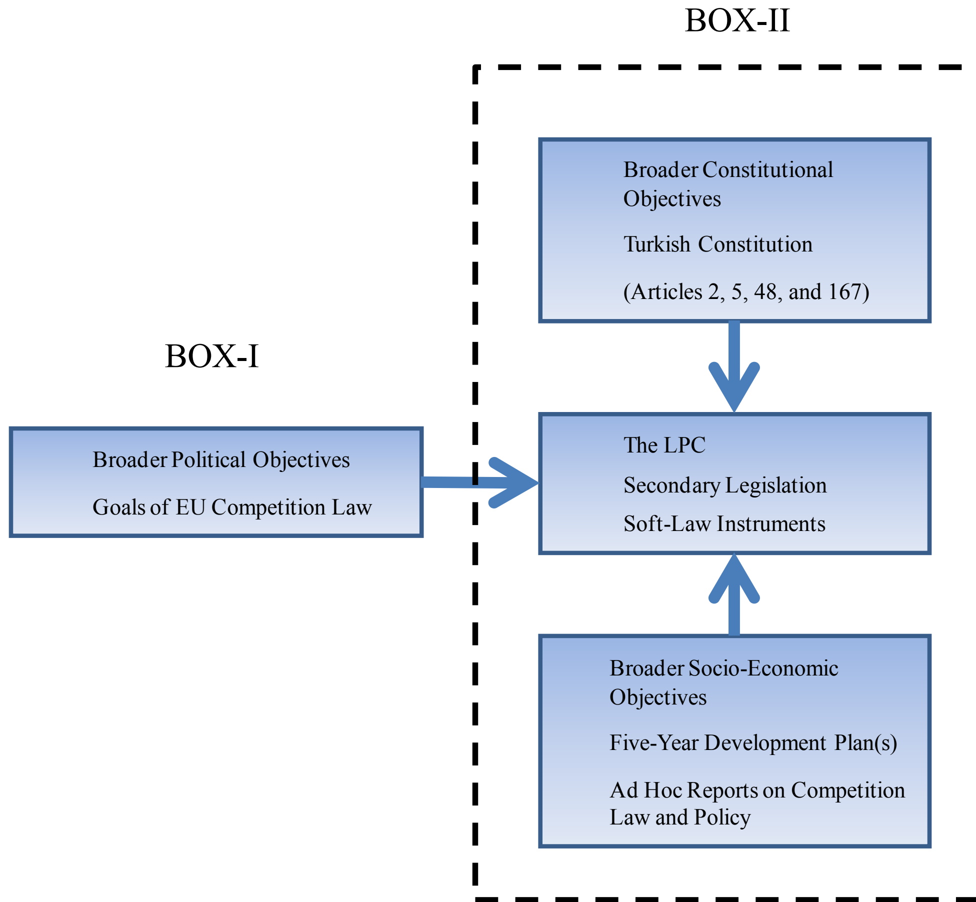

Figure 1: The Roadmap on the Goals of the EU and Turkish Competition Law Systems

2.9 Conclusion

The analysis conducted in Chapters I, II, and III is particularly important not only in that it has laid the foundations for the central research question and formulated a feasible methodology and roadmap for the analysis of the research question, but also in that it has defined the scope and limits of this thesis.

The bilateral-political relationship between the EU and Turkey, i.e. the Association Agreement, Customs Union and Accession Partnerships conducted between the two jurisdictions, while establishing the legal foundations for the 'transplant' of EU competition law to Turkey, has led to, at the same time, problems of legal uncertainty and a lacuna pertaining to the 'implementing rules' on competition applicable between the EU and Turkey.[299] The formation and adoption of implementing rules on competition, required under both the Association Agreement and the Customs Union, have yet to be fulfilled by the Parties. This legal lacuna defeats the purpose of these two bilateral agreements, both of which pursue a sole economic goal as established by the ECJ in *Ziebell* and particularly noted by Advocate General Bot in his reasoning.[300] Another legal uncertainty and problem relates to the position of the Customs Union at the national level in Turkey and its lack of compliance with Turkish procedural law stipulated for international and bilateral agreements under Article 90(1) of the Turkish Constitution.[301] The existing ambiguity concerning Turkey's long-standing EU candidacy and its possible future membership to the EU further highlights the importance and role of the Association Agreement and the Customs Union as the fundamental legal pillars underpinning the bilateral relationship between the Parties, and the necessity of the adoption of implementing rules on competition to be applied between the EU and Turkey.[302]

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[299] Association Agreement (n 1), Decision No. 1/95 (n 2), Accession Partnerships (n 14).

[300] Case C-371/08 *Nural Ziebell* (n 214).

[301] TC (n 73)

[302] Association Agreement (n 1), Decision No. 1/95 (n 2).

Admittedly, in terms of methodology, the suitability of a 'model' competition law to an individual jurisdiction can be assessed through a variety of legal methods and with a focus on different components of competition law. As formulated and proposed under the 'Roadmap on the Goals of the EU and Turkish Competition Law Systems', this thesis adopts Watson's method and understanding of comparative legal studies and assesses the suitability of the EU competition law regime to Turkey through the comparison of the objectives of the two competition law systems.[303] While the EU component of the thesis comprises the first limb of the comparison (BOX-I), the remainder part (BOX-II) shall focus on the objectives of Turkish competition law.

Notably, the inquiry into relevant terminology, and, particularly into the tools of neo-classical economy used in competition law analysis, sheds further light on how policy objectives and views on how society ought to maximise welfare and prosperity dictate welfare standards and efficiency goals adopted in assessing the legality of cases under competition law. In this context, the debate over a 'consumer welfare' *versus* 'total welfare' standard further indicates the possibility of different objectives being pursued by different competition law regimes.

[303] The 'Roadmap on the Goals of the EU and Turkish Competition Law Systems', page 126.

3 The Objectives of the EU Competition Law System (BOX-I)

'Competition is not necessarily a zero-sum but can represent the more efficient (or democratic) means to achieve the higher end of human progress, namely, greater justice, higher quality of life, and a more humane ordering of social relationships'[304]

'Social order requires general acceptance of a minimal set of moral standards. Well-defined laws of property and freedom of market exchange minimize the necessary scope and extension of such standards, but they by no means eliminate them'[305]

3.1 Introduction

In line with the 'roadmap' proposed for the purpose of addressing the central research question, [306] this chapter seeks to examine the objectives of the EU competition law system. As noted previously, however, this analysis shall be limited to an examination of the objectives of EU competition law and how these objectives have been accommodated and interpreted under the competition rules of the EU. This examination shall, in turn, enable a 'comparative' analysis of the objectives of the two legal systems, i.e. EU competition law *vis-à-vis* Turkish competition law, albeit following Watson's understanding on comparative legal work,[307] and enable an assessment of the extent to which the EU competition law model is suitable for Turkey.

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[304] M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (n 32)

[305] J. Buchanan, 'Good Economics, Bad Law' (1974) 172 Virginia Law Review 183.

[306] The 'Roadmap on the Goals of the EU and Turkish Competition Law Systems', page 126.

[307] Watson's understanding of 'comparative legal work', p 80-86.

As established in Chapter III, the legal footing for the connection between these two competition law systems relies on the bilateral and political affair developed by the EU and Turkey mutually, which is initially established with the Association Agreement of 1963 and further entrenched by the Customs Union and finally through Turkey's recognition as a an EU candidate as of 2004.[308] What is more important, however, is the relevance and importance of the EU *acquis* on competition for Turkey that is repeatedly and progressively established by the Helsinki Declaration and Accession Partnership(s) (of 2001, 2003 and 2008) of the European Council,[309] and the Turkish National Programmes on Convergence (Programmes on Convergence) of the Turkish Council of Ministers of the time.[310] Based on this legal requirement, the assumption can be made that the objectives of the EU competition law regime has been 'transplanted' into the national competition law regime of Turkey. Nevertheless, it remains to be seen whether and to what extent this 'transplant' has in fact been conducted since the adoption of the Turkish Law on the Protection of Competition (the LPC) of 1994 and particularly following national Programmes on Convergence, which require further harmonisation of competition rules in Turkey with the relevant EU *acquis*.[311] Chapters IV, V and VI aim to shed light on this issue.

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[308] Decision No. 1/95 (n 2); Association Agreement (n 1).

[309] Presidency Conclusions, Helsinki European Council, 10-11 December 1999, point 12.
See, < http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/ACFA4C.htm>.
Council Decision (2008/157/EC) on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. (Official Journal L 051, 26/02/2008 P. 0004 – 0018).

[310] The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2001/2129, 19 March 2001; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2003/5930, 23 June 2003; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No:2008/14481, 10 Nov 2008.

[311] LPC (n 15).

3.2 The Academic Debate on the Objectives of EU Competition Law

An extensive debate on the objectives of EU competition law appears in academic conferences and written literature produced particularly after the 1990's. In one of the earliest academic conferences with a particular focus on the objectives of the EU competition law system, Giuliano Amato captured the essence of this debate and summarised the root cause of the problem existing at the time. During the workshop held at the Robert Schuman Centre of the European University in Florence in 1997 he openly stated that the perennial problem of the goals of EU competition law *'...requires a frank discussion, because it is doubtful that we all agree on the goals of competition law. Generally, however, we refrain from discussing it openly, and ambiguities remain.*'[312] An overall assessment of the academic literature on the objectives of EU competition law reveals that the debate predominantly revolves around one central question: Does EU competition law adopt 'multiple' objectives, or, does it pursue a single economic goal?[313] However, even confining the debate to the discussion of 'single *versus* multiple objectives of EU competition law' has not settled this controversial

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[312] Panel discussion on the objectives of competition policy in C.D. Ehlermann and L.L. Laudati, *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing, Oxford 1998) 3.

[313] Scholars who argue that EU competition law should consider multiple goals: R. B. Bouterse, *Competition and Integration-What Goals Count* (Kluwer 2004); L. Parret, 'Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6(2) European Competition Law Journal 339; M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (2010) The University of Tennessee College of Law Legal Studies Research Paper Series No. 123/2010, 1; C. Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009) 2; L. L. Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP, Cambridge 2010). Scholars who argue in favour of a single goal: R. Whish, *Competition Law* (OUP, Oxford 2009) 1; O. Odudu, 'The Wider Concerns of Competition Law' (2010) 30 Oxford Journal of Legal Studies 599.

problem or led to a common understanding among academics on the issue. As a striking example, even academics who argue in favour of multiple objectives of competition law rely on different values and benchmarks, and provide various descriptions and explanations concerning the problem of the objectives of competition law. For instance, while Bishop and Walker argued that the ultimate objectives of EU competition law are 'market integration' and 'enhancing the economic capacity of the EU' as an economic unit on its own,[314] Monti stated the three main goals ascribed to EU competition law as the protection of 'economic freedom', 'market integration', and enhancing 'economic efficiency'.[315] Similarly, Motta argued that 'economic efficiency' and 'market integration' are the overriding goals of EU competition law, and further stated, 'social and political objectives' of the EU have also had implications for the interpretation of competition rules.[316] Motta and Monti, albeit admitting potential conflict between these 'multiple' objectives, argued, at the same time, that the institutional and legal framework for EU competition law provides a mechanism for balancing various goals.

However, based on her examination of, for the first time in literature, the *travaux préparatoires* of competition rules of the Treaty of Rome, Akman challenges Monti and other scholars who posit the 'protection of economic freedom' as an objective of EU competition law.[317] She centrally argues that drafters of the

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[314] S. Bishop and M. Walker, The Economics of EC Competition Law: Concepts, Application and Measurement (3rd edn Sweet and Maxwell, London 2010).

[315] G. Monti, 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review 5, 1057.

[316] M. Motta, Competition Policy: Theory and Practice (CUP, Cambridge 2004) 15.

See also, A. Ayal, Fairness in Antitrust: Protecting the Strong from the Weak (Hart Publishing 2014).

[317] P. Akman, 'Searching for the Long Lost Soul of Article 82 EC' (2009) 29 Oxford Journal of Legal Studies 2, 269-297.

Akman challenges scholars such as D. J. Gerber, L.L. Gormsen and K. Cseres. For arguments on the influence of 'ordoliberalism', see: DJ Gerber, Law and Competition in Twentieth Century Europe Protecting Prometheus (OUP Oxford, 2001) 264; L Lovdahl Gormsen, 'Article 82 EC:

Treaty of Rome did not, in essence, aim for the protection of the 'economic freedom' of competitors within the EU or the protection of rivals as such under the competition rules of the EU.[318] This objective has actually developed over the years from the Commission's and Union Courts' interpretation and application of the competition rules of the EU. On the contrary, she argues, the *travaux préparatoires* of the Treaty of Rome clearly demonstrates 'economic efficiency' as the primary concern of EU competition law.[319]

On the other hand, in his work 'Article 81 EC and Public Policy', Townley tackles the problem from a different perspective and analyses the extent to which 'non-economic' 'public policy' objectives have been pursued under the EU competition law system.[320] In order to find an answer to this question Townley examines the EU Treaties, the relationship between the individual provisions of the EU Treaties and how these provisions 'impinge upon' each other, and, the case-law of the Union Courts on the interpretation of competition rules. Based on this analysis, Townley posits the central argument that the unique nature of the political, legal, economic and social framework for the 'EU project' requires a holistic and systematic reading of the EU Treaties as a whole *vis-à-vis* the individual

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Where are we coming from and where are we going to?' (2005) 2 Competition L Rev 5, 10; KJ Cseres, Competition Law and Consumer Protection (Kluwer Law International, The Hague, 2005) 82.

[318] Akman, Searching for the Long Lost Soul of Article 82 EC (n 357).

[319] ibid.

[320] C. Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009) 48.

For public policy objectives under EU competition law, see: D. Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) Centre for Competition Policy, UEA Law School, University of East Anglia Working Paper 16-13; M. Schinkel and L. Toth, 'Balancing the Public Interest-Defense in Cartel Offences' (2016) Amsterdam Law School Legal Studies Research Paper No. 2016-05; B. Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Wolters Kluwer 2012).

provisions of the EU Treaties.[321] Undoubtedly, this includes provisions on competition, i.e. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and the EU Merger Control regime.[322] In light of this explanation, Townley argues that competition provisions of the EU Treaties do not exist as stand-alone and independent rules aimed at isolated objectives, but rather constitute a set of rules that are embedded in the founding document of a unique supranational socio-economic system.[323] None of the policy objectives stipulated under the EU Treaties prevails over another and they are all equally prominent under the EU legal framework. All individual objectives, competition policy being one of them, exist in order to attain the broader objectives of the EU system. Therefore, a holistic reading of the existing structure and framework for EU Treaties allows the reconciliation of a variety of goals under competition provisions.[324] It is this argument of Townley's that explains the EU Courts' stance on the matter and the accommodation of public policy objectives under competition rules. Townley's exposition of the matter has also been endorsed by the former Commissioner van Miert in a speech, in which he stated:

> Competition policy has so long been a central Community policy that it is often forgotten that it is not an end in itself but rather one of the instruments towards the fundamental goals laid out in the Treaty-namely the establishment of the common market, the approximation of economic policy, the promotion of harmonious development and economic expansion, the increase of high living standards and the

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[321] This approach is also referred to as the 'purposive interpretation' of the EU Treaties, whereby each text is interpreted as a part of the broader legal framework and each provision is connected to the totality of the texts in the legal system. See, A. Barak, *Purposive Interpretation in Law,* (Princeton University Press, Princeton 2005) (in); O. Andriychuck, 'Does Competition Matter? An Attempt of Analytical Unbundling of Competition from Consumer Welfare: A Response to Miasik' (2009) European University Institute; University of East Anglia (UEA)-Centre for Competition Policy Yearbook of Antitrust and Regulatory Studies, Vol. 2, No. 2.

[322] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning the European Union [2012] OJ C326/1 (TFEU).

[323] C. Townley, *Article 81 EC and Public Policy* (n 360) 50-75.

[324] ibid.

> bringing about of closer relationship between Member States. Competition therefore cannot be understood or applied without reference to this legal, economic, political and social context.[325]

It is clear from the above discussion that there is little common understanding among scholars and disagreement prevails on the particular question of the objectives of EU competition law. In essence, however, the current debate seems to revolve around the dichotomy of 'single' versus multiple objectives of EU competition law. While a group of scholars argue that EU competition follows more than one single objective, such as enhancing 'economic freedom', 'market integration' within the EU, others claim that since the *travaux préparatoires* of the Treaty of Rome there has been one single objective, i.e. economic efficiency. Nevertheless, in order to understand the essence of this debate and the problem of the objectives of EU competition law, it is equally essential to understand the foundations of EU competition law as a 'system' and 'institution' and to expose how competition rules operate under the broader EU framework. Only then it is possible to understand the crux of the problem, expose, if any, the connection between the broader policy goals stipulated within the EU Treaties and individual provisions on competition, and understand and assess the argument that in the EU context competition rules have been interpreted in light of EU Treaties as a whole.

3.3 The Legal and Institutional Framework for Competition within the EU

3.3.1 The Broader Framework and Policy Objectives of the EU 'Scheme', and the Role of Competition Law in this Context

[325] K. van Miert, 'Competition Policy on the 1990's' speech for the Royal Institute of International Affairs (Chatham House, London) 11 May 1993, cited in, W. Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997) 120.

With the Lisbon Treaty modifications of 2007, the longstanding term 'European Community' was replaced by the new terminology 'European Union'.[326] The introduction of new terminology was not the only aspect of the Lisbon Treaty as it led to structural and substantive changes to the broader EU framework. Most significantly, the Lisbon Treaty amends the 'Treaty on European Union' and the 'Treaty establishing the European Community' and forms 'Treaty on the Functioning of the European Union' (TFEU).[327] Therefore, under the current legal framework, the EU is founded upon the 2012 consolidated versions of the Treaty of the European Union (TEU) and the TFEU, both of which have the same legal value, and establish together the 'EU Treaties' as a whole.[328]

Before the Lisbon Treaty amendments Article 2 EC stated:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.[329]

Following this, Article 3(1) EC stated:

> For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the

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[326]European Union, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, 2007/C 306/01. Available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML >

[327] Official Journal of the European Union, CE 321, 29 December 2006

[328] TFEU (n 362).

[329] Treaty Establishing the European Community [2002] OJ C325/33 (EC Treaty).

> timetable set out therein... (g) a system ensuring that competition in the internal market is not distorted.[330]

Therefore 'a system ensuring that competition within the EU is not distorted' is explicitly stipulated as one of the policy objectives of the EU with a view to attaining the broader values of the EU established under Article 2 EC.[331] This view was strengthened with Article 4(1), which states that for the purposes the fundamental objectives of the EU outlined in Article 3 EC, the EU aims to establish '*an economic policy…conducted in accordance with the principle of an open market economy with free competition*'.[332]

In a similar manner with Motta and Monti, who argue that the institutional and legal framework for EU competition law provides a mechanism for balancing various goals, Townley explains the way in which the system works as follows: Article 2 sets out the ultimate aims; Articles 3 and 4 establish common values and policies seeking to achieve the aims set in Article 2; these values and policies will then be implemented by individual EU Treaty provisions.[333] In this context, competition provisions themselves have been considered as an instrument to achieve the 'common market' goal of the EU, which then seeks to achieve the ultimate goals stated in Article 2 EC Treaty. Thus, he argues that the interwoven structure of the EC Treaty justifies relationship between competition provisions and other Treaty principles and broader objectives.[334] In the particular context of

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[330] Article 3(1) EC Treaty.

[331] Article 2 EC Treaty.

[332] Article 4(1) EC Treaty.

[333] Townley *Article 81 EC and Public Policy* (n 360).

[334] This approach represents a 'purposive interpretation' of the EC Treaty, whereby each text is interpreted as a part of the broader legal framework and each provision is connected to the totality of the texts in the legal system. See, A. Barak, *Purposive Interpretation in Law,* (Princeton University Press, Princeton 2005) (in); O. Andriychuck, 'Does Competition Matter? An Attempt of Analytical Unbundling of Competition from Consumer Welfare: A Response to Miasik' (2009)

competition law, competition provisions of the EU Treaties work, in themselves, as an instrument to achieve the broader goals of establishing the EU 'common market'.[335] Accordingly, this is the theoretical framework underpinning the multiple objectives of EU competition law.

In the technical legal sense, it is hard to contest Townley's argument because under the current legal framework the EU Treaties provides no hierarchy between the different aims and policies pursued by the EU. No policy objective prevails over another. This rule applies to the objective of '*ensuring that competition in the internal market is not distorted*' and its relationship with other policy objectives. Nevertheless, with the recent Lisbon amendments Article 3 of the amended EC Treaty no longer refers to '*a system ensuring that competition in the internal market is not distorted*' as one of the policy objectives of the EU and this objective has now been moved to the Protocol on the Internal Market.[336] Furthermore, the reference to an open market economy based on the principle of free economy has also been shifted from Article 4 EU to Article 119 TFEU. This means both objectives are removed from the fundamental values of the EU that took place under Articles 2, 3 and 4 EU. This change seems to reflect the then French government's arguments during the negotiation of the Lisbon Treaty, the idea that competition law was given too much weight within the European legal order and its competition provisions should not be considered as an end in itself but rather a means to an end, i.e. achieving the 'single market' goal.

In light of the above discussion, the recent modification of the EU Treaties, and particularly the shift of 'undistorted competition' from the main text of the TFEU

European University Institute; University of East Anglia (UEA)-Centre for Competition Policy Yearbook of Antitrust and Regulatory Studies, Vol. 2, No. 2.

[335] Townley *Article 81 EC and Public Policy* (n 360).

[336] Consolidated version of the Treaty on European Union - Protocol (No 27) on the Internal Market and Competition states, '…the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'.

and to one of the Protocols, leads to questions as to whether this development aims and reflects merely a 'tactical' manoeuvre of the Commission as a response to reaction from Member States, such as France, and the extent to which this shift has implications for the position of 'undistorted competition' as one of the objectives of the broader EU scheme. It is clear that the structure and framework for the EU Treaties as a whole, and the individual provisions of the TFEU hereof, confirms Townley's argument that all policy objectives under the EU Treaties are intrinsically linked with one and another. In this case, two questions prevail: How does this interaction between broader policy goals of the EU affect the role of competition law and its objectives as a separate set of legal rules under this wider framework; Have the Lisbon Treaty amendments, and particularly the removal of the objective of '*ensuring that competition in the internal market is not distorted*' from the fundamental policy of the EU, had an impact on the interpretation of competition rules?

The remainder of this chapter aims to understand and seek answers to these two questions, as well as to the critical the question that emerged in previous sub-section, i.e. the interpretation of competition rules in light of the objectives competition law and policy in the EU. With this primary objective, the following section aims to examine the legal and institutional framework for competition under the EU Treaties. This examination is a prerequisite to understand the above questions in that it shall clarify substantive rules on competition particularly, whether and to what extent they shed light on the objectives of competition rules, and, the relevant bodies and institutions within the EU for the application and interpretation of these legal rules.

3.3.2 The Legal and Institutional Framework for EU Competition Law

The official EU website for competition states:

> 'The European Commission, together with the national competition authorities, directly enforces EU competition rules, Articles 101-109

> TFEU, to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole.[337]

Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for these direct enforcement powers.

> …The treaty instituted "a system ensuring that competition in the common market is not distorted". The aim was to create a set of well-developed and effective competition rules, to help ensure that the European market functions properly and provide consumers with the benefits of a free market system. Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. These are the reasons why the EU fights anticompetitive behaviour, reviews mergers and state aid and encourages liberalisation.'[338]

As openly stated, the Commission is the primary authority to directly enforce the EU rules on competition, i.e. Articles 101 to 109 TFEU. It terms of their content, competition rules of the TFEU cover: anti-competitive behaviour; merger control; and, state-aid. This thesis aims to limit its scope to, as referred to in the US jurisprudence, rules on 'antitrust', namely legal rules on 'anti-competitive behaviour' under Articles 101 and 102 TFEU.[339] Reference to the EU merger control regime will be made only insofar as (efficiency and non-efficiency) objectives of EU competition law are concerned.

Decisions of the Commission are administrative in nature and are subject to review by the EU Courts. Under the broader EU legal system, which is founded on the rule of law, the ECJ provides the authoritative interpretation of competition rules. The Commission, on the other hand, is required to ensure the application of the Treaties, and, as Wils, the Hearing officer for the Commission puts it,

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[337] <http://ec.europa.eu/competition/>

[338] <http://ec.europa.eu/competition/>

[339] TFEU (n 362), Articles 101 and 102.

‘oversee’ the application of EU law.[340] Nonetheless, the Commission does so under the control of the ECJ whose interpretation of the EU competition rules is binding upon the Commission.

In this context, while the European General Court (GC) functions as the court of first instance, the European Court of Justice (ECJ) operates as the appellate court. However, national courts of the Member States, if in doubt about the interpretation of EU competition rules, can directly seek from the ECJ further clarification under the ‘preliminary ruling’ mechanism provided by in Article 267 TFEU.[341] Therefore, relevant case law for EU competition law comprises of decisions of the Commission and the EU Courts under Articles 101 and 102 TFEU.[342]

The EU competition law rules are set forth in Articles 101 and 102 TFEU. Article 101 TFEU reads:

> 1. 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.

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[340] W. Wils, ‘The Judgment of the EU General Court in Intel and the So-Called ‘More Economic Approach’ to Abuse of Dominance’ (2014) 37 World Competition: Law and Economics Review 405.

[341] TFEU (n 362), Article 267.

[342] TFEU (n 362), Articles 101 and 102.

> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> (a) any agreement or category of agreements between undertakings,
> (b) any decision or category of decisions by associations of undertakings,
> (a) any concerted practice or category of concerted practices,
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU presents:

> 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.

The EU Merger Regulation Articles 23 and 24 state:

> (23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.
> (24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition,

> this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

As seen from the above provisions, under all three pillars of EU competition law anti-competitive conduct is prohibited within the EU as 'incompatible with the internal market'. In essence, the difference between these provisions mainly relates to the type of conduct that restricts competition, namely: 'anti-competitive agreements between undertakings'; the 'abuse of a dominant position by one or more undertakings'; and, 'concentration of undertakings which lead to significant impediment of competition'. In terms of its structure, however, Article 101 TFEU differs from other prohibitions of anti-competitive conduct in that the legal appraisal of an agreement under this provision is divided between Articles 101(1) and 101(3) TFEU. While Article 101(1) TFEU prohibits 'agreements'[343] between 'undertakings'[344] which affect trade between Member States that have either as their 'object' or 'effect' the restriction of competition to an appreciable extent[345], Article 101(3) TFEU stipulates that if an agreement falls under the previous prohibition clause it may be provided an exception provided that all the four

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[343] In addition to 'agreements', Article 101(1) TFEU prohibits 'concerted practices between undertakings' and 'decisions by association of undertakings'. In this thesis, the terms 'agreement', 'arrangement', and 'conduct' are used interchangeably.

[344] The term 'undertaking' has been interpreted widely by EU Courts to cover 'any entity engaged in economic activity'. See, Case C-41/90, *Hdfner & Elser v Avacroton GmbH* [1991]ECR 1-19 79, para 21.

[345] For an agreement to fall under the Article 101 prohibition, such an arrangement must restrict competition within the EU to an 'appreciable' extent. If there is no appreciable effect in inter-state trade, the arrangement will fall under the national competition regime(s) of Member State(s). For the 'De Minimis' rule applied to restriction on competition, see Notice on Agreements on Minor Importance [2001] OJ C368/13, [2002] 4 CMLR 699.

conditions are satisfied. These cumulative conditions are: the production of the specified economic benefits (i.e. improve the production or distribution of goods or promote technical or economic progress); allowing consumers a fair share of these benefits, restriction of competition is indispensable to the attainment of the above benefits; and, the restriction of competition does not lead to the elimination of competition in a substantial part of the product in question. Thus, the structure of Article 101 TFEU provides a so-called 'bifurcated' character to the provision, based on a 'prohibition' [Article 101(1) TFEU] and an 'exception' clause [Article 101(3) TFEU], and entails a two-stage assessment in assessing the legality of an agreement under Article 101 TFEU.

In relation to their objectives, neither of the provisions sets a clear definition as to the goal(s) pursued by EU competition rules nor its relationship to the broader objectives of the EU. Therefore, the objectives would have to be inferred from the case-law of the Commission and EU Courts'. Nevertheless, the legal framework for EU competition law contains various other legal instruments. In addition to the substantive provisions stipulated within the TFEU (Articles 101 and 102), and the EU Merger Regulation, a number of 'secondary legislation' and 'soft law instruments' have been adopted over the years. Secondary legislation on competition, which is legally binding in nature, is adopted either by the European Council or by the Commission and is adopted in the form of a 'Regulation'. Soft law instruments, on the other hand, are formulated and adopted by the Commission and may be issued in the form of a 'Notice' or a 'Guideline'. Soft law instruments are non-binding in nature and aim to further explain the Commission's practice on a number of particular issues on competition.

In consideration of the substantive competition rules analysed above, it becomes clearer that under the current framework for EU competition law there is considerable scope and discretion afforded to the Commission and European Courts in the construction and interpretation of the objective(s) of EU competition law. This conclusion relates to the observation under previous sub-sections that the objectives of competition law are reflected by the interpretation of substantive rules. The following section seeks to analyse relevant EU case-law on

competition, relevant secondary legislation and soft-law instruments in an attempt to reveal the objectives of EU competition law. Again, as emphasised above, this analysis primarily aims to shed light on: the relationship between the broader policy goals of the EU and competition, the implications of this relationship for the objectives of competition law, whether the removal of the objective of '*ensuring that competition in the internal market is not distorted*' from the fundamental policies of the EU has had an impact on the role of competition law as one of the policy goals; and, more importantly, as suggested by relevant scholarship, whether EU competition law strictly adopts a single 'efficiency' objective or if it incorporates other 'non-economic' goals.

The discussion presented below is important and provides a fundamental component of the comparative legal study for the purpose of this thesis as we turn to the objectives of the Turkish competition law regime in the following chapters.

3.4 The Case-Law of EU Courts and Decisions of the Commission: The Objectives of EU Competition Law

3.4.1 Case-Law of the EU Courts

The fundamental objective of 'establishing a common market', clearly defined under the then Article 2 EC Treaty,[346] was described by the ECJ as a stage and process of the economic integration of all EU Member States.[347] The aim and purpose of establishing a 'common market', as explained by EU Courts, was to remove all barriers to trade within the EU to ultimately form a 'single market' that

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[346] EC Treaty (n 369), Article 2.

[347] Case 15/81, *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

gives rise to conditions as close as possible to a genuine 'internal market'.[348] The Lisbon Treaty marks the end of this stage of the integration process and replaces the fundamental tenets of 'common market' and 'single market' with the concept of 'internal market'.[349] Nonetheless, the significance of establishing a European single market appears as a political objective of the EU based on the central idea that a single economic market ultimately leads to prosperity and enhances the well-being of the people of the EU.

What does the single market objective mean for EU competition law? Historically, 'ensuring undistorted competition' as defined initially under the then Article 3(1) EC and currently under Protocol No. 27, has been perceived by EU Courts as a means to achieve the 'single market' objective.[350] Since *Consten & Grundig*, the single market imperative has been repeatedly referred to as an objective that the EU competition law seeks to achieve.[351] EU Courts have embraced the market integration objective of competition law as a mechanism on its own that reinforces and implements other wider EU objectives such as '*establishing a common market and an economic and monetary union and by implementing common policies*' or '*to promote throughout the Community a harmonious, balanced and sustainable development of economic activities*'.[352] In light of the single market objective, the 'partitioning' of European markets through anti-competitive conduct has been repeatedly condemned in cases such as *United Brands, Tetra Pak*, and *General Motors*, under both Articles 101 and 102

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[348] ibid.

[349] European Union, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007/C 306/01

[350] Treaty Establishing the European Community [2002] OJ C325/33 (EC Treaty); Consolidated version of the Treaty on European Union Protocol (No 27) on the Internal Market and Competition states.

[351] Case 56/64 *Consten and Grundig v Commission* [1966] ECR 429.

[352] ibid.

TFEU.[353] Moreover, the interpretation of EU competition rules by particular reference to the wider 'market integration' objectives of the EU, as posited by Townley, clearly appears in *Continental Can*.[354] In this case, the ECJ not only re-established the role of competition rules in attaining '*...the institution of a system ensuring that competition in the common market is not distorted*', as enshrined in (the then) Article 3(1)(g) EC, but also linked this objective to '*...Article 2 EC according to which one of the tasks of the community is to promote throughout the union a harmonious development of economic activities*'.[355] On the other hand, the ECJ defines the limits of this interpretation as the extent to which the restraint of competition does not conflict with the wider objectives of the EU. In this context, the ECJ stated:

'... restraints on competition are limited by the requirements of [Articles 2 and 3EC]. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the common market.'[356]

Therefore, the legal adopted by the ECJ required competition rules of the EU to be construed in light of various objectives of EU Treaties with the condition that this interpretation does not lead to competition being eliminated. Again, the General Court reiterated in *Tetra Pak* that competition rules of the EU must accordingly be interpreted:

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[353] Case 27/76 *United Brands Co. v. Commission* [1978] ECR 207, paras 227 and 233. See also: Case 226/84 *British Leyland plc v. Commission* [1986] ECR 3263; Case 26/75 *General Motors Continental NV v. Commission* [1975] ECR 1367; Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia EE and others v. GlaxoSmithKline AEVE* [2008] ECR I-7139.

[354] Case 6/72 *Europemballage Corporation and Continental Can Co. Inc. v. Commission* [1973] ECR 215, para 23.

[355] ibid.

[356] ibid.

'...by reference to its object and purpose as they have been previously described by the ECJ and in accordance with the general objectives set out in Article 3(1)(g) EC'.[357]

Furthermore, it is suggested that the objectives of EU competition law may also be inferred from EU Courts' interpretation and understanding of 'restriction of competition' and 'abuse of dominant position' prohibited under Articles 101 and 102 TFEU. That is to say, the EU Courts' understanding of what amounts to 'restriction of competition' and the way in which the Court conducts this legal assessment for the 'abuse of dominant position' may be considered as a reflection of Courts' understanding of the objectives of competition rules. This will be examined separately under Articles 101 and 102 TFEU.

- **Under Article 101 TFEU**

In relation to the interpretation of Article 101 TFEU, and particularly to the prohibition clause, one of the benchmark judgments of the ECJ is *Société Technique Minière v Maschinenbau Ulm GmbH* (*STM*). In its decision the Court stated:

The fact that the (restriction of competition by 'object' or be 'effect') are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement in the economic context in which it is to be applied. This interference with competition referred to in Article [101 (1)] must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by the prohibition, it is then

[357] See Case T-83/91 *Tetra Pak International SA v. Commission* [1994] ECR II-755, para 114.

necessary to find that those factors are present which show that competition had in fact been prevented or restricted or distorted to an appreciable extent.[358]

In this judgment, the ECJ essentially did two things: First, it clarified the method for assessing cases under the prohibition clause, Article 101(1) TFEU, and it did this through clarifying a 'sharp' division between 'by object' and 'by effect' restrictions of competition; second, it established the legal formula for conducting 'competitive assessment', i.e. assessing the legality of conduct, again under Article 101(1) TFEU. The legal formula coined by the ECJ is based on the assessment of the overall context within which the agreement is made; and, second, the purpose of the agreement. This means that when assessing the legality of conduct under Article 101(1) TFEU, reference to the provisions of the agreement is made in light of the broader context of the agreement in question and ultimately to its purpose.

In relation to the first point, it is seen that, in the following years the clear division between 'by object' and 'by effect' restrictions of competition framed under Article 101(1) TFEU, initially established in *Consten & Grundig*, was further reinforced by the GC in *European Night Services*.[359] In the latter case, the GC reiterated its contextual approach and stipulated that legal assessment under Article 101(1) TFEU requires to take into account the economic context within which relevant agreement takes place, the nature of the products or services in question, as well as the structure of the relevant market '*...unless it is an agreement containing obvious restrictions of competition such as price fixing, market-sharing, or the control of output [in which case] such restrictions may be*

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[358] Case (56/65) *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, para 249.

[359] Cases T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141.

weighed against their claimed pro-competitive effects only in the context of [Article 101(3) TFEU]...'[360]

This legal formula draws a fine line between the two types of infringements under Article 101(1) TFEU, 'by object' and 'by effect' restrictions of competition, and defines the first one as 'obvious infringements of competition' by virtue of their very nature. According to EU Courts, 'by object' restrictions of competition are so 'obvious' and 'absolute' that there is no need to take into account the 'effects' of the agreement on competition and an assumption is made that effect on competition is 'sufficiently deleterious'. Over the years, the EU Courts have considered the following practices as restriction of competition 'by object': agreements between competitors to fix prices and limit output or share markets; [361] agreements between competitors to reduce capacity of supply; [362] information exchanges between competitors designed to remove uncertainties concerning the intended conduct of such undertakings;[363] agreements which confer the distributer an exclusive sales territory for the product supplied by the producer and which restrict distributers to resell the products to another Member State;[364] and, agreements which restrict distributers to resell the products to another Member State.[365] Nevertheless, this stimulates the question of what this demarcation means for the purpose of the objectives of Article 101(1) TFEU. What is understood in light of the case-law is that competitive assessment for the

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[360] ibid at para 136.

[361] ibid.

[362] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers*, [2008] ECR I-8637, para 41(Irish Beef).

[363] Case C-8/08, *T-Mobile Netherlands BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR 1-4529, para 36-43.

[364] Case 56/64, *Consten and Grundig* (n 391).

[365] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2010] 4 C.M.L.R. 2., para 58; Cases 32/78, 36/78-82/78, *BMW Belgium v Commission* [1979] ECR 2435, paras 20-28, and 31; Cases C-468/06-C-478/06, *Sot-Lelos kai Sia* [2008] ECR 1-7139, para 65.

two different kinds of restriction of competition will not be the same. If '*the precise purpose of the agreement in the economic context in which it is to be applied*' is to restrict competition, its anti-competitive effects are assumed and no further legal assessment is conducted. If otherwise, legal standards of *European Night Services* apply.

In Métropole, another important case that marks the EU Courts' competitive assessment under Article 101(1) TFEU, the appellants contested the Commission's decision on the grounds that the latter had made an error of law and that it had conducted a competitive assessment under Article 101(3) TFEU instead of Article 101(1) TFEU.[366] In essence, what the appellants argued was that the Commission should have applied the legal test established for 'competitive assessment' under the prohibition clause but not under the exception clause in Article 101(3) TFEU. Upon its legal analysis the General Court stated:

> 'It is true that in a number of judgments the Court of Justice [ECJ] and the Court of First Instance [General Court] have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty [Article 101(1) TFEU]'…They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold ... that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in [Article 101(1) TFEU]. In assessing the applicability of [Article 101(1) TFEU] to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned'.[367]

In its reasoning, albeit admitting the EU Courts' 'more flexible interpretation' under Article 101(1) TFEU, the General Court rejected the appellants' argument. By reference to *Albany*, the General Court noted that this broader interpretation of the prohibition clause was in particular relation to another 'trend' in case-law,

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[366] Case T 112/99 *Métropole Télévision and others v Commission* [2001] ECR II-2458.

[367] ibid at paras 76-78.

which did not resonate to the case under examination.[368] Effectively, in *Albany* the ECJ aimed to address the specific question of whether and to what extent legitimate public policy objectives should be assessed under the prohibition clause.[369] In this regard, the ECJ stated that, as with the case in *Albany*, agreements concluded between employers and employees in the form of collective bargaining are conducted with a view to improving employment conditions.[370] Particularly, the terms and clauses of the agreement in question, according to the ECJ, aimed at restoring the dialogue between the two sides in the pursuit of a purely social objective, is a method that is strongly encouraged under Articles 151 and 154 TFEU.[371] This legal assessment openly and clearly required a 'balancing' exercise of the social policy goal (i.e. improving employment conditions through social dialogue) *vis-à-vis* competition rules, as a result of which the ECJ held the agreement did not infringe Article 101(1) TFEU.[372]

The ECJ held on to its 'more flexible interpretation' under the prohibition clause, and, in fact, following on from its legal standard established in *STM*, further expanded and re-defined its competitive assessment under this provision first in

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[368] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I 5751.

[369] ibid.

[370] ibid.

[371] TFEU (n 302), Article 151(1): The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

Article 154 (1): The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

[372] C-67/96 *Albany International BV* (n 408).

Wouters[373] and then in *Meca Medina*.[374] In relation to the question of whether and to what extent 'legitimate public policy' objectives are to be considered under Article 101 TFEU, the ECJ coined its more 'expanded' legal formula: each and every legal assessment under this provision needs to first establish the overall context within which the agreement takes place and more particularly its objectives, and, following this analysis, it shall then consider whether the agreement's restrictive effects on competition are inherent in the pursuit of those objectives and if they are proportionate.[375] Following this, in *Wouters* when the ECJ was asked whether a rule imposed by the Netherlands Bar Association that prohibited the formation of multi-disciplinary partnerships between lawyers and accountants fell within prohibition clause Article 101(1), the Court acknowledged that the rules prohibiting any form of multi-disciplinary partnerships between such professions had an adverse effect on competition in the internal market to an appreciable extent, but, at the same time, went on to reiterate that not every agreement between undertakings that restricted the freedom of action of the parties necessarily fell within the prohibition laid down in Article 101(1) TFEU.[376] On the basis of its 'expanded' competitive assessment, the Court emphasised, the objective of the agreement in *Wouters* was to ensure that legal services and the sound administration of justice were provided with the necessary standards of integrity and justice, and, for this reason, the restriction imposed by the Netherlands Bar Association was a necessary measure for the proper practice of the legal profession.[377]

Similarly in *Meca Medina*, the ECJ was required to assess the legality of anti-doping rules set forth by the International Olympic Committee (IOC), which

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[373] Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I 1577, [2002] 4 CMLR 913.

[374] Case C-519/04, *Meca Medina v Commission* [2006] ECR I-6991, para 43.

[375] Case C-309/99, *Wouters* (n 413).

[376] Case C-309/99, *Wouters* (n 413) para 86.

[377] ibid.

required the exclusion of athletes from competitive sports if a prohibited substance would appear in the relevant tests, under Article 101 TFEU.[378] In relation to the compatibility of anti-doping rules with EU competition law the ECJ referred to its position in *Wouters* and stated that in the application of Article 101(1) TFEU to a particular case, account had to be first of all taken of the overall context in which the decision was taken, and, more specifically, of its objectives.[379] The Court held that, in light of the overall context within which the rule was made, and, more specifically, of its objectives, anti-doping rules pursued a legitimate public policy aim, i.e. to combat doping in order for competitive sports to be conducted fairly and to safeguard equal chances for athletes, the integrity and objectivity in competitive sports and ethical values in sports. In this light, the Court stated, anti-doping rules of the IOC were limited to what was necessary to achieve those aims, and although these rules resulted in the limitation of the appellants' freedom of action, they did not necessarily constitute a restriction of competition within the meaning of Article 101(1) TFEU.[380]

In the following years, the EU Courts have held onto this 'flexible' legal test and contextual approach under the interpretation of the prohibition clause and further 'expanded' the breadth and scope of legal assessment under Article 101(1) TFEU in *O2 (Germany) GmbH & Co. OHG v Commission (O2)*.[381] In this case, an agreement which provided conditions for sharing certain infrastructure components between mobile network operators 'O2' and 'T-Mobile' and granted O2 the right to roam on T-Mobile's network in Germany that covered at least 50% of the population in the relevant German State, the Commission found certain provisions on roaming to be incompatible with Article 101(1) TFEU as it eliminated competition to an appreciable extent within the two Member States the

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[378] Case C-519/04, *Meca Medina* (n 414) para 43.

[379] ibid.

[380] Case C-519/04, *Meca Medina* (n 414) para 42.

[381] Case T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission* [2006] ECR II-1231.

United Kingdom and Germany.[382] The Commission, however, granted O2 exemption under Article 101(3) TFEU.[383] Upon O2's appeal to seek an annulment of Commission's decision in relation to 'restriction of competition' under Article 101(1) TFEU, the GC rejected Commission legal analysis under the prohibition clause on the grounds that the latter had failed to examine, under the prohibition clause, the factual effects of the agreement in question, and, went on to further 'introduce' a so-called 'counterfactual' analysis under Article 101(1) TFEU:

...where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The conduct in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.[384]

...the examination required in the light of [Article 101(1) TFEU] consists essentially in taking account of the impact of the agreement on existing and potential competition ... and the competition situation in the absence of the agreement, ... those two factors being intrinsically linked.[385]

In 02, although the GC explicitly clarified that the so-called counterfactual analysis under the prohibition clause 'does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason' akin to the US antitrust law jurisprudence, the crux of

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[382] Case T-328/03, *O2 (Germany)* (n 421) para 6.

[383] ibid.

[384] ibid at para 68.

[385] ibid at para 71.

the GC's judgment is to further reinforce and strengthen the Court's contextual interpretation of the notion of 'restriction of competition' under Article 101(1) TFEU. The GC's legal 'formula' was stipulated as: if, following an assessment of the situation of competition within the actual context in which it would occur vis-a-vis without the agreement in question, i.e. the counterfactual analysis, it becomes obvious that the agreement is necessary for entrance into a new market the agreement in question may no fall within the prohibition clause.

In a relatively recent case, the *Competition Authority v Beef Industry Development Society Ltd.* (*Irish Beef*), the ECJ took the liberty to expound more on its contextual interpretation under the prohibition clause, and, this time, with an emphasis on 'by object' restrictions of competition.[386] The *Irish Beef* case is of great significance in that it reveals the ECJ's position on the legality of 'crisis cartels' under competition rules, and whether these restrictions of competition 'by object' can be justified with existing economic crisis such as drop in consumer demand and significant overcapacity in certain industries under Article 101 TFEU.

Initially, at the national level, the Irish Competition Authority objected to the BIDS scheme on the grounds that it stipulated the closure of plants processing up to a quarter of the meat production in Ireland and the exit of a number of competitors due to the considerable fall in demand for meat and resultant overcapacity of meat processors. In terms of its effect on the structure of the market, The BIDS scheme required those who agreed to exit the market not compete with competitors in the market for up to two years and imposed upon them a number of restrictions concerning the future use of their buildings and land. On appeal, however, the Irish High Court took into account Court took into account the long term over-capacity in the market and the economic crisis prevailing in the market for meat processors and held that the agreement had

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[386] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers* (n 402).

neither the 'object' nor 'effect' the restriction of competition. Eventually, the Irish Supreme Court brought this national legal matter to the ECJ through preliminary referencing under Article 267 TFEU and asked the ECJ whether the agreement in question could be regarded as having an anti-competitive object. In assessing the legality of 'crisis cartels', which is also referred to as 'restructuring agreements', the Advocate General asserted that the notion of 'restraint of competition' could not be appraised without having regard to: the overall objective of Article 101 TFEU, i.e. the protection of the competitive process; the legal and economic context of the restraint; the objective content of the agreement; the extent to which the agreement in question limits the freedom of each of its parties to determine their conduct independently on the market to such a degree as to have an appreciable adverse effect on the dynamics of competition on the market; and, finally, the objective intention of the parties.[387] In this connection, the ECJ has interpreted, in light of the objectives of Article 101 TFEU, that the restructuring of an industry, despite an existing economic crisis, is regarded as restriction of competition 'by object' by virtue of the implications of the agreement for the competitive process and the concern for potential competitors' rights to access the market. The limitation of production, encouraging the withdrawal of a number of competitors from the industry, and the requirement imposed upon certain competitors not to use their premises are all inferred by the Court as barring the access of potential competitors to the Irish market, having the object of harming the structure of the market, and thus falling within the prohibition clause.[388]

Nevertheless, in its 'landmark' case *GlaxoSmithKline Services Unlimited v Commission* (*GSK*) the ECJ re-established its understanding of the notion of 'restriction of competition' under its 'consumer welfare' standard, and, under this definition, set its legal formula in assessing cases under Article 101 TFEU.[389] In

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[387] ibid at paras 43-46.

[388] ibid

[389] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

GSK the agreement in question was subject to scrutiny by the EU Courts as it stipulated different sales prices of the same pharmaceuticals to different wholesalers depending on the ultimate Member State of resale, and banned each wholesaler to re-sell the product across other Member States. In essence, the agreement aimed at restricting parallel trade of certain medicine originating from Spain where the prices of medicine were lower than in other Member States due to fixation of prices by the Spanish State. Despite the established broader single market imperative since *Consten & Grundig*,[390] the GC re-established a new 'legal formula' concerning the restriction of parallel imports across EU Member States based upon the introduction of its 'new' 'consumer welfare' standard. According the GC, the objective of Article 101(1) TFEU is to prevent undertakings from reducing the welfare of final consumers through restriction of competition, and, in this connection, an agreement to limit parallel trade amounts to restrict of competition 'by object' only in so far as it could be presumed that final consumers are deprived of the advantages of effective competition.[391] With this decision, the GC endorsed the Commission's decision on the matter.[392] Under this interpretation of the prohibition clause, restriction of parallel trade between EU Member States would constitute a 'by object' restriction of competition only if it can be presumed that the conduct in question had adversely affected the welfare of final consumers. The reasoning of the GC meant a 'narrower' interpretation and understanding of the broader 'market integration' objective based on a 'consumer welfare standard' as defined by neo-classical economics. However, the ECJ overruled the GC's position and held:

> '...It must be borne in mind that the Court [ECJ] has held that, like other competition rules laid down in the Treaty, [Article 101(1) TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers

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[390] Case 56/64 *Consten and Grundig v Commission* (n 391).

[391] ibid

[392] ibid

> be deprived of the advantages of effective competition in terms of supply or price...'[393]

Thus, the GC's 'narrow' interpretation of 'restriction of competition' based on the 'consumer welfare' standard has been rejected by the ECJ. Moreover, in the following years, the ECJ has repeatedly held onto its position. In *T-Mobile Netherlands*, for example, the ECJ reiterated its position in *GSK*,[394] and, as recently as in 2011, in *Konkurrensverket* the Court re-established the role and objectives of EU competition law under the broader EU scheme.[395] In the latter case, despite the GC's 'attempt' in *GSK* to introduce a 'narrower' and consumer-welfare based legal test, the ECJ reiterated its broader view of what EU competition law aims to achieve. It stated that the fundamental objective of EU competition law is: '*preventing competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*'.[396]

- **Under Article 102 TFEU**

As opposed to Article 101 TFEU, which is concerned with collusive behaviour between undertakings, Article 102 TFEU is concerned with the unilateral conduct of a single dominant undertaking and prohibits 'abusive' behaviour insofar as it may affect trade across Member States. Instead of the prohibition of 'restriction

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[393] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405), para 63.

[394] Case C-8/08, *T-Mobile Netherlands BV* (n 403).

The ECJ stated in paragraph 38 of its judgement: '...Like the other competition rules of the Treaty [Article 101 TFEU] is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.'

[395] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, para 22.

[396] ibid.

of competition' under Article 101 TFEU, Article 102 TFEU condemns 'abusive' conduct.

Nevertheless, similar to Article 101 TFEU, the case-law of the EU Courts makes reference to the wider single market objectives under Article 102 TFEU. As early as in *Continental Can*, the ECJ stated that Article 102 TFEU, as does Article 101 TFEU, plays an important role in implementing the objective of '... a system ensuring that competition in the common market is not distorted', enshrined in (the then) Article 3(1)(g) EC, and equally corresponds to Article 2 EC and to the task of 'promoting throughout the EU a harmonious development of economic activities'.[397]
At the same time, however, the ECJ went further to state that restraints on competition are limited by the requirements of (the then) Articles 2 and 3 EC because 'going beyond this limit involves the risk of weakening of competition and this would conflict with the aims of the 'internal market'.[398] This means, according to the ECJ, as far as reference to the broader objectives is concerned, restriction of competition is allowed only to the extent that this restraint does not conflict with the wider objectives of the EU.

In *United Brands*, upon stipulation of different sales prices to distributors in different Member State by the dominant supplier of bananas 'United Brand Company', the ECJ held that the partitioning of national markets through geographical price discrimination had created 'artificially' high price levels and placed certain distributors at a competitive disadvantage.[399] In this case, not only

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[397] Case 6/72 *Europemballage Corporation and Continental Can Co. Inc.* (n 394) para 23.
The General Court reiterated in *Tetra Pak* that Article 102 TFEU must accordingly be interpreted by reference to its object and purpose as they have been previously described by the ECJ and in accordance with the general objective set out in the then [Article 3(1)(g) EC]. See Case T-83/91 *Tetra Pak International SA v. Commission* [1994] ECR II-755, para 114.

[398] ibid.

[399] ibid.

did the ECJ reiterate the application and relevance of the market integration objective to cases under Article 102 TFEU, but, differently from the legal assessment under Article 101 TFEU, it placed emphasis on and took into account as an objective 'the ability and freedom of competitors to compete against one and another'.

In succeeding cases, ensuring the objective of the right to operate in markets under Article 102 TFEU has been illustrated in the form of 'protecting the structure of markets'. In numerous cases the ECJ utilised the latter as a criterion and benchmark against which the legality of conduct has been assessed under Article 102 TFEU.[400] Over the years, under the interpretation of what amounts to an 'abuse of dominance', EU Courts' concern for the competitive structure of markets has manifested itself in different types of unilateral behaviour. For instance: while in *Commercial Solvents* the ECJ held that 'an undertaking in a dominant position, as regards the production of raw material and therefore able to control the supply to manufacturers of these derivatives, cannot, just because it decides to start manufacturing these derivatives, act in such a way to eliminate competition… and risk eliminating all competition on the part of this customer.'[401]; in *Michelin I* and *Hoffmann-La Roche* the ECJ held that discounts provided on the condition that the customer will purchase all or most of its requirements from the dominant undertaking remove customer's freedom to choose his sources of supply and prevents other firms' access to markets.[402] Another form of rebate that has been prohibited by EU Courts under Article 102 TFEU is what is referred to as 'loyalty rebates'. This form of abusive behaviour was best demonstrated in *BPB Industries*, a judgment in which the GC stated 'the

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[400] See opinion of Advocate General Kokkot in Case C-95/04P *British Airways plc v Commision*, delivered 23 February 2006.

[401] Case 6–7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission* [1974] ECR 223, para 25 (emphasis added).

[402] Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v. Commission* (Michelin I) [1983] ECR 3461, para 73.

application by a supplier who is in a dominant position, and upon whom as a result the customer is more or less dependent, of any form of loyalty rebate through which the supplier endeavours, by means of financial advantages, to prevent its customers from obtaining supplies from competitors constitutes an abuse'.[403] EU Courts' objective to assure competitors right to access markets and to ensure the competitive structure of markets can be observed in recent cases such as *Microsoft* and *Intel*.[404]

Nevertheless, in the light of the objectives of 'internal market' and 'ensuring the competitive structure of markets', EU Courts have come to develop a legal test under Article 102 TFEU that is based on the analysis of whether and to what extent conduct of dominant undertakings have led to 'exclusionary' and 'foreclosure' effects. The criterion of 'foreclosure' and exclusionary effects have been utilised by EU Courts under Article 102 TFEU as a measure through which

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[403] Case T-65/89 *B PB Industries and British Gypsum v. Commission* [1993] ECR II-389, para 120; Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 89.

[404] Case T-201/04 *Microsoft Corp v Commission* [1997] ECR-II 03601; Case T-286/09 *Intel Corp v Commission* [2014] (General Court, 12 June 2014).

P. Akman, The Concept of Abuse in EU Competition Law (Hart 2012); Claus-Dieter Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008); F. Etro and I. Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010); A. Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* (OUP 2009); L. Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) G. Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law & Practice 1; R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011); R. O'Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013); L. Pace, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Elgar 2011); D. Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 Journal of Competition Law & Economics 149; P. Colomo, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (2014) LSE Law, Society and Economy Working Papers 29-2014.

the legality of conduct has been assessed. For example, the legal test of 'foreclosure effects' was recently re-established in *Post Danmark* upon the Danish Commercial Court's preliminary reference to the ECJ.[405] When the national Danish Commercial Court approached the ECJ and asked how to assess the legality of a retroactive rebate system operated by Denmark's national postal services incumbent Danish Postal Services, the ECJ reiterated its legal standard established under previous case-law and pointed out that the key issue at hand was whether the dominant undertaking granted rebates with exclusionary effects that cannot be economically justified.[406] In this context, the ECJ highlighted that a retroactive rebate system 'imposed' by a dominant undertaking is considered 'exclusionary' for the purpose of Article 102 TFEU: if it does or has the effect of making market entry very difficult or impossible for competitors; or, if it makes it more difficult or impossible for customers to choose between various sources of supply. Again, the ECJ's focus appears to be centred on the 'economic freedom of competitors' that is measured through their capability to enter and operate in markets, but, ultimately, assessed through and based on the legal standard of 'exclusionary effects'.

Furthermore, in a similar way to the demarcation between 'by object' and 'by effect' restrictions of competition under Article 101(1) TFEU, case-law suggests that EU Courts have made a distinction under Article 102 TFEU between 'conduct abusive by their very nature' *vis-a-vis* 'conduct that are not inherently abusive' and require further analysis in order to determine whether they do have exclusionary effects. While conduct under the first 'category' is presumed to have exclusionary effects and, is, therefore, abusive for the purpose of Article 102 TFEU, legal assessment under the second type conduct requires further analysis under the 'foreclosure' test. In terms of legal assessment this means that the first group relates to cases that are, at least *prima facie*, prohibited with no requirement

[405] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, judgment of 27 March 2012 (Post Danmark I).

[406] ibid.

on EU Courts to show evidence of exclusionary effects, whereas the second type of behaviour requires evidence of exclusionary effect and actual impact of conduct on competition.

So far, EU Courts' case-law under Article 102 TFEU has revealed: reference to the wider EU 'single market imperative',[407] and 'ensuring the competitive structure of markets' as objectives;[408] and, the adoption of a 'foreclosure/exclusionary effect' legal standard under Article 102 TFEU.[409] Nonetheless, another important question for the purpose of this thesis is whether and to what extent the 'consumer welfare' objective is adopted under Article 102 TFEU. The first, and perhaps among the most explicit, discussion in this context takes place under the Commission and the ECJ's decision in *Continental Can*.[410] In defence of its infringement decision against dominant undertaking Continental Can, the Commission emphasised the necessity and importance of interpreting Article 102 TFEU and (the then) Article 3(1)(g) EC together.[411] Under this purposive reading of the provisions of the then EC Treaty, the Commission argued that a change in the structure of competition reduces consumers' market alternatives and is ultimately detrimental to consumers' well being.[412] The ECJ

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[407] Case 56/64 *Consten and Grundig* (n 391); Case 27/76 *United Brands* (n 393), paras 227 and 233. See also: Case 226/84 *British Leyland plc v. Commission* [1986] ECR 3263 (n 393); Case 26/75 *General Motors Continental* (n 393); Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia EE* (n 393)

[408] Case 6/72 *Europemballage Corpn and Continental Can Co Inc* (n 394), [1973] CMLR 199; Case 85/76 *Hoffmann-La Roche* (n 443), [1979] 3 CMLR 211; Case 27/76 *United Brands Company v Commission* (n 393), [1978] 1 CMLR 429; Case 322/81 *Nederlansche Banden-Industrie Michelin NV* (n. 442).

[409] Case T 30/89 *Hilti v Commission* [1991] ECR II-1439; Case T 83/91 *Tetra Pak International SA* [1992] ECR II-755; Case T-201/04 *Microsoft Corp* (n 444); Case T-286/09 *Intel* (n 444).

[410] Case 26/75 *General Motors Continental* (n 393)

[411] ibid.

[412] W. Haubert II, 'Continental Can: New Strength for Common Market Anti-trust' (1973-1974) 11 San Diego Law Review 227; L. Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP, Cambridge 2010), p 71, fn 68.

endorsed the Commission's argument on the matter and stated that Article 102 TFEU is not only aimed at practices which may cause damage to consumers directly but also those that are detrimental to consumers through their impact on the competitive structure of markets.[413] The ECJ reiterated this position in recent cases such as *British Airways* and *France Telecom* in which it established that Article 102 TFEU refers not only to conduct which may cause damage to consumers directly, but also to those which are detrimental to consumers through the conduct's impact on and effective competitive structure.[414]

The implications of the Commission and the ECJ's decisions for the notion of 'consumer welfare' as an objective and legal standard applicable in cases assessed under Article 102 TFEU mean that the objective of consumer welfare has been utilised in a broader manner to reflect and include 'the welfare of consumers', but not exclusively in the form of 'consumer surplus' as a legal benchmark and criterion. The objective of ensuring the 'welfare of consumers' in the form of better quality, lower prices and more choice of goods and services has been inferred by the Commission and the ECJ from harm to the structure of relevant markets, rather than a mere reliance on a 'consumer surplus' benchmark. In this case, it is argued, standard of proof on the part of EU Courts and the Commission to establish an abuse of dominance under Article 102 TFEU is lower compared to an exclusive 'consumer surplus' benchmark had the latter standard been adopted.

3.4.2 A Reflection on Relevant EU Case-Law

In the light of the analysis of the EU case-law, two questions prevail: What does the case-law expose for the purpose of the objectives of the EU competition law

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[413] Case 6/72 *Europemballage Corpn and Continental Can Co Inc* (n 394).

[414] Case C-95/04 P *British Airways v Commission* [2007] ECR 2331, para 106; Case C-202/07 P *France Telecom SA v Commission* Judgment of 2 April 2009, para 105.

system; and, how does this relate to the economic literature and academic debate on the objectives of competition law and to the discussion on consumer welfare discussed in previous chapters?

First of all, the case-law examined above sheds light on the fundamental question of what the objectives of competition law mean for the purpose of the application and interpretation of substantive rules: EU Courts have 'shaped' the substance of legal provisions on competition in the light of the objectives of competition law. In other words, the objectives of competition law have guided the EU Courts' and Commissions' interpretation and application of the substantive rules. The impact of the objectives and its implications for the interpretation of substantive rules can be further observed in the following points.

The second observation relates to the way in which EU Courts have interpreted competition rules by particular reference to the wider single market objective of the EU under both Articles 101 and 102 TFEU. The existing institutional and legal framework under the EU Treaties has successfully provided the mechanism necessary for balancing various goals under the competition rules of the EU. Most evidently, in *Continental Can* the 'legal formula' established by the ECJ is based on the rule that there exists no hierarchy among the different values embraced by and stipulated in the EU Treaties, and, therefore, competition rules shall be interpreted accordingly with the condition that this not led to competition being eliminated within the EU.[415] Following from this observation, it is self evident that, as advocated by former Commissioner van Miert and systematically proposed by Townley,[416] competition rules have been interpreted as a part of the broader EU theme and in the light of its wider objectives but not in isolation or with an understating that EU competition rules exist in a vacuum. In this context,

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[415] Case 6/72 *Europemballage Corpn and Continental Can Co Inc* (n 394).

[416] K. van Miert, 'Competition Policy on the 1990's' speech for the Royal Institute of International Affairs (Chatham House, London) 11 May 1993 (n 359); Townley, *Article 81 EC and Public Policy* (n 360).

since *Consten & Grundig* the most commonly referred 'broader' policy objective and the one that EU Courts have had regular recourse to in competition law assessment has been the 'market integration' objective.[417]

As the third conclusion it is submitted that the single market imperative is not the only 'non-efficiency' public policy objective that has been accommodated under EU competition law. In cases such as *Albany* and *Wouters*, the ECJ conducted a 'balancing' exercise under the prohibition clause and weighed the 'restriction of competition' against the 'public interest' test.[418] In its legal assessment the ECJ took into account both public policy and competition objectives under a 'necessity and proportionality' test, weighed one objective against the other, and, arrived at a 'compromise' in favour of public policy concerns.[419] One might argue, in the absence of an infringement of Article 101 TFEU in these cases, the insignificance of public policy objectives concerning the outcome decision of the Court. However, the importance of the ECJ's judgments in *Albany* and *Wouters* lies beneath the inclusion and consideration of public policy objectives together with 'restriction of competition' in under competition rules and its implications for the Courts final decision. Albeit, admittedly, cases such as *Albany* and *Wouters* can be referred to as exceptional, the consideration of the 'public interest test' in a series of cases indicates that under existing case law there exists 'room' for public policy objectives in the interpretation of competition rules by the ECJ.[420]

The fourth observation relates to the legal implications of recent Lisbon Treaty modifications in relation to the role and interpretation of competition rules as a part of the EU Treaties and framework. Despite the removal of '*a system ensuring that competition in the internal market is not distorted*' from the main

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[417] Case 56/64 *Consten and Grundig* (n 391)

[418] C-67/96 *Albany International BV* (n 408), [1999] ECR I 5751; *Case C-309/99 Wouters* (n 413), [2002] 4 CMLR 913; *Case C-519/04, Meca Medina* (n 414).

[419] ibid

[420] ibid

text of EU Treaties to a separate Protocol No.27 on the Internal Market, recent rulings of the EU Courts reaffirm the settled case law on 'attaining the single market objective' and the establishment and maintenance of 'undistorted competition' through competition rules.[421] Undoubtedly, in this context, recent cases such as *GSK*[422] and *Konkurrensverket*[423] recapitulate and reaffirm the 'ever-prevailing' ultimate objective of the provision of 'undistorted competition' within the EU, and reveal Lisbon Treaty's limited implications for the role of competition rules as a tool to ensure undistorted competition.

As a fifth point, it is asserted that since its inclusion in the main text of the Treaty of Rome of 1957, the objective of ensuring undistorted competition within the EU has been endorsed by EU Courts as the overriding 'ultimate' objective regardless of the type of anti-competitive conduct. Stretching from vertical arrangements between undertakings, such as in *GSK*,[424] to the most 'severe' cases of collusion between undertakings such as cartels in the form of price fixing, output control, or market allocation, such as in *Irish Beef*,[425] and, to the abuse of dominance cases as recently observed in *Intel*,[426] protecting 'undistorted competition' has been adopted by EU Courts as the 'ultimate objective' under competition law assessment. Nonetheless, the nuance between the differing types of conduct, this author posits, lies beneath the 'intermediary goals' adopted and utilised in the legal assessment of conduct under competition rules, which ultimately serve as a tool to achieve the ultimate objective of ensuring undistorted competition. This

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[421] Treaty Establishing the European Community [2002] OJ C325/33 (EC Treaty); Consolidated version of the Treaty on European Union Protocol (No 27) on the Internal Market and Competition states.

[422] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

[423] Case C-52/09 *Konkurrensverket* (n 435).

[424] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

[425] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers* (n 402).

[426] Case T-286/09 *Intel* (n 444).

assertion, therefore, makes a distinction between the 'ultimate' and 'intermediary' objectives of competition law and attributes different roles to these goals.

More importantly, it is argued that under the EU competition law system the question of the objectives of competition law, i.e. 'intermediary goals', relate to the notion of 'restriction of competition'. In this connection, the EU Courts' legal assessment conducted in individual cases reveal, fundamentally two things: first, EU Courts' understanding and definition of the notion of 'restriction of competition', stipulated under both Articles 101 and 102 TFEU, have shaped the substance of these provisions; and, second, the notion of 'restriction of competition' directly relates to the criteria upon which a conduct is perceived unlawful under Articles 101 and 102 TFEU. Ultimately, it is this 'criterion', what can also be referred to as 'legal standard', which depends on and is guided by the 'intermediary objectives' of competition law.

Therefore, point five concludes that while the ultimate objective of EU competition law is to ensure 'undistorted competition' in all cases, the way in which EU Courts assure that competition within the EU is not distorted, i.e. the legal standard for assessing the legality of conduct, in other words the 'intermediary objectives', may differ from conduct to another.
Point six relates to the fundamental and much-debated question of the 'consumer welfare' objective under EU competition law. The above analysis of the existing case law reveals that as recently as in *GSK* and *Konkurrensverket*, in the legal assessment of cases under competition rules EU Courts have asked, as a criterion and legal standard, whether the conduct in question restricted competition in the form of 'harming the structure of the market'; restricting existing or potential competitors' rights to access the market; and, the impairment of consumers' welfare in terms of lower prices and higher quality. As opposed to what has been suggested by the group scholars examined above, EU Courts have not exclusively focused on efficiency and welfare measures, such as the consumer welfare standard, in the definition of 'restriction of competition'. In essence, 'consumer surplus' has not been applied or interpreted by EU Courts as the exclusive objective and legal criterion in the application of EU competition law. On the

contrary, the competition rules have been interpreted in the light of their broader 'non-welfare' objectives such as 'single market imperative'[427] and other public policy goals.[428]

This is further demonstrated in *GSK* with the GC's attempt to limit the legal standard for 'competitive harm' to consumer welfare at the expense of the 'market integration' objective, a decision that was eventually overruled by the ECJ. Conduct that leads to 'consumer harm' is considered as anti-competitive by the ECJ.[429] However, this need not be direct harm to consumers in the form of reduction of 'consumer surplus' as defined by neo-classical economic theory but may as well take place as indirect harm to consumers through harm to the competitive process or to the structure of markets within the EU, or exclusion of competitors.

Therefore, the existing case law rules out the proposition that consumer welfare is the 'ultimate objective' of EU competition law, and confirms the view that consumer welfare is rather perceived as one of the 'intermediary objectives' endorsed by EU Courts. Nonetheless, this is not to say that economic analysis and the consumer welfare standard has been overlooked by EU Courts altogether. EU Courts have regularly had recourse to mainstream economics in their judgment to define the scope of competition provisions of the TFEU and formal economic analysis is embedded in EU Courts' case-law. Under the current procedural framework, EU Courts fully engage with the legal and factual aspects of administrative decisions, i.e. decisions of the Commission, brought before it. In

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[427] Case 56/64 *Consten and Grundig* (n 391); Case 27/76 *United Brands Co.* (n 393), paras 227 and 233. See also: Case 226/84 *British Leyland plc v. Commission* [1986] ECR 3263; Case 26/75 *General Motors Continental NV v. Commission* [1975] ECR 1367; Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia EE and others v. GlaxoSmithKline* AEVE [2008] ECR I-7139

[428] C-67/96 Albany International BV (n 408), [1999] ECR I 5751; Case C-309/99, *Wouters* (n 413), [2002] 4 CMLR 913; Case C-519/04, *Meca Medina* (n 414), para 43.

[429]Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

this context, legal and economic analysis conducted by EU Courts together has contributed to the 'shaping' of competition rules in terms of helping to set benchmarks and developing presumptions to be used in the legal assessment of cases under competition rules. In light of the above proposition on the demarcation between 'intermediary' and 'ultimate' objectives of EU competition law, the figure below aims to illustrate this assertion, the role attributed to each group of objectives and their interaction with each other.

Figure 2: The Objectives of EU Competition Law; (BELT-I → BELT-II → BELT-III)

Point seven addresses the importance and meaning of the demarcation between 'by object' and 'by effect' restrictions of competition as interpreted by EU Courts and its relationship with the objectives of competition law.

In addition to the clarification of the structural framework for the prohibition and exception clauses under Article 101 TFEU, through the division between 'by object' and 'by effect' restrictions of competition EU Courts have further expanded the legal test for 'competitive harm' and the interpretation of substantive rules on competition. Under this division interpreted by EU Courts, 'certain types of conduct between undertakings that reveal a sufficient degree of harm to competition, i.e. 'by object' restrictions, are presumed, by their very nature, as 'being harmful to the proper functioning of competition'. If, having regard to the content of its provisions, the objectives it seeks to attain, and the economic and legal context of which it forms a part, EU Courts do not need to legally assess effects on competition, as the conduct will be presumed anticompetitive in nature.[430] This means EU Courts presume the 'satisfaction' of one or more of the legal standards, i.e. intermediary objectives, in BELT I, and 'jumps' straight into BELT II. In this case, the burden of proof shifts from EU Courts to the relevant undertaking(s) and it is for the latter to argue that their conduct either satisfies the conditions stipulated under Article 101(3) TFEU or can be objectively justified under Article 102 TFEU.

To date case-law has identified the following conduct as 'restraints by object': agreements to fix prices, allocate markets or restrict output, such as in *European Night Services*;[431] reduce capacity, as discussed above in *Irish Beef*;[432] information exchanges to remove uncertainties and facilitate price fixing, such as

[430] Case (56/65) *Société Technique Minière* (n 398).

[431] Cases T-384/94 and T-388/94 *European Night Services* (n 399).

[432] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers* (n 402).

in *T-Mobile*;[433] vertical restraints conferring an exclusive sale territory, in *GSK*;[434] the imposition by supplier on re-seller a minimum or fixed resale price. Comparably, it is observed that certain conduct under Article 102 TFEU has also been presumed to have anti-competitive purpose, and, are, therefore, considered as outright infringements. For instance, EU Courts have considered predatory pricing,[435] tying,[436] exclusive dealing[437] and loyalty rebate[438] arrangements of dominant undertakings as anti-competitive by their very nature. These conduct have so far been accepted by EU Courts to have hindered 'undistorted competition', without having been examined under the intermediary objectives.

Most importantly, it is observed that economic analysis has been the central tool to help EU Courts to develop presumptions on motivation behind business behaviour and to formulate benchmarks with a view to drawing a line between '*prima facie'* restrictions of competition and 'by effect' restrictions of competition. This is to say that preconceptions have been formulated by EU Courts through economic tools with a view to help understanding motivations behind potential anti-competitive practices and the likelihood of effects on competition.

In consideration of all points addressed above the final conclusion is made that although the 'consumer welfare' objective has been utilised by the EU Courts, legal assessment under competition rules encompasses a broader spectrum of objectives that accommodates material welfare and 'non-welfare' public policy

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[433] Case C-8/08, *T-Mobile Netherlands BV* (n 403).

[434] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

[435] Case T-286/09 *Intel* (n 444).

[435] Case 56/64 *Consten and Grundig* (n 391).

[436] Case T 30/89 *Hilti* (n 449); Case T 83/91 *Tetra Pak* (n 437); Case T-201/04 *Microsoft* (n 444); Case T-286/09 *Intel Corp v Commission* [2014] (General Court, 12 June 2014).

[437] Case C-85/76 *Hoffmann-La Roche* (n 443); Case 322/81 *Nederlandsche Banden-Industrie Michelin* (n 442).

[438] Case T-203/01 *Nederlandsche Banden-Industrie Michelin* (n 442)

objectives as illustrated in BELT-I of chart above. From a legal perspective, this means that not only conduct that has material welfare effects on EU markets may be subject to the application of competition rules, but also that agreements with a detrimental impact on public policy objectives may get caught under competition law scrutiny by EU Courts.

Intermediary objectives illustrated in BELT-I have been used by EU Courts as legal benchmarks in assessing the legality of conduct under EU competition law. These objectives have been utilised in order to ensure that 'undistorted competition' is maintained in the EU (Protocol No. 27), which, in turn, aim to promote the well being of people and to facilitate sustainable development of the EU (Article 3 TEU). This web of relations aims to explain the role of objectives of EU competition law in the interpretation of substantive rules by EU Courts. Nevertheless, this interpretation has been furthered through EU Courts' demarcation between 'by object' and 'by effect' restrictions of competition and its contextual interpretation of cases, which takes into account the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, as coined in *Métropole*,[439] *STM*,[440] and *European Night Services.*[441] The contextual approach of EU Courts has been 'wide enough' to accommodate public policy objectives, as seen in *Wouters* and *Meca Medina,*[442] and a counterfactual analysis of the case at hand, as observed in *O2.*[443] Again, from a legal perspective, the implications of this contextual interpretation for the assessment of cases mean that substantive rules are interpreted in the light of intermediary and ultimate objectives of EU competition law with a view to ultimately promoting the well-being of the people of EU.

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[439] Case T-112/99 *Métropole Television* (n 406).

[440] Case (56/65) *Société Technique Minière* (n 398).

[441] Cases T-384/94 and T-388/94 *European Night Services* (n 399).

[442] Case C-309/99, *Wouters* (n 407); Case C-519/04, *Meca Medina* (n 414).

[443] Case T-328/03, *O2 (Germany)* (n 421).

3.5 Decisions of the Commission

3.5.1 The Legal Nature of the Commission's Decisions

As examined at the beginning of this chapter, the EU competition law enforcement regime adopts a legal system comprising of an administrative authority to enforce substantive rules, i.e. the Commission, which carries out the role of both an investigator and a 'first-instance' adjudicator, and of review courts, i.e. the GC and the ECJ, that engage with the 'legal review' of the case at hand.

With the mandate provided by Regulation 1/2003, potential infringements of competition law are initially investigated and prosecuted by Commission. In this regard, the Commission holds all three functions under its possession: investigation; prosecution; and, decision-making.[444] According to Article 263 TFEU, the Commission's decisions are essentially subject to review by the GC on specific grounds: 'lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of powers'.[445] The review process allows the GC only to quash the Commission's decision, in whole or part, if the former is able to demonstrate that the Commission's decision is manifestly wrong on points stipulated above. The court cannot substitute or replace the Commission's decision with its own or 'reformulate' the decision in such manner. On the other hand, this general rule on legal review of Commission's decisions has been stretched under Article 261 TFEU to grant the GC '...unlimited jurisdiction within the meaning of [Article 261 TFEU] to review decisions whereby the Commission

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[444] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (Reg. 1/2003).

[445] TFEU (n 362), Article 263.

has fixed a fine or penalty payment; it may cancel, reduce or increase the fine or penalty payment imposed'.[446]

Nevertheless, overall the 'legal review' mandate provided to EU Courts by Articles 261 and 263 TFEU resembles a 'control of legality' type of legal review that is along the lines of review process adopted by the administrative 'civil-law' competition law systems of the continental Member States of the EU, and, the 'judicial review' process conducted in common law jurisdictions. This review process conceptually differs from, and is more limited compared to, a full 'appeal on the merits' type of legal review where the appeal court has full jurisdiction to review the facts, the law and all aspects of the overall correctness of the decision.

That being said, recently in *Menarini*[447] the European Court of Human Rights (ECrtHR) confirmed that Article 6(1) of the European Convention of Human Rights (ECHR), which has formally become a part of the 'Treaty on the European Union' by virtue of Article 47 of the Charter of Fundamental Rights, applies to competition rules of the EU. Article 6(1) ECHR reads:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[448]

Well before *Menarini* it was established in *KME* that, for the purposes of Article 6(1) ECHR, decisions of the Commission imposing fines in competition cases are 'criminal charges' in nature,[449] and that the 'tribunal' within the meaning of Article 6(1) ECHR that determines the criminal charge must not only be

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[446] Ibid

[447] *Menarini Diagnostics S.R.L v Italy* App. No 43509/8 (ECrtHR 27 September 2011).

[448] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

[449] Case C 279/9 P *KME Germany and others v Commission* [2011] ECR I-13125.

independent and impartial, but must also have 'full jurisdiction' to examine and determine all questions of fact and law relevant to the dispute before it.[450] On the latter point, the GC itself has indeed held that the Commission is not a 'tribunal' for the purposes and meaning of Article 6(1) ECHR, but that the judicial control exercised by the GC over the Commission's decisions satisfies this requirement.

In this case, the essential question is whether review of the Commission's decisions by EU Courts entitles a 'full jurisdiction' for the purposes of Article 6(1) ECHR despite the general rule of a 'legal review' type of control as stipulated under Articles 261 and 263 TFEU. To that effect, the jurisprudence of EU Courts in cases such as *GSK*[451] and *Microsoft*[452] clearly sets the case for a 'manifest type of error' review at least in relation to cases where Commission's decision entails complex economic analysis. The test set by the GC in *Microsoft* requires a case review by the GC that is confined to ascertaining whether a 'manifest error of assessment' has been made by the Commission on points of use of powers, rules on procedure, compliance with the statement of reasons, and statement of facts.[453] Again in *GSK*, the ECJ endorsed the GC's test for the review of complex economic assessment conducted by the Commission:

'…the Court hearing an application for annulment of a decision applying Article [101(1) TFEU] must undertake a comprehensive review of the examination carried out by the Commission, unless that examination entails a complex economic assessment'.[454]

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[450] *Le Compte, Van Leuven and De Meyere v Belgium* App No. 6878; 7238/75 (ECrtHR 23 June 1981).

[451] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

[452] Case T-201/04 *Microsoft Corp* (n 444).

[453] ibid.

[454] Joined Cases (C 501, 513, 515 & 519/06 P) *GlaxoSmithKline Services Unlimited* (n 405).

More recently, in *KME Germany*[455] and *Chalkor*[456] the ECJ has set the case for the scope of control of legality provided to EU Courts and held that in cases involving complex economic analysis EU Courts have a mandate to review the Commission's interpretation of information of an economic nature, whether or not the information relied on is factually accurate, reliable, and consistent in order to assess complex economic cases.

EU jurisprudence clarifies that in light of the mandate assigned to them under Articles 261 and 263 TFEU, EU Courts themselves have reviewed the Commission's decisions on both law and facts, assessed whether evidence submitted by the Commission is accurate, sufficient and reliable, annulled the contested decision, and altered fines imposed by the Commission. However, questions remain as to whether the 'manifest error' tests complies with the 'full jurisdiction' requirement imposed by Article 6(1) ECHR, and the extent to which matters of complex economic analysis of the Commission's is subject review by EU Courts.

Analysed from a legal perspective, it is submitted that under the current EU legal order and framework, and relevant jurisprudence, EU Courts retain a 'control of legality' type of review, which falls short of the exercise of a 'full jurisdiction' control over the Commission's decisions, and this allows the latter a substantive margin and appreciation for the interpretation, application and enforcement of substantive rules. This is particularly relevant to cases of complex economic analysis, such as the fundamental analysis of the definition of the relevant market, abuse of dominance and the notion of restriction of competition. And although the existing legal framework allows for the EU Courts to examine all aspects of evidence under a 'manifest error' test, annul decisions of the Commission on these rounds, and to conduct a full review of fines imposed, complex economic analyses in cases not involving fines are not subject to a 'full jurisdiction' appeal.

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[455] Case C 279/9 P *KME Germany* (n 489).

[456] Case 386/10 P Chalkor AE Epexergaisas Metallon v Commission [2011] ECR I-13085.

For the purpose of the question that this thesis seeks to answer, the argument can be made that the current EU legal framework grants an appreciable margin of discretion to the Commission in the interpretation of competition rules, and particularly in relation to conducting 'complex economic analysis' in competition cases that is not subject to full jurisdiction review by EU Courts. So long as the Commission retains all the functions of a prosecutor and a decision-maker for findings of infringement and imposing 'criminal' penalties under competition rules of the EU for the purpose of Article 6(1) ECHR, the Commission's decisions as a part of EU jurisprudence will be on equal footing with the EU Courts' case-law.

The question of whether the lack of a full jurisdiction type of review by EU Courts over decisions of the Commission that are considered as criminal in nature is itself affront to fundamental rights provided by the ECHR is open to further discussion, but that transcends beyond the purpose and objective of this thesis.

3.5.2 Case-Law of the Commission

The International Competition Network (ICN)'s 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/ Substantial Market Power, and State Created Monopolies'[457]

The International Competition Network (ICN)'s 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/ Substantial Market Power, and State Created Monopolies' throws particular light on the question of the

[457] The Unilateral Conduct Working Group, International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 6 (2007) 5. (ICN Report on the Objectives)

objectives of competition law addressed directly by competition law enforcers/authorities.[458] For the purpose of this report, the ICN forwarded a questionnaire to thirty-three member 'competition law enforcers/authorities' of the ICN. While a group of competition law authorities noted that their objectives are explicitly stipulated in their national legislative acts or constitution,[459] others pointed that this question need be extracted from their legislative history, and judicial and competition authority interpretation.[460]

As a response to the ICN's questionnaire, the Commission emphasised that the objectives of EU competition law are to: ensure an effective competitive process both as a goal and a means; promote consumer welfare; maximise efficiency; and, achieve market integration. In this context, it was noted by the Commission that the objectives are particularly rooted to the historical context in which EU competition law was adopted, and particularly to the market integration objective and the 'four freedoms' enshrined in the Treaty of Rome, namely the freedom of movement of goods, services, persons and capital. More importantly, however, even though thirty out of thirty-three respondents appear to have pointed the 'promotion of consumer welfare' as one of their objectives there is no single definition or economic understanding that explain the term. The only indicator provided by the Commission in this context is its statement that it assesses possible violations of competition rules on the basis of the effects of the conduct

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[458] The ICN report focuses on the goals of unilateral conduct (i.e. Article 102 TFEU). However, the majority of the questionnaire respondents indicated that the objectives provided for the purposes of the ICN report are not limited to unilateral conduct only, but are considered as general objectives which apply to the competition regime as a whole. The EU Commission and the Turkish Competition Authority are among those respondents who indicate that the objectives stipulated are relevant their competition law regime in general. See fn. 9 of the report.

[459] ICN Report on the Objectives (n 497) 5. These jurisdictions: Australia, Brazil, Bulgaria, Canada, Czech Republic, European Union, Jersey, Korea, Latvia, Mexico, New Zealand, Pakistan, Romania, Russia, Singapore, the Slovak Republic, Switzerland, Turkey and Ukraine.

[460] ICN Report on the Objectives (n 497) 5. These jurisdictions: Chile, France, Germany, Israel, Italy, Jamaica, Netherlands, United Kingdom, and United States.

on the markets. In other words, whether the conduct in question has actual or likely restrictive effects on the market and harms consumers is considered as a legal benchmark for the Commission. Nevertheless, based on the Commission's explicit statement in ICN report, the most striking difference between the EU Courts' case law and the Commission's interpretation of competition rules seems to be the latter's emphasis on the role of 'efficiencies' as a goal of EU competition law. In this specific respect, the Commission highlights in the ICN report that it will adopt a 'more economic approach' under EU competition law.

In light of the ICN report and the Commission's points on the objectives of EU competition law question remains as to what it means by 'the more economic approach', whether the more economic approach differs from EU Courts' case-law, and its implications for the objectives of competition law.

- **What Does the 'More Economic Approach' Mean for the Interpretation of Competition Rules and Ultimately for the Objectives of EU Competition Law?**

An analysis of statements issued by the Commission and legal instruments adopted in this respect, such as soft-law instruments and secondary legislation, show at first sight that the more economic approach to EU competition law was initially introduced by Mario Monti during his term as Commissioner for Competition. In late 1990's Monti declared that the Commission had embarked on a 'review' of its policy on the interpretation of competition rules and referred to this as the 'modernisation' of EU competition policy.[461] Accordingly, the purpose of the reform process was to ensure a shift from a 'form-based approach' to a more 'economic effects' based approach in the interpretation of competition

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[461] Commission (EC), 'Green Paper on Vertical Restraints in EC Competition Policy' COM (96) 721 final [1997] 4 CMLR 519; OJ [1999] C 132/1 Commission White Paper, 'Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty'.

rules of the EU.[462] Following this shift, Monti argued '...the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market'. In a similar vein, his predecessor Commissioner Neelie Kroes stated in 2005:

> 'Consumer welfare is now well-established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring efficient allocation of resources'.[463]

How does the Commission aim to achieve the 'modernisation' process? The Commission has embarked on the 'more economic approach' from both fronts of the EU competition law system: modernisation of procedural and substantive competition law.

The Commission's modernisation of procedural competition law can be explained as a reaction to and a necessity stemming from the continuous expansion of the EU, the future accession of the then Eastern European candidates of the EU, and, as a result of this, the increasing workload of the Commission in this respect.[464] This need has been clearly reflected in the Commission's open statements in

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[462] Former Competition Commissioner Mario Monti, Merchant Taylor's Hall London. SPEECH/01/340, 9 July 2001: 'The Future for Competition Policy in the European Union'. See: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=0&language=EN&guiLanguage=en;

[463] Former Competition Commissioner Neelie Kroes, SPEECH/05/512, 15 September 2005, 'European Consumer and Competition Day: European Competition Policy – Delivering Better Markets and Better Choices' See<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/512&format=HTML&aged=0&language=EN&guiLanguage=en>

[464] As of 01.01.2010 candidate countries for accessing the EU are Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro and the Republic of Turkey.
See EU website for information <http://europa.eu/abc/european_countries/candidate_countries/index_en.htm>.

which it has called for a more ‘efficient’ competition law enforcement system through the ‘modernisation’ of the administrative framework for EU competition rules. In this context, the central piece of legislation adopted with a view to ‘modernising’ the administrative framework for and the enforcement of competition rules, i.e. ‘procedural modernisation’, is Regulation 1/2003.[465] In essence, Regulation 1/2003 aims to achieve a modernised and efficient enforcement system through the establishment of a ‘de-centralised’ system and network for the application of competition rules. The de-centralised enforcement system is fundamentally achieved through the direct applicability of the exception clause Article 101(3) TFEU, as it has been the case with Article 101(1) TFEU and Article 102 TFEU, by National Competition Authorities (NCA) and National Courts, and the establishment of the European Competition Network (ECN), which comprises of the Commission and NCA’s.[466] Thus, the de-centralised enforcement system under Regulation 1/2003 is constructed on this institutional framework and the increased level of co-operation between NCA’s, National Courts and the Commission.[467] More importantly, however, one of the key aspects of ‘procedural modernisation’ under Reg. 1/2003 is its aim to strengthen

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[465] See Commission Press Release, IP/04/411 (30 March 2004) ‘Commission finalises modernisation of the EU <antitrustenforcementrules’http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/240&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 1 April 2010.

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

[466] B. Rodger and A. MacCulloch, *Competition Law and Policy in the EC and UK* (n 41).

For more on the modernisation of EU competition policy, see: P. Lowe, ‘*Current Issues of EU Competition Law: The New Competition Enforcement Regime*’ (2004) 24 Northwestern Journal of International Law & Business 567; CD Ehlermann, ‘*The Modernisation of EC Competition Policy: A Legal and Cultural Revolution’* (2000) 37(3) Common Market Law Rev 537; D. J. Gerber & P. Cassinis, ‘*The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part I*’ (2006) 27 European Competition Law Review 10; D. J. Gerber & P. Cassinis, ‘*The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part II*’ (2006) 27 European Competition Law Review 51.

[467] B. Rodger and A. MacCulloch (n 41).

and reinforce the application of EU competition law at the national level in Member States through a more accelerated convergence of national competition laws with that of the EU.[468] The de-centralisation of EU competition law enforcement and the direct applicability now of all substantive competition rules by Member State competition authorities and national courts require particularly the 'accession' Member States to simultaneously apply EU and national competition law for an accelerated convergence of national competition law. This means the modernisation of substantive competitive law also has a direct and full impact on accession States and candidate countries of the EU.

As examined above, Reg. 1/2003 and the procedural modernisation of competition law mirrors only one side of the Commission's modernisation process. As highlighted by the Commission in its official statements and press release, Reg. 1/2003 marks the 'finalisation' of this process, and the 'modernisation package' covers a series of other legal instruments, which are mainly concerned with 'substantive modernisation' of EU competition law.[469] In this respect, soft law instruments and secondary legislation introduced under the Commission's review process seems to cover all the three pillars of competition law: Article 101 TFEU, Article 102 TFEU, and, the EU Merger Control regime. The Commission's 'more economic approach' mainly carried out by means of soft-law instruments, covers the review of all fronts of competition law: review of 'vertical restraints;[470]

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[468] See, OJ [1999] C132/1 Commission White Paper, 'Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', para 78.

[469] See Commission Press Release, IP/04/411 (30 March 2004) 'Commission finalises modernisation of the EU antitrustenforcementrules'http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/240&format=HTML&aged=0&language=EN&guiLanguage=en accessed 1 April 2010.

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

[470] A 'vertical agreement' occurs between entities at the different level of the same market, such as an agreement concluded between a producer of a product and a distributor. 'Vertical restraints' is defined as contractual restrictions employed in vertical agreements for the purposes of facilitating

application of Article 101 TFEU; application of Article 102 TFEU; and, the EU 'merger control' regime.[471] Although these legal instruments adopted under the Commission 'modernisation' process mostly takes place in the form of 'Guidelines' or 'White Paper', which are non-binding in legal nature, theoretical principles introduced and outlined in these instruments are not abstract but rather to reflect Commission's 'practice' and 'case-law' under its 'more economic approach' and its meaning for the application of competition rules.

Unlike Regulation 1/2003, which is mainly concerned with procedural modernisation and the administrative framework for the enforcement of competition rules, the rest of the legal instruments adopted under the 'more economic approach' seem to reflect a fundamental change in the Commission's

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the distribution of goods and services. See, B. Rodger and A. MacCulloch, *Competition Law and Policy in the EC and UK* (n 41).

[471] In relation to vertical restraints: Commission (EC), 'Green Paper on Vertical Restraints in EC Competition Policy' COM (96) 721 final [1997] 4 CMLR 519; Commission (EC), 'Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow-up to the Green Paper on Vertical Restraints)' COM (98) 544 final [1998] OJ C 365/3; Commission (EC), 'Guidelines on Vertical Restraints' [2000] OJ C291/1. In relation to the application of Articles 101 and 102 TFEU: Commission (EC), 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty Commission Programme No 99/027' COM (1999) 101 final [1999] OJ C 132/1; Commission (EC), 'White Paper on Reform of Regulation 17: Summary of the Observations' [2001] 4 CMLR 10; and Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1. Commission (EC), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/1. In relation to the application of Article 102 TFEU: DG COMP's *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (December, 2005); 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. In relation to merger control: OJ [2004] L24/1 Commission Merger Regulation No. 139/2004.

thinking about 'substantive competition law'.[472] Indeed, it is this aspect of the Commission's 'modernisation' process that relates more to the debate of the objectives of EU competition law.

In the specific context of 'substantive modernisation', the overall analysis of the legal instruments introduced under the 'modernisation process' allows the following observation. In almost all legal instruments the Commission makes reference to introducing a 'more economic approach' to the application of EU competition law and stipulates that this requires 'bringing competition legislation into line with current economic thinking using the tools of modern economic theories'. Under this premise, the Commission's theory underlining the 'more economic approach' is based on a limited understanding of the objectives of EU competition law: 'the objective of EU competition law is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[473]

In this case, the essential question is the implications of narrowing the objectives of EU competition law to a single 'consumer welfare' goal and the Commission's reference to 'efficiencies' and the tools of 'formal economic methodology' for the interpretation of interpretation of substantive competition rules. What does a 'single consumer welfare' objective and the use of formal economic methodology mean for the purpose and meaning of the interpretation of competition rules?

In the context of Article 101 TFEU, the Commission's 'more economic approach' and its limited view of the single 'consumer welfare objective' requires that for an agreement to have 'anti-competitive effects' on the relevant market the conduct in

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[472] For more comments on the 'modernisation' of substantive competition law in EU David J. Gerber, 'Two Forms of Modernization of European Competition Law' (2007) 31(5) Fordham International Law Journal 1235.

[473] Commission Notice- Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 49.

question must have negative effects on prices, output, innovation, variety and quality of goods and services with a reasonable degree of probability.[474] In relation to Article 102 TFEU and the prohibition of the 'abuse of a dominant position', the Commission introduces its theory on 'anti-competitive foreclosure'.[475] Similar to the legal test adopted for Article 101 TFEU, Article 102 TFEU aims to:

> '...ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.'[476]

Under the Commission's 'revised' legal test it is also made clear that the concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, 'including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers'[477].

It is therefore concluded that under the 'more economic' approach and the single consumer welfare objective for the Commission the standard of legality does not rely on the sole criterion of whether or not 'the freedom of action of one or more of the competitors' are limited. In other words, competitors' economic freedom and the deterioration of the structure of markets are considered anti-competitive only as long as they lead to harm of consumers measure in terms of higher prices, lower quality, less variety and innovation. In effect, this standard of legality pinned down to a single 'consumer harm' standard is a revised understanding of

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[474] ibid

[475] 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, points 19-22.

[476] ibid.

[477] Guidance on the Commission's enforcement priorities, fn 15.

the Commission and introduces a new substantive test for ‘competitive harm’ in the application of the competition rules. Accordingly, the Commission’s focus is to ‘protect competition on the market for the benefit of consumers’, and under this ‘ultimate objective’ the Commission does not consider competitors’ freedom to act and the deterioration of the structure of markets as ‘intermediary objectives’ on its way to reach the former goal.

However, in the context of ‘substantive modernisation’, a re-defined substantive test on ‘restriction of competition’ seems to reflect only one side of the Commission’s ‘more economic approach’ to the interpretation of competition rules. In an equally important manner, the Commission’s legal formula underlying ‘the more economic approach’ introduces a ‘revised’ view of what type of benefits is capable of offsetting competitive harm. In this context, the Commission explains that ‘efficiency gains’ are capable of ‘outweighing’ anti-competitive effects of the conduct in question.

How do these two aspects of the ‘more economic approach’ of the Commission compare to its prior case-law? In relation to the first point, i.e. the ‘single consumer welfare goal’, the Commission’s prior case-law suggests the accommodation of a broader set of objectives in the interpretation of competition rules. To begin with, during the ‘pre-modernisation’ period there exists no soft-law instruments or secondary legislation that are particularly dedicated towards explaining the theory underlying the objectives of EU competition law. Nevertheless, early policy tools of the Commission such as the ‘Tenth Report on Competition Policy’ and the ‘Twelfth Report on Competition Policy’ signalled the consideration of industrial policy objectives with a view to promoting the re-structuring of certain industries to overcome the then existing economic crisis.[478]

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[478] Commission of the European Communities, *Tenth Report on Competition Policy* (Office for Official Publications of the European Communities, 1982, p. 9; Commission of the European Union, *Twelfth Report on Competition Policy* (Office for Official Publications of the European Communities, 1983, p 38.

In line with these policy tools, the practice and case-law of the Commission, suggests that during the pre-modernisation period a 'broader' set of goals have been taken into account in the interpretation of competition rules and that 'efficiency gains' was not considered by the Commission as the only benefit capable of counter-balancing against the conduct's anticompetitive effects.[479] A striking example in this context takes place in relation to the Commission's approach to 'crises cartels' and whether and to what extent these agreements may be considered under the exception clause, Article 101(1) TFEU. As recently as in *Irish Beef*, the Commission submitted in its *amicus curiae* that in cases of crises cartels although capacity reducing agreements could lead to efficiency gains, through the removal of inefficient players from the market and an increased output by the remaining players, the general rule is that market forces are the best means of correcting overcapacity.[480] Also, during the 'pre-modernisation' period in cases such as *BPCL/ICI,*[481] *ENI/Montedison*,[482] and, in *Enichem/ICI*[483] the Commission had considered numerous 'restructuring agreements' under the exception clause and concluded that the reduction of excess capacity contributed to restoring the profitability of the sector by re-establishing market conditions.

It is further analysed that during the pre-modernisation period the Commission considered an array of 'economic' and 'non-economic' benefits as offsetting the anti-competitive effects of conduct particularly under the exception clause Article 101(3) TFEU. Although efficiency considerations have been taken into account by the Commission under the exception clause, further examples in this context can be illustrated as the accommodation of industrial policy considerations,[484] to

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[479] Commission Decision of 24 January 1999 (Case IV.F.1/36.718-CECED) OJ [2000] L 187/47; Commission Decision of 17 September 2001 (Case COMP/34.493-*Der Grune Punkt-Duales System Deutschland AG*) OJ [2001] L 319/1; Commission Decision of 16 December 2003 (Cases COMP/D3/35.470-ARA and COMP/D3/35.473-ARGEV, ARO).

[480] *Irish Beef* (n 342).

[481] Commission Decision of 19 July 1984 (IV/30.863-BPCL/ICI) OJ [1984] L212/1.

[482] Commission Decision of 4 December 1986 (IV/31.055-ENI/Montedison) OJ [1987] L5/13.

[483] Commission Decision of 22 December 1987 (IV/31.846-Enichem/ICI) OJ [1988] L50/18.

[484] BPCL/ICI (n 462); ENI/Montedison (n 463); Enichem/ICI (n 464).

social policy values[485] and environmental objectives.[486] In pursuit of its 'more economic approach', however, the Commission considers 'efficiency gains' as capable of counter-balancing anti-competitive effects not only under Article 101(3) TFEU but under all three pillars of EU competition law: Article 101 TFEU; Article 102 TFEU; EU Merger Control regime. While under Article 102 TFEU efficiencies are considered under the notion of 'objective justifications'[487], provided that the conduct is indispensible to achieving the efficiencies and it does not eliminate competition on the market completely, under the EU merger control regime efficiencies are able to offset a merger's anti-competitive effects if they benefit consumers, are merger-specific and verifiable.[488]

In the light of the Commission's case-law following the 'more economic approach' and the legal instruments adopted in this context, the following final conclusions are drawn. The 'modernisation' of substantive competition law in the EU has led to two significant outcomes: firstly, the narrowing of the goals of EU competition law by the Commission, thereby replacing the prevailing objectives with that of a single 'consumer welfare' criterion in terms of better quality, lower price, more choice and increased output of goods and services; and, secondly, the adoption of formal economic methodology by the Commission as the standard and method in the assessment of cases under EU competition law. Compared to the Commission's 'pre-modernisation' case-law, this means a narrower view of the Commission on the standards and criterion, i.e. 'intermediary objectives', utilised in the legal assessment of cases under all three pillars of EU competition law. Under the Commission's 'more economic' approach, while anti-competitive effects of conduct are assessed on the basis of their effects on consumer welfare,

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[485] Commission of the European Union, *Twelfth Report on Competition Policy* (n 519) para 39-41. Commission Decision of 23 December 1992 (IV/33.814-Ford/Volkswagen) OJ [1993] L20/14.

[486] Commission Decision of 21 December 1994 (IV/34.252-Philips/Osram) OJ [1994] L378/37.

[487] 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, point 28.

[488] Horizontal Merger Guidelines, point 76.

‘efficiency gains’ are considered as capable of ‘outweighing’ these anti-competitive effects provided that they fulfil certain conditions stipulated by the Commission. The narrowing of the objectives to a single consumer welfare criterion has led to a ‘revised’ theory of ‘competitive harm’, which has significant implications for the interpretation of substantive rules.

The ‘procedural modernisation’, on the other hand, has significant implications not only in terms of providing a ‘modernised’ competition law enforcement at the EU level, but also for the simultaneous application of EU competition law by national competition authorities and the courts of Member States, accession States, and candidate countries. Reg. 1/2003 and particularly direct applicability of all fronts of EU competition law at the national level now requires accession and candidate countries’ competition authorities and national courts to provide ‘maximum convergence’ in the field of competition law.[489] Having discussed the implications of ‘substantive modernisation’ for the Commission’s interpretation of competition rules and its understanding of the objectives of EU competition law under the ‘more economic approach’, it is argued that the Commission’s ‘re-formulated’ substantive test in assessing the legality of conduct under competition rules may have been ‘transplanted’ into the competition law systems of the accession States and candidate countries to the EU. This proposition, however, requires further examination under individual jurisdictions. For the purpose and meaning of this thesis the remainder chapters shall examine the objectives of the Turkish competition law system, which shall reveal whether and to what extent the Commission’s ‘re-formulated’ understanding of the objectives of EU competition law is transplanted into the Turkish competition law system through the harmonisation and convergence process.

[489] Reg. 1/2003 (n 484).

3.6 Conclusion

At the beginning of this thesis, Chapter II aimed at providing a theoretical explanation concerning the concept of ‘legal borrowing’, a theoretical debate that sits in the heart of the central research question.

Based on this theoretical debate it was posited in Chapter II that the general assumption behind the ‘borrowing foreign laws’, and the particular example of the ‘Turkish competition law system’ modelled on the EU competition law system, were best explained by ‘law and development’ theorists and Alan Watson’s propositions and theories on ‘legal transplants’. According to this theoretical explanation, the most common form of ‘legal change’ in social history has been the ‘borrowing’ of law from foreign jurisdictions, and this ‘borrowing’, to which Watson refers to as ‘legal transplants’, has been the main source of legal and economic development in jurisdictions adopting foreign laws.[490] In this light, it was then proposed that the ‘suitability of the EU competition law system to Turkey’ is best examined and legally assessed under Watson’s theory of ‘comparative legal work’. Based on this proposition, it was argued, the comparative legal work provided by this thesis, would examine actual influences that have taken place between the EU and Turkish competition law systems.

Following this, Chapter III modified Alan Watson’s theories on ‘comparative legal work’ and ‘legal transplants’ in accordance with the existing EU and Turkish competition law systems and submitted a ‘roadmap’ on page 126 for the purpose of this thesis. According to this roadmap, while the first limb of this comparative legal work focuses on the ‘goals of the EU competition law system’, the second limb of the study focuses on the ‘objectives of the Turkish competition law

[490] See pages 77-82.

system'. Again, the theory behind this comparative legal work relies on the premise that legal transplants examined in the form of patterns and divergences over a period of time best reveals, if any, societal concerns of relevant jurisdiction and how law responds accordingly, and, ultimately, provides a legal study against which we can assess the suitability of one legal system for a jurisdiction other than its 'origin'. Driven by these premises submitted in Chapters II and III, this chapter (Chapter IV) aimed at analysing the goals of the EU competition law system.

In the light of the proposed 'roadmap' for the central research question of this thesis, Chapter IV focused on the objectives of the EU competition law system. In this context, it first analysed the institutional and legal framework for EU competition law, and, following this, analysed relevant case-law of the Commission and EU Courts. The central purpose behind this examination was to understand the role and implications of the objectives of EU competition law for the application and interpretation of substantive rules by the Commission and EU Courts. The conclusions drawn from this analysis are as follows:

Firstly, the examination of the broader legal and institutional framework within which EU competition law is located reveals one thing: competition rules of the EU do not exist as a separate set of 'stand-alone' legal rules, but rather appear as a part of the wider EU legal and political system. It is examined that being a part of this wider EU legal and institutional framework has had significant implications for the purpose and meaning of EU competition law. Most importantly, it is posited, competition rules serve as a tool not only to achieve the ultimate objective of the EU competition law system, i.e. 'ensuring undistorted competition', but also to achieve the broader objectives of the EU legal, socio-political, economic system that are stipulated in Article 3 TEU. BOX-III submitted on page 162 best explains the role of competition rules under the dynamics of this broader institutional and legal system and the way in which substantive rules on competition are utilised to achieve the objectives of the EU competition law system and the broader objectives of the EU stipulated in Article 3 TEU. According to this assertion, the Commission and EU Courts utilise

substantive rules on competition law to achieve the ultimate objective of EU competition law, i.e. 'ensuring undistorted competition', with a view to ultimately achieving the broader objectives stipulated in Article 3 TEU. In other words, the competition law objective of 'ensuring undistorted competition' works, albeit indirectly, as a tool to *inter alia* promote the well-being of the people, and, facilitate sustainable development, of the EU.

The second conclusion relates to the question of how the Commission and EU Courts achieve these objectives through the application substantive rules on competition. This question throws light on the role and importance of 'intermediary objectives' of EU competition law. By intermediary objectives posited in BOX-III, this author means legal, economic, and public policy standards against which the Commission and EU Courts assess the legality of conduct. The importance of intermediary objectives lies beneath their role in determining under which standards conduct is considered unlawful.

The analysis of relevant case-law has provided that both the Commission and EU Courts have utilised public policy and efficiency (intermediary) objectives under EU competition law. As BOX-III illustrates, these objectives stretch from the single-market imperative to ensuring higher quality and lower prices for goods and services provided to consumers. In some cases, such as *Wouters* and *Meca Medina*, it was further examined that EU Courts have successfully balanced one public policy objective against another 'economic' goal.[491] This clearly affirms the legitimacy of 'multiple' objectives of EU competition law in both theory and practice, as opposed to arguments in literature that have vouched for a single 'consumer welfare' objective. This observation on the objectives of EU competition law relates back to the discussion under Chapter III that views on how society ought to maximise welfare dictate economic and legal standards adopted under competition rules. The ECJ's recent judgment in *Konkurrensverket* best demonstrates the way in which EU competition law aims to maximise the

[491]Case C-309/99, *Wouters* (n 413); Case C-519/04, *Meca Medina* (n 414).

welfare of society.[492] The EU competition law system aims at '*preventing competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*'.[493]

Nonetheless, the conclusion in the context of the objectives of EU competition law is that the EU Courts have, since the adoption of the Treaty of Rome of 1958, relentlessly and continuously utilised public policy and efficiency objectives under all fronts of EU competition law, whereas the Commission, particularly following its 'modernisation' process, seems to have 're-established' its position on the role of efficiency objectives. While the Commission's 'procedural modernisation' under Reg. 1/2003 has succeeded in providing a more organised and systematic approach to the enforcement of EU competition law by NCA's and the Commission, as well as to the allocation of cases between these two authorities, its 're-defined' notion of competitive harm based on a 'narrow' consumer welfare objective, and, introduction of 'efficiency' objectives under all three pillars of EU competition law, seem to have led to a disparity between the Commission and the EU Courts' understanding on the objectives and role of competition law in the EU. This divergence between the Commission and the EU Courts is problematic on two points, at least as far as the central research question of this thesis is concerned. The first one relates to problems of legal uncertainty and integrity in the context of EU competition law, while the second issue is the extent to which these problems of legal uncertainty and integrity are 'transplanted' into the legal systems of foreign jurisdictions as a result of 'legal borrowing'.

And although the Commission's decisions are subject to judicial scrutiny and a 'comprehensive' control of legality by EU Courts, as examined earlier in this Chapter, the adoption of different objectives by the two institutions of the same

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[492] Case C-52/09 *Konkurrensverket* (n 435).

[493] Case C-52/09 *Konkurrensverket* (n 435) para 22.

legal system still leads to procedural unfairness and legal uncertainty mainly led by the adoption of different substantive assessments under same legal rules. Given that, in many cases the Commission, during its investigation and enforcement period, and parties to the allegedly anti-competitive conduct agree on remedies and commitments cases are 'settled' decisions of the Commission are not even subject to review by EU Courts. Furthermore, this problem also runs the risk of extending beyond the realm of the EU competition law system and to have ramifications for EU Member States' competition law systems during the harmonisation process. As regards the second issue argued above, problems may arise in the event of 'legal borrowing' and the transplant of the EU competition law 'model' into foreign legal systems, such as in the example of Turkish competition law.

In this case, one can argue that the problems of legal uncertainty and procedural unfairness observed under the EU competition law system defeat the central purpose behind the theory and practice of the 'borrowing' of model laws. As asserted by 'law and development' theorists, as well as Parsons, the theory behind the incorporation of 'modern law' and its traits into the legal systems of 'foreign' jurisdictions' relies on the premise that this legal borrowing shall open the pathway to economic and social development in the latter. If this is the case, it is questionable whether one can assure correct and consistent application of a 'borrowed' model law when the fundamental principle of 'the rule of law' and standards such as such legal certainty and integrity cannot be assured in the 'model' competition law in the first place.

In light of the problematic issue of the objectives of EU competition law, and observations made in this context, the following chapters shall continue under the 'Roadmap on the Goals of the EU and Turkish Competition Law Systems' presented on page 100 and proceed for the analysis of the 'goals of the Turkish competition law system' as asserted in BOX II.

4 THE OBJECTIVES OF THE TURKISH COMPETITION LAW SYSTEM (BOX-II)

'Competition is not necessarily a zero-sum but can represent the more efficient (or democratic) means to achieve the higher end of human progress, namely, greater justice, higher quality of life, and a more humane ordering of social relationships.'[494]

4.1 Introduction

In Chapter III, a map on the goals of Turkish competition law was presented.[495] This map aimed to achieve two things: first, to provide a 'framework' which outlines the structure of this thesis; second, to present, in a systematic way, how this PhD thesis aims to answer its central research question. In line with this methodology, Chapter III focused on the political and bilateral relationship between the European Union (EU) and the Republic of Turkey (Turkey).[496] In this respect, bilateral legal instruments were examined in order to understand the role of competition rules within this political relationship and the obligations imposed upon Turkey in this context. The analysis demonstrated that, among other implications, the political relationship between the parties eventually led to the adoption of 'National Programme(s) Concerning the Adoption of the *Acquis Communautaire*' at the national level in Turkey, which requires the alignment of Turkish competition law with the relevant EU *acquis*. The relevant *acquis* constantly evolves and therefore Turkey will have to adopt the *acquis* as it stands at the time of its EU accession. In this case, it is important to question whether

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[494] M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (n 32).

[495] The 'Roadmap on the Goals of the EU and Turkish Competition Law Systems', page 126.

[496] See Chapter III, p. 92-128.

and what extent the constant alignment of Turkish competition law with that of the EU has led to the 'transplantation' of the objectives of the EU competition law into the Turkish context. To be able to answer this question, it was first necessary to examine the objectives of competition law at the EU level. Chapter IV examined the objectives of EU competition law as a separate discourse.[497] The extensive body of the case-law of the EU Commission (Commission) and the European Union Courts (Union Courts) on the objectives of EU competition law has been problematic. This problem that prevails at the European level, again, poses the question and the risk of having been transported to the Turkish competition law system.

In light of the 'Roadmap on the Goals of the EU and Turkish Competition Law Systems' and the conclusions drawn from Chapters I, II, III and IV, the remainder chapters shall focus on the analysis of the objectives of competition law at the national level in Turkey.[498] For this reason, Chapter V seeks to exclusively focus on the Turkish legal framework for competition. In this respect it aims to focus on: the relevant provisions of the Turkish Constitution of 1982 (TC 1982);[499] the fundamental provisions of the Law on the Protection of Competition (LPC);[500] and, secondary legislation on Turkish competition law, and, the case-law of the Turkish Competition Authority (TCA) as the national enforcement agency for the LPC, and the Turkish Council of State as the appellate for the decisions of the TCA. What does the analysis of national legal instruments in Turkey aim to address? First and foremost, it aims to understand the constitutional framework for Turkish competition law under the TC 1982[501] and clarify whether the TC 1982 explicitly states or defines the role and objectives of Turkish competition law in the wider national legal, economic and social context of Turkey. Even

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[497] Chapter IV p. 129-198.

[498] The 'Roadmap on the Goals of the EU and Turkish Competition Law Systems', page 126.

[499] TC (n 73)

[500] LPC (n 15).

[501] TC (n 73).

though the TCA stated in the ICN 'Report on the Objectives of Unilateral Conduct Laws' that the objectives of Turkish competition law are clearly stipulated under the LPC, further analysis of the LPC and Turkish case-law is required to clarify how the TCA and the Turkish Council of State have defined these objectives and utilised economic and legal standards under the LPC in this respect.[502] Furthermore, the analysis of Turkish secondary legislation, relevant soft-law instruments, and policy documents is particularly important as it may reveal country-specific competition policy objectives.

4.2 The Turkish Constitution of 1982 (TC 1982) and the objectives of Turkish competition law

4.2.1 Social, Economic and Legal Order in Turkey and its Reflection on Competition Law: From the Turkish Constitution of 1961 to the Turkish Constitution of 1982

The 'Turkish Constitution of 1982' (TC 1982) is the supreme law of Turkey.[503] In order to understand the relevant provisions of the TC 1982 properly, one has to first have a grasp of the unique and exceptional socio-political circumstances underpinning the formation and adoption of the TC 1982. Only in this way, is it possible to conduct a contextual interpretation of the provisions of the TC 1982 and understand the role and objectives of competition rules in the wider context of the TC 1982.

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[502] See, Unilateral Conduct Working Group, International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 6 (2007) 1.

[503] TC (n 73).

Social and economic challenges facing Turkey in the 1960's took place in the Association Agreement (AA) as a major concern that prevented Turkey's immediate accession to the EU at the time.[504] In the preamble of the AA, the EU specifically emphasises 'special problems presented by the development of the Turkish economy', and suggested that improving the Turkish people's standard of living will facilitate the accession of Turkey to the EU at a later date.[505] According to the AA, at the time, Turkey lacked the necessary legal, economic, social and institutional background for an immediate accession to the EU. Nevertheless, the adoption of the AA coincides with particular socio-economic and legal developments at the national level in Turkey such as the Turkish military coups of 1960 and 1980. Both military interventions led to the formation of a new constitution: the Turkish Constitution of 1961 (TC 1961),[506] and TC 1982.[507]

Despite fundamental differences between the TC 1961 and the TC 1982, the two constitutions hold common features in terms of their nature and content. First, both constitutions have been formulated by a 'constituent assembly'. In the Turkish context, this assembly, half of which represents the Turkish military, is the foundation of the new Turkish Parliament following each military coup. Second, both the TC 1961 and the TC 1982 were subject to public referenda. Third, both constitutions have been formulated in a detailed manner instead of a generally worded constitution susceptible for interpretation over time in parallel to societal developments and needs. The preference for a precisely worded constitution may be explained with a reaction and a legalistic solution to the on-going social, economic and political catastrophe of the time that eventually led to two military coups in Turkey.

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[504] Association Agreement (n 1) Preamble.

[505] ibid.

[506] 'The Constitution of the Republic of Turkey', Law No: 334, dated 09.07.1961, Official Gazette No: 10859, became effective as of 20 July 1961 (TC 1961).

[507] TC (n 73).

Nevertheless, the TC 1961 can be considered as a milestone in Turkish history in terms of introducing a new social, economic and political order in Turkey. In this context, the most important features of the TC 1961 are, first, the grant of certain social and economic rights to individuals for the first time in a Turkish constitution, and, second, the introduction of a 'planned economic system' in Turkey. In relation to the first aspect, certain provisions of the TC 1961 stand out. Particularly, Article 2 TC 1961 which defined Turkey as a 'social state' and set forth certain values and principles on which Turkey as a State is based, and Articles 36 and 40 TC 1961 which granted certain rights to individuals in the social and economic context, are certainly among the fundamental provisions which mark the TC 1961 as 'revolutionary' constitution. Article 2 TC 1961 states:

> 'The Republic of Turkey, founded on the principles of human rights and the principles set forth in the preamble, is a national, democratic, laic, social State based on the rule of law'.[508]

Following this, based on the fundamental tenets of 'rule of law' and 'social state' the TC 1961 granted in Articles 36 and 40, the right to own and inherit properties,[509] and the freedom of contract and the freedom to establish private entities.[510] This was the first time a Turkish constitution clearly and openly provided these social and economic rights to individuals.

Secondly, TC 1961 aimed to facilitate economic, social, and cultural development in Turkey through the formulation and adoption of economic 'plans'. The nature and objective of a 'planned economy' system can be understood from the wording of Article 41 TC 1961 itself. That provision states:

> 'Social and economic order (in Turkey) shall be planned with a view to providing a humanely standard of living (for Turkish society) and based on the principles of justice and efficiency. It is the duty of the

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[508] TC 1961 (n 547) Article 2.

[509] TC 1961 (n 547) Article 36.

[510] TC 1961 (n 547) Article 40.

> State to enhance economic, social and cultural development through democratic means; to this end, the State shall raise national savings, to utilise national sources in accordance with the primary needs of the (Turkish) society, and formulate development plans.'[511]

The socio-economic system stipulated under Article 41 TC 1961 resonates neither to a system based on a 'free market' nor to a strictly planned economy, but rather represents a unique approach to social and economic order in Turkey. The objective behind the formulation of 'development plans' is not to lead to a centrally planned Turkish economy, but to strategically formulate State policies with a view to facilitating economic and social development in Turkey. Accordingly, there is one ultimate goal behind the economic plans: enhancing social, economic and cultural development. If the legislative intent behind the 'development plans', as articulated under Article 41 TC 1961, had been to centrally plan and control Turkish economy in the strict sense, this objective would have contradicted with Articles 36 and 40 TC 1961 because they grant freedom to contract, the freedom to establish private enterprise, and the right to inherit and own properties. In any case, Article 41 TC 1961 clearly states that social and economic order in Turkey shall be formulated through 'development plans'. The nature and role of 'development plans' are explained in Article 129 TC 1961. That provision reads:

> 'Economic, social and cultural development shall be based on a (development) plan. Development shall be achieved in accordance with (development) plans. The ... fundamental principles on the formulation, enforcement, implementation, and amendment of the (development) plans ... shall be dealt with under relevant laws.'[512]

The tradition of formulating Turkey's social and economic order through a 'development plan', and granting fundamental economic and social rights to individuals, have been maintained within the currently effective constitution, the

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[511] TC 1961 (n 547) Article 41.

[512] TC 1961 (n 547) Article 129.

TC 1982.[513] The TC 1961, therefore, whilst marking the end of previous authoritarian-like socio-economic regime in Turkey, also introduced a strategy for formulating development plans concerning social and economic order in Turkey. In this context, the Turkish Constitutional Court, during its term under the TC 1961, stated that Articles 36 and 40 TC 1961 which grant certain social and economic rights to individuals are strong indicators of Turkey's economic policy and it is a 'mixed economic system', i.e. a 'hybrid' economic system.[514] The decision of the Turkish Constitutional Court, however, has been subject to a heated debate in Turkish literature on the grounds that under economic theory and practice the grant of certain rights such as those granted under Articles 36 and 40 TC 1961 does not necessarily conflict with a socio-economic system based on 'development plans' and the two can co-exist under free market economic system.[515] In any case, even though the TC 1961 did not contain any provisions on competition it remains as the first Turkish constitution to mark the beginning of a new political and economic thinking in Turkey.

4.2.2 The Turkish Constitution of 1982

Even though the LPC[516] provides the backbone of the Turkish competition law regime, the TC 1982[517] lies at the heart of the national legal system as the currently effective constitution of Turkey. Compared to TC 1961,[518] the TC 1982 is more detailed and longer in terms of both the number and content of provisions.

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[513] See Chapter VI, p 129-198.

[514] Turkish Constitutional Court, Decision Date: 23-25.10.1969, Decision Number: E.967/41-K.969/57.

[515] M. Akad, Teori ve Uygulama Acisindan 1961 Anayasasi'nin 10. maddesi, (Istanbul 1984) 186.

[516] LPC (n 15).

[517] TC (n 73).

[518] TC 1961 (n 547).

While the former has 151 provisions, each of which is comparably shorter to that of the TC 1982, the latter has 177 provisions. In relation to the social and economic order, Chapter 1 incorporates ‘Fundamental Provisions’ (Articles 1 to 11 TC 1982);[519] Chapter 2 TC 1982 deals with ‘Fundamental Rights and Obligations’ (Articles 12 to 74 TC);[520] whereas Chapter 4 TC 1982 accommodates ‘Provisions on Finance and Economics’ (Articles 161 to 173 TC 1982).[521] Before analysing the relevant provisions of the TC 1982, and the LPC and relevant national case-law in following sections, it is important to first understand the position of the TC *vis-à-vis* other national legal instruments and the hierarchical structure concerning legal norms in Turkey. The supremacy of the TC 1982 over national legislation and international and bilateral agreements signed by Turkey is dealt with under Article 11(1) TC 1982.[522]

The provision states:

> The Binding Nature and Supremacy of the Constitution
>
> The provisions of the Constitution are the fundamental law principles (of Turkey) which have a binding affect on legislative, executive and judicial bodies, administrative authorities, and on other entities and individuals.
>
> Statutes cannot be contrary to the Constitution.[523]

This means that the TC 1982 is superior to national primary and secondary legislation, national case-law, administrative decisions and international agreements ratified by the Turkish Grand National Assembly.[524] The hierarchy of norms in the Turkish legal context takes place in the following order: the TC

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[519] TC (n 73), Articles 1-11.

[520] TC (n 73) Articles 12-74

[521] TC (n 73) Articles 161-173.

[522] TC (n 73) Article 11(1).

[523] ibid.

[524] TC (n 73), Article 90 (5) TC states: ‘International agreements that have come into effect in accordance with the procedure (set forth in the TC) is equivalent to (national) primary legislation.’

1982; primary legislation and international agreements; secondary legislation; and soft-law instruments respectively. This means, Turkish legislation, case-law, administrative decisions, and bilateral and international agreements concerning competition law and policy are required to be compatible with the fundamental principles of the TC generally and the provisions of the TC 1982 on competition in particular. The compatibility of national legislation with the TC 1982 is subject to review by the Turkish Constitutional Court.[525] Every individual has the right to challenge the compatibility of national legislation with the TC 1982 before the Turkish Constitutional Court.[526]

4.2.2.1 'Fundamental Principles': Articles 2 and 5 TC 1982 and the Notion of 'Social State'

The first chapter of the TC 1982, 'General Principles', incorporates Articles 1 to 11 and establishes, amongst others, the nature and objectives of the State. Accordingly, Article 2 TC 1982 reads: 'The Republic of Turkey is a democratic, secular and social state governed by the rule of law …'[527]
Following this, Article 5 TC 1982 provides:

> 'The fundamental objectives and obligations of the State are: to safeguard the independence and integrity of the Turkish nation, the integrity of the country, and, the Republic and democracy; to protect the Republic and democracy; to ensure the welfare, peace and happiness of individuals and the (Turkish) society; and, to strive for the removal of political, social and economic obstacles which are incompatible with the principles of fairness and social state governed

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[525] TC (n 73) Article 148 TC states: 'Turkish Constitutional Court reviews the compatibility of statutes, decrees, and the standing rules of the Turkish National Assembly to the Turkish Constitution in terms of their form and essence'.

[526] With amendment (12/09/2012 – 59/18) Article 148 TC states: 'The Turkish Constitutional Court reviews the compatibility of (national) legislation, decree laws, and the standing rules of the Turkish Grand National Assembly to the Constitution in terms of their substance and form and assesses individuals' applications in this context.'

[527] TC (n 73) Article 2.

> by the rule of law and which restrict the fundamental rights and freedom of individuals; and to provide the conditions required for the development of the individuals' material and spiritual existence.'[528]

The notions of 'social state' and the 'welfare of individuals and the Turkish society' under the TC 1982 are fundamental in terms of understanding the social and economic order in Turkey under the TC and therefore need to be examined in more detail. The TC 1982 itself does not provide a definition of the concept of 'social state' and/or the role of State in facilitating the welfare of individuals. The Turkish Constitutional Court, however, defines 'social state' as:

> '…(a State) which provides and secures the well-being of its individuals; maintains the balance between individuals and the whole society; maintains a balanced relationship between labour and capital; provides a steady and secure environment for the existence of private entities in markets; adopts social, economic and financial measures in order to provide humanely living standards for its people and a determined working environment; adopts measures to prevent unemployment and provide a fair distribution of national wealth; provides and maintains a just legal system; and, follows the rule of law and a state policy based on the notion of freedom'.[529]

In the light of the 'Fundamental Principles' enshrined in the TC 1982,[530] and the Turkish Constitutional Court's interpretation of the notion of 'social state',[531] the following conclusion is drawn. The State's objectives concerning particularly social and economic order in Turkey are: first, it is the objective of the State to ensure the welfare of individuals and Turkish society as a whole; second, it is the obligation of the State to eliminate political, social, and economic hindrances that restrict rights and freedoms conferred upon individuals by the TC 1982; third, the State is required to secure the operation of private entities and markets within which entities function.

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[528] TC (n 73) Article 5.

[529] Turkish Constitutional Court, Decision No: K.1967/29, dated 16-27 September 1967.

[530] TC (n 73) Articles 2 and 5.

[531] Turkish Constitutional Court, Decision Date: 23-25.10.1969, Decision Number: E.967/41-K.969/57.

As opposed to the TC 1961, the TC 1982 provides in a separate provision under Article 5 the obligations of the State concerning the assurance of certain social and economic rights of individuals.[532] This provision,[533] combined with the Constitutional Court's perception of 'social state',[534] constitute clear evidence of the above-mentioned objectives of the social and economic order in Turkey, of which competition law is an indispensible component.

4.2.2.2 'Fundamental Rights and Obligations' and 'Provisions on Finance and Economics': Articles 35, 48 and 167 TC 1982

As observed above, Chapter 1 TC 1982 incorporates the fundamental principles and objectives of Turkey as a State. The 'Fundamental Principles' constructed under the framework of Chapter 1 TC 1982 reveals that the objectives stipulated in Article 5 TC are indeed the fundamental pillars through which the democratic and secular 'social state' of Turkey shall be established. The objectives of the State, however, are only attained through the use of necessary legal and economic measures. In this context, legal and economic measures specifically assigned to facilitate the objectives of the State are accommodated in the following chapters of the TC 1982. The examination of all provisions concerning social and economic order in Turkey is beyond the scope of this thesis, and therefore the focus shall be only on these provisions concerning competition and the social and economic system in Turkey within which competition takes place. Instead of examining the relevant provisions of the TC 1982, this section seeks to analyse

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[532] TC (n 73) Article 5.

[533] ibid

[534] Turkish Constitutional Court, Decision Date: 23-25.10.1969, Decision Number: E.967/41-K.969/57

the TCA's decision in IŞ-TIM.[535] This is the only decision in which the TCA draws upon the provisions of TC1982 in relation to competition and the functioning of markets in Turkey.[536] This analysis is aimed at understanding the social and economic system within which the Turkish national competition rules operate. In other words, the purpose is to draw a picture of the legal framework for social and economic order as constructed by the TC and understand the role of the competition rules within this wider constitutional framework.

In IŞ-TIM, the TCA analysed whether the national mobile telecommunications provider of Turkey, IŞ-TIM, had unlawufully refused to supply national roaming services to its competitors Turkcell and Telsim.[537] In its legal analysis, the TCA initially made reference to the 'free market economy' as the viable economic system of Turkey and states that in the Turkish context 'free market' aims, amongst others, to assure the free operation of entities and thus the competitive structure of markets in Turkey which, in turn, leads an efficient allocation of resources, promotes innovation, reduces costs and prices and enhances the welfare of consumers.[538] Following this, the TCA continues to state that the free market economy, in the Turkish legal context, is based on Articles 35 and 48 TC1982.[539] The said provisions are worded as follows:

> Article 35 TC1982: 'Everyone is granted property rights and the right of inheritance.'[540]

Article 48 TC1982:

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[535] TCA Decision, İŞ-*TIM Telekomünikasyon Hizmetleri A.Ş. v. Turkcell İletişim Hizmetleri A.Ş and Telsim Mobil Telekomünikasyon Hizmetleri A.Ş.*, File Number: SR/02-13, Decision Number: 03-40/432-186, Decision Dated: 09.06.2003

[536] ibid.

[537] ibid

[538] ibid at para 1710.

[539] ibid at para 1720.

[540] TC (n 73) Article 35.

> 'Everyone has the freedom to work in the field of their own choice. It is free to establish private enterprises. The State shall take necessary measures to ensure that private enterprises operate in a secure and stable environment in accordance with national economic requirements and social objectives.'[541]

According to the TCA, when put in its economic context, Article 35 TC1982 grants individuals the right to produce, possess, and dispose of their own product and services, and to enter and exit from Turkish markets.[542] Article 48 TC1982, on the other hand, grants the freedom of contract and the right to own and inherit properties and therefore provides the constitutional legal basis for the process of competition among rivalries.[543] According to the TCA, the process of competition established through the rights granted in Articles 35 and 48 TC1982 leads to the reduction of cost, higher quality and lower prices of products and services, and facilitates the maximum use of resources.[544] This system, the TCA states, which prevails within the Turkish economy should therefore enhance social welfare in Turkey. Nonetheless, the TCA accepted that the unrestricted use of freedom granted by Articles 35 and 48 TC1982 may undermine the functioning of this system and went on to state that the TC ensures the protection of this system through a separate provision, i.e. Article 167 TC1982.[545] From the viewpoint of the TCA, Article 167 TC1982 condemns the unrestricted use of the rights granted by the TC as it interferes with the economic freedom of others and halts the process of competition.[546] Accordingly, the motive behind Article 167 TC1982 is to secure the aggregate welfare of society that is achieved as a result of the process of competition. The text of Article 167 TC1982 states:

> 'The State shall take necessary measures in order to assure the orderly and healthy functioning of the markets for capital, finance, and, goods

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[541] TC (n 73) Article 48.

[542] TCA Decision, İ*Ş-TIM Telekomünikasyon Hizmetleri A.Ş* (n 576) para 1720.

[543] ibid.

[544] ibid.

[545] ibid

[546] ibid

> and services; and to prevent the formation of monopolies and cartels arising from agreements or decisions.'[547]

When assessed in conjunction with Articles 35 and 48 TC1982, it becomes clear that Article 167 TC1982 plays an important role in ensuring the healthy functioning of the social and economic order in Turkey established by the TC1982. Albeit having included only 'monopolies' and 'cartels' in the text of the provision, the primary motive behind Article 167 TC1982 is the prohibition of anti-competitive conduct in general with a view to ensuring the constant and uninterrupted process of competition in Turkish markets. In the wider social and economic context of the TC1982, however, Article 167 TC1982 not only establishes the constitutional basis for competition law in Turkey but also provides legal footing for the socio-economic order of Turkey.

Articles 35 and 48 TC1982 provide the legal constitutional basis for a free market economy system of which the process of competition is an indispensable element. The role of Article 167 TC1982 in this context is to the ensure the process of competition, through the prohibition of anti-competitive conduct and thus the free market system in order to attain the fundamental objectives in Article 2 and 5 TC1982. Therefore, all provisions of the TC1982 examined above -Articles 2, 5, 35, 48, and 167 TC1982- work hand in hand to establish the legal framework assuring a free market economy in Turkey. In this context, to the role of competition rules in particular is to work as a tool and an indispensable component of the whole system in order to ensure the uninterrupted process of competition.

In addition to the provisions of the TC1982 analysed above, at this point it is fundamental to examine the preamble of Article 167 TC1982 as it denotes the legislators' motive behind the prohibition of anticompetitive conduct. Admittedly, it is not argued that the analysis of the legislative intent behind

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[547] TC (n 73) Article 167.

Article 167 TC1982 is sufficient in itself in assessing the objectives of competition rules in Turkey. The objective is to understand and put legislators intent in the context of the wider legal, social and economic framework of the TC1982. In this context, the Preamble of Article 167 TC1982 states:

> 'The State shall ensure the development of private entities in competitive market conditions. (The objective of) providing competitive conditions imposes, in itself, two further obligations upon the State. (First) ... the State shall prevent monopolies occurred as a result of decisions or practices. This applies to both private and state-owned enterprises. The prevention of monopolies, monopoly-like groups, and the diffusion of dominance is ... indispensible for ensuring a healthy society and a healthy democracy. Furthermore, protecting individuals and the society from the detrimental affects of monopolies promotes peace and the welfare of Turkish society. [548] (Second) ... the formation of cartels, whether in the form of price-fixing, or market allocation, or any other conduct with a similar affect, is prohibited. The intent is to prevent the elimination of competition (from Turkish markets), and to prevent monopolies and cartels to determine or influence prices (and other parameters within national markets).'[549]

The preamble of Article 167 TC clearly provides that ensuring the operation of private entities and the process of competition in Turkish markets are seen by legislators as the fundamental pillars of a healthy functioning free-market economy system in Turkey. More importantly, a clear link is made between article 167 TC and the 'Fundamental Provisions', particularly Articles 2 and 5 TC, in that the intent behind the prohibition of anti-competitive conduct under Article 167 TC is stated as facilitating social and economic democratic values and promoting the welfare of Turkish society. These objectives seem to be in harmony with those stipulated under Articles 2 and 5 TC. In this case, it is argued, both the text and preamble of Article 167 TC clarifies two things. First, the provision constitutes clear evidence as to the instrumental role of competition law in the wider Turkish legal and economic context stipulated in the TC. In other words, the prohibition of cartels and monopolies –by which is meant

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[548] ibid.

[549] TC (n 73) Preamble of Article 167.

‘competition rules’- is indispensible in maintaining competitive markets and functioning of a free market system in Turkey. Second, the maintenance of competitive markets –achieved through competition rules- is aimed at achieving two final objectives: assuring (economic) democracy in Turkey; and, enhancing the welfare of Turkish society. In this context, it is not argued that competition rules have been assigned by the legislators of the TC 1982 as the exclusive legal instrument to attain economic democracy and enhance the welfare of Turkish society, but it is argued that competition rules have been perceived as a fundamental tool in attaining the ultimate objectives stated in Articles 2 and 5 TC.

4.2.2.3 The Chart Establishing the Constitutional Legal Framework for Competition

The constitutional framework establishing a free market economy in Turkey, and the role of competition law in this context, is illustrated in the below graph. This chart is based on the analysis conducted under Chapter VI so far. Accordingly, the competition rules within the TC 1982, which are generally worded as the ‘prevention of cartels and monopolies’ in Article 167 TC 1982, constitute a legal mechanism aimed at assuring the functioning of a free market economy in Turkey. Therefore, Article 167 TC1982 works in this process as a means to protect economic democracy and ensure the welfare of Turkish society.

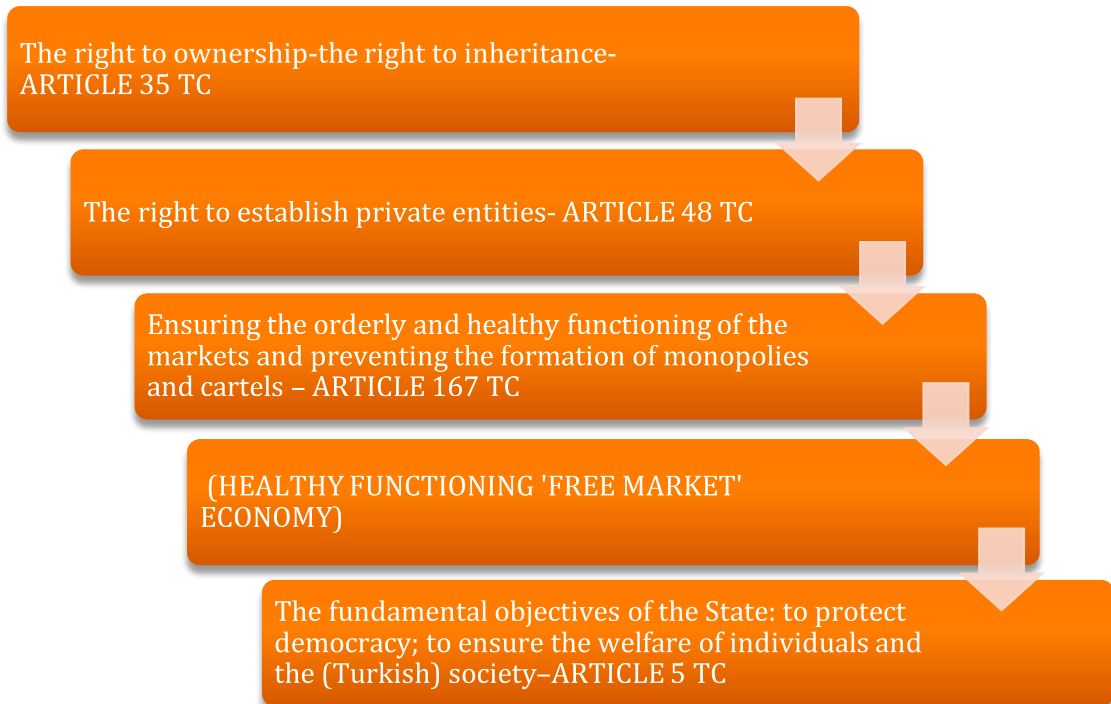

Figure 3: The Constitutional Framework for Social and Economic Order in Turkey

4.2.2.4 A Critical Analysis Concerning the Provision on Competition Rules: Propositions Concerning Article 167 TC 1982

Despite establishing a legal constitutional setting for the functioning of markets in Turkey and the role of competition rules within this social and economic order, Article 167 TC suffers from several shortcomings. First, Article 167 TC does not openly and directly condemn 'anti-competitive behavior' in general but rather requires the State to prohibit 'cartels' and 'monopolies'. Even if legislators' intent was to use the notions of 'cartels' and 'monopolies' as generic terms representing anti-competitive conduct in general, the wording of Article 167 TC is ill-defined. Admittedly, Article 167 TC is not intended to serve as national competition rules condemning an array of anti-competitive conduct. This is left to national legislation with a specific focus competition, i.e. the LPC, relevant secondary legislation, and soft law instruments. Nevertheless, as seen in the chart above, which draws the 'constitutional framework' for a free market economy in Turkey, Article 5 TC1982 establishes the ultimate objectives of Articles 35, 48 and 167 TC1982.

This means that Articles 35, 48 and 167 TC1982 work as a 'link' between national competition rules (the LPC, relevant secondary legislation and soft law instruments) and the ultimate objectives stipulated in Article 5 TC1982, i.e. promoting economic democracy and enhancing welfare of Turkish society. For this reason, it is argued, in order to ensure this link between Article 5 TC1982 and national competition rules the integrity of 'competition law as a system' in Turkey, a revision of Article 167 TC1982 is necessary.

The second drawback in relation to Article 167 TC1982 relates to the lack of reference to specific rules that prohibit anti-competitive conduct. The provision, as read above, only requires the State to take necessary legal measures in order to prevent anti-competitive conduct. Similar to the first point, the lack of reference to competition rules leads to a gap between national competition rules and Article 167 TC1982, and thus the ultimate objectives of Article 167 TC1982. This flaw is referred to as a lacuna in the sense that it causes a gap between the ultimate objectives of competition rules -stipulated in Article 5 TC1982- and the national legislation on competition. The chart below aims to draw the relationship between the national legal instruments on competition and explain the rationale behind the lacuna in a more structured way.

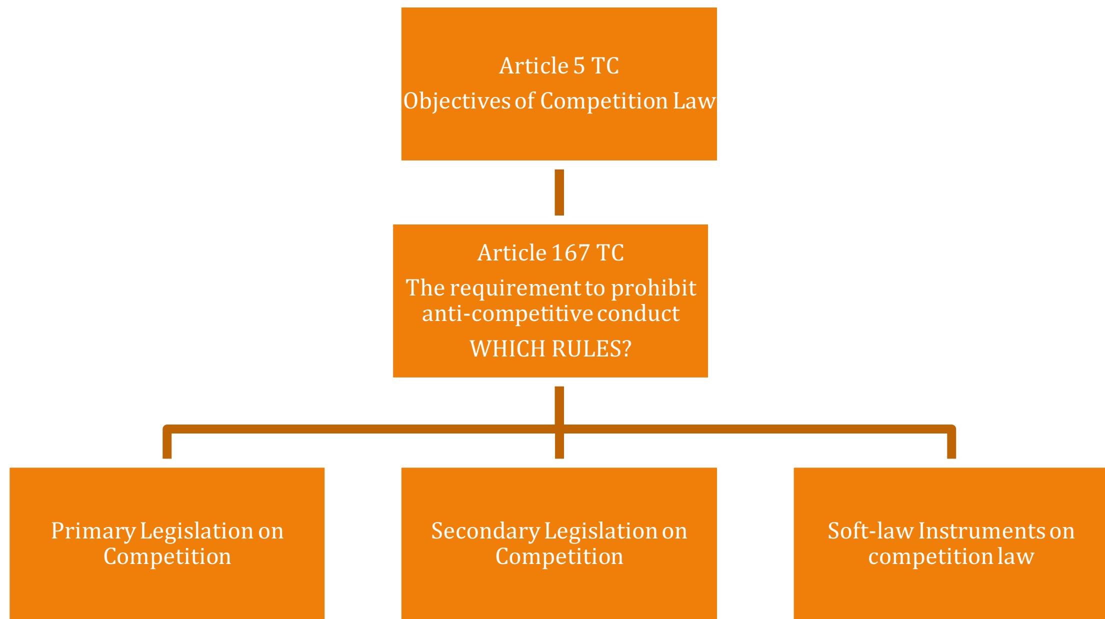

Figure 4: The Broader Legal Framework for Competition in Turkey

In light of the current proposals in Turkey for 'replacing' the TC1982 with a new constitution, the author suggests the following amendment concerning Article 167 TC1982. Provided that, at least in terms of their content, the objectives of the State stipulated in Article 5 TC1982 and the fundamental rights granted to individuals in Articles 35 and 48 TC1982 are retained in the new constitution, the author suggests the following amendments concerning Article 167 TC1982. First, the inclusion of a specific reference to national competition rules to the text of Article 167 TC. In this case:

> 'The State shall take necessary measures under national competition rules in order to assure the orderly and healthy functioning of the markets for capital, finance, and, goods and services; and to prevent the formation of monopolies and cartels or similar anti-competitive arrangements arising from agreements or decisions.'
>
> Alternatively, the author proposes the addition of a separate paragraph to Article 167 TC 1982.
>
> 'The State shall take necessary measures in order to assure the orderly and healthy functioning of the markets for capital, finance, and, goods and services; and to prevent the formation of monopolies and cartels arising from agreements or decisions.

> Decisions, agreements, or similar anti-competitive arrangements, and the abuse of economic power that restrict or distort the functioning of competitive markets in Turkey are prohibited as incompatible with the principles of fairness and social state and the fundamental rights and freedom granted to individuals with this Constitution.'

The proposed amendment above seeks to fill in the lacuna and restore the link between national legislation on competition, Article 167 TC1982, and, the objectives of the free market economy in Turkey and competition law -as an indispensible part of this system- stipulated in Article 5 TC1982. From a legal point of view, this is the most legitimate form of constructing the hierarchy from national rules on competition all the way to the objectives of Turkish competition law system established in the constitution.

Nevertheless, having examined the relevant provisions of TC1982 as the primary law for Turkish competition law, the following section shall focus on the LPC following the hierarchical structure of legal instruments at the national level.[550]

4.3 The Law on the Protection of Competition (LPC) and the Objectives of Turkish Competition Law and Policy

The Law on the Protection of Competition, the LPC, is the national legislation on competition in Turkey.[551] As analysed in Chapter III, the Association Agreement, the AA, of 1963 set forth two separate requirements in the specific context of competition rules.[552] First, it stipulated the application of EU competition rules at the bilateral level between the EU and Turkey.[553] Second, it required the EU competition rules to be adopted and applied at the national level in Turkey. The 'implementing rules' concerning the application of EU competition law at the bilateral level is yet to be adopted by the EU-Turkey Association Council.[554] As

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[550] LPC (n 15).

[551] LPC (n 15).

[552] Association Agreement (n 1).

[553] See Chapter III, p 92-128.

[554] ibid

for the second requirement, the LPC was adopted in 1994 with a view to commencing the third and final stage of the 'association' process, i.e. the 'Customs Union'.[555] This means a three-decade absence of national competition rules in Turkey, between the bilateral agreement of the AA in 1963 and the adoption of the LPC in 1994. Inevitably, this delay has had several implications for competition law and its application at the national level in Turkey. Firstly, until the adoption of TC 1982, no legal rules at the national level in Turkey addressed anti-competitive conduct. Secondly, after the TC1982 any allegedly anti-competitive conduct would have to be prosecuted in the absence of specific rules on competition and a dedicated enforcement agency. Article 167 TC1982 would have been the only legal grounds to legally assess anti-competitive conduct, and any potential breach would have to be dealt by civil courts. Thirdly, the delay in the formulation and adoption of the LPC engenders the risk of potential discrepancies between the TC and the LPC in terms of the objectives of competition rules in Turkey and the role of competition law in the wider national legal, economic and social context. Evidently, the rationale behind the adoption of the TC (1982) and the LPC (1994) are different due to divergent economic and legal setting at the time of their adoption. While the TC1982 aims to reflect the new social, economic, and legal order in Turkey following the military coup of 1981,[556] the motive behind the adoption of the LPC is purely political.[557] Nonetheless, in accordance with the principle of primacy, the LPC is required to be compatible with competition provisions of the TC 1982, i.e. Article 167.[558]

The following section seeks to analyse the LPC and its application by relevant Turkish administrative and judicial authorities, and to understand the objectives of Turkish competition law under this particular legislation.[559]

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[555] Decision No. 1/95 (n 2).

[556] TC (n 73).

[557] LPC (n 15).

[558] TC (n 73) Article 167.

[559] LPC (n 15).

4.3.1 The Turkish Competition Authority (TCA): Its Role in the Application of the LPC and the Objectives of Turkish Competition Law

The Turkish Competition Authority (TCA) was established in 1998 with a view to enforcing the LPC.[560] Article 20 LPC states:

> 'The (Turkish) Competition Authority, a public corporate body provided with administrative and financial autonomy, has been established in order to ensure the maintenance and protection of free and healthy competitive markets for goods and services (in Turkey) and to carry out the enforcement (of the LPC) and other tasks assigned to it (by the LPC).[561]
> The agency works under (the roof of) the Ministry of Customs and Commerce.
> The agency is independent in its administrative function. No other agency, authority, organization or individual shall give directions or orders with a view to influencing the decision making process of the agency.'[562]

Article 27 LPC stipulates the duties of the TCA as follows: to analyse, inquire into and investigate allegedly anti-competitive conduct prohibited by the LPC, initiated either upon complaint or *ex officio*; to take necessary measures and impose administrative fines when a breach of the LPC is established; to adopt soft-law instruments in the form of communiqués and other relevant legal measures in order to ensure the effective enforcement of the LPC; to deliver opinions and make proposals to the Ministry of Customs and Commerce concerning necessary amendments to the Turkish competition law system; to ensure the policy of its personnel and to monitor personnel in this context; to monitor other jurisdictions' competition law systems in terms of legal and

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[560] LPC (n 15) Article 20.

[561] Article 20 LPC (n 15), Amendment 24.10.2011-KHK 661/53.Md).

[562] LPC (n 15) Article 20.

economic measures, enforcement, and policy; and, to prepare annual reports on the operation and performance of the TCA.[563]

As stated by Article 20 LPC, the TCA is an independent public corporate body in terms of its decision making process. This provision also establishes that the TCA is not only required to monitor its own policy, but is also expected to monitor other jurisdictions' competition law systems in relation to policy objectives, legal and economic standards utilised in the application of substantive competition rules, and how these objectives are enforced by other competition law systems.[564]

4.3.2 The Statement of Purpose of the LPC

According to Article 88 of the TC1982[565] and Article 73 of the Rules of Procedure of the Grand National Assembly of Turkey, Bills submitted to the Turkish Parliament shall include a statement of purpose.[566] On this basis, this section starts of with an analysis of the Preamble of the LPC as submitted to the Turkish Parliament and later adopted as a part of the LPC. It then continues with an analysis of Articles 4, 5, and 6 LPC, the national provisions corresponding to Articles 101(1), 101(3) and 102 TFEU respectively.

The analysis conducted in Chapter IV revealed the discrepancies between the Commission and the Union Courts concerning the objectives of EU competition

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[563] LPC (n 15) Article 27.

[564] LPC (n 15) Article 20.

[565] TC (n 73).

Article 88(2) TC: 'The fundamental principles and procedure on the negotiation of draft bills at the Turkish National Assembly are formulated by parliamentary law'.

[566] The Rules of Procedure of the National Assembly of the Republic of Turkey, Decision Number: 584, Approval Date: 05.05.1973, Official Gazette No: 14506, dated 13.04.1973. Article 77(2): 'Draft Bills formulated by the Cabinet, endorsed by all Minsters and including a Preamble shall be submitted to the speaker of the parliament'.

law and the interpretation of the prohibition (Article 101(1) TFEU) and exception (Article 101(3) TFEU) clauses, and Article 102 TFEU under these objectives.[567] The observation was made that while the Commission adopts 'consumer welfare' as the objective and standard in assessing the legality of conduct under EU competition law, and an efficiency-based interpretation of EU competition rules, the EU Courts have accommodated non-efficiency based public policy objectives.[568] Based on this conclusion under Chapter IV, the remainder of this chapter seeks to examine the objectives of Turkish competition law under Articles 4, 5, and 6 LPC to clarify whether and to what extent the problem of 'consumer welfare' *versus* non-efficiency objectives under EU competition law has had implications for the interpretation of the LPC by the TCA and the Council of State. The crucial question in this context is whether the problem between the Commission and EU Courts concerning the objectives of EU competition law, and the interpretation of competition rules, can be observed under the Turkish competition law system.

The Accession Partnership(s) issued by the European requires the alignment of Turkish competition law with the relevant EU *acquis communautaire*.[569] So does the 'National Programme(s) Concerning the Adoption of the *Acquis Communautaire*'.[570] Under the EU legal order, case-law of Union Courts is superior to the decisional practice of the Commission. This means, the TCA and

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[567] TFEU (n 362) Articles 101 and 102.

[568] ibid

[569] Accession Partnership (n 14).

The currently effective Accession Partnership is: Council Decision (2008/157/EC) on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. (Official Journal L 051, 26/02/2008 P. 0004 – 0018).

[570] The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2001/2129, 19 March 2001; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2003/5930, 23 June 2003; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No:2008/14481, 10 Nov 2008.

Turkish Courts are required to follow the case-law of the Union Courts primarily. If the below analysis of Turkish case-law indicates that the TCA and/or the Council of State, or both, follow the Commission, this leads to inconsistency between Turkish competition law and the case-law of the Union Courts. If not, this reveals an inconsistency between the decisional practices of the TCA and those of the Commission. In any case, it is important to understand whether the TCA's and the Council of State's position is compatible with the constitutional framework for competition in Turkey. Concisely, it is this particular problem that Section 2 aims to examine and understand.

The Statement of Purpose of the LPC submitted to the Turkish Parliament in 1993, as a first step, provided the rationale underlying the adoption of competition rules in Turkey. It states:

> 'The main structure and components of the current economic system in Turkey relates to (the economic ideology of) 'market' or 'free market' economy. Accordingly, ... fundamental economic functions such as the co-ordination and direction of economic units, the quantity of supply and demand, and, the prices for goods and services are determined by the market itself.
> The principle and central economic policy that maintains and ensures the functioning of a free market economy is 'competition'.

However, competition functions properly only under the existence of certain conditions. Since 'competition' operates as a tool that ensures the functioning the market economy, the absence of conditions providing competitive markets prevents the proper functioning of this economic system.

(...) The effective functioning of a free market economy primarily requires a healthy competitive process.

The existence of (competitive markets) is closely linked to the structure of markets. It is crucial that the structure of markets allows the entry of new market players. The existence of barriers to enter markets tend to impair the functioning of competition. It therefore, leads to concentration of markets and restriction of competition.

On the other hand, competition requires the impulse and desire, in other words the spirit to compete in markets. The spirit to compete reflects entrepreneurs' attitude concerning success in economic activities.

Another condition necessary for establishing competitive markets is the provision of relevant legal measures.'[571]

The statement of purpose of the LPC clearly indicates the law-makers' concern for establishing a 'healthy competitive process' in Turkey. This concern is compatible with the Turkish constitutional framework for competition stipulated under TC 1982.[572] Therefore, both the TC1982 and the LPC consider the maintenance of 'competitive markets' in Turkey as a fundamental first step indispensible to establishing and maintaining the 'new' economic ideology and system based on a 'free market' economy. The fundamental difference between the TC 1982 and the LPC is that while the first considers establishing competitive markets as a duty of the State to ensure fundamental 'constitutional' rights granted to individuals, i.e. 'economic democracy' and 'economic freedom', the LPC provides specific legal measures to ensure a 'healthy competitive process' in Turkish markets. In this context, the LPC links the objective of ensuring the competitive process to the existence of three indispensible preconditions: the maintenance of 'open' markets free from legal and economic barriers to ensure entry by new market-players; ensuring the presence of 'entrepreneurs' willing to enter these markets; and, finally, the existence of relevant legal measures, i.e. 'competition law' to ensure the proper functioning of the 'process of competition'. In the author's view, the emphasis on the objective of 'the protection of the process of competition', in both the TC and the LPC, is mainly due to the lack of a prior constitutional, legal, economic and social background and tradition in Turkey necessary for establishing competitive markets. Without 'competitive markets' and a functioning 'process of competition', neither a 'free market'

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[571] Statement of Purpose, Draft LPC (n 16) paras 1, 2, 4, 6, 7, 8.

[572] See the 'Constitutional Framework for Social and Economic Order in Turkey', p 202-218.

system nor other objectives expected as an outcome of this system can be achieved in the first place.

Following this introduction, the Preamble of the LPC - similar to certain foreign competition legislation -[573] continues to stipulate a series of objectives. The Preamble continues:

> 'The protection of the process of competition (in Turkey) shall provide the allocation of national resources in accordance with society's demand (*allocative efficiencies*), whilst the increase in economic efficiency shall maximise general welfare (*general welfare*). Rivalry among competitors shall enhance efficiencies in the production and management of utilities, and, also, facilitate to minimise costs and resource utilization (*productive efficiencies*), and promote technological innovation and development (dynamic efficiencies). This, in turn, shall lead to higher quality goods and services, and, thereby, enhance the welfare of (end) consumers (*consumer welfare*) and Turkish society as a whole (*social welfare*). (para 16)

Along with the (primary) goals stated above, the competition system aims to achieve secondary objectives. First of all, with the elimination of hindrances to market entry, the competitive order shall facilitate the protection of small and medium enterprises *(protection of Small and Medium Enterprises- SMEs)*. Furthermore, an economic order lacking a competition system leads to increased State intervention into economics and a high number of state-owned enterprises (*market liberalisation, privatisation*). (para 17)

Competitive order also aims to promote fairness and honesty in the operation of markets (*fairness*). It is also known that competitive markets help reduce inflation (*combat inflation*). Another matter to be resolved through (the LPC) is arising entrepreneurship within the country. (*promote entrepreneurship*). (para 18)

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[573] The Canadian Competition Act incorporates a list of objectives in its purpose clause. See, E.M. Iacobucci, Chapter 3, *Landmark Cases in Competition Law* (B. Rodger ed,, Kluwer Law International 2012).

... Ensuring the rights of economic entities in a marketplace can only be achieved trough the help of and autonomous agency who is capable of functioning and taking decisions without (political) restrains. As a State in the on-going process of democratization, (Turkey) is in need of such independent administrative agencies. The establishment and maintenance of free competition in Turkey shall be provided by the (Turkish) Competition Authority, and in this way free commerce and entrepreneurship shall be secured (*economic freedom*). (para 21)[574]

Furthermore, Article 1 LPC, with title the 'Purpose', reads:

> 'The objective of this legislation is to prevent agreements, decisions and practices which prevent, distort and restrict competition on markets for goods and services, and the abuse of dominant position by those undertakings with significant market power, and, *to ensure the protection of competition* through necessary legal measures and supervisions.'[575]

Clearly, the Preamble of LPC [576] puts into perspective the constitutional framework for competition stipulated under the TC 1982,[577] the 'Statement of Purpose'[578] and 'Purpose' of LPC as stated under Article 1 LPC.[579] When all are read in conjunction, it becomes clearer that legal framework for competition in Turkey considers 'competition' as both an objective in itself, and as an intermediary objective, i.e. as a means, to achieve broader objectives. Particularly, the reference to establishing 'economic democracy' under TC 1982 indicates the role of 'competition' as an objective itself to ensure 'freedom to

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[574] Preamble, Draft LPC (n 16) para 16-18.

Neither the Statement of Purpose, nor the Preamble appears in the final version of LPC after its adoption by the Turkish Parliament on 7 December 1994.

[575] LPC (n 15) Article 1.

[576] Preamble, Draft LPC (n 16).

[577] The 'Constitutional Framework for Social and Economic Order in Turkey', p 202-218

[578] Statement of Purpose, Draft LPC (n 16).

[579] LPC (n 15) Article 1.

compete' in Turkish markets, whereas the 'primary' and 'secondary' objectives under the Preamble demonstrates how competition law functions as an instrument to achieve broader objectives.

However, as much as the clarification it provides on the role of competition law in Turkey, the Preamble of LPC seems to stipulate a mix of 'efficiency' and 'non-efficiency' objectives without further indication as to their role in the application of competition rules. The only clarification is the statement under the Preamble that the 'the protection of the process of competition' shall provide allocative, productive, dynamic efficiencies, all of which, in turn, shall, enhance 'social welfare' and 'consumer welfare'.[580] Following this, the list continues with, at least, the following 'secondary' objectives: promoting market liberalisation; privatisation; entrepreneurship; fairness; economic freedom; and, protecting SME's.

It was concluded in Chapter III that efficiency and/or non-efficiency objectives under competition law are not necessarily compatible with each other.[581] This conclusion was drawn from the rationale that views on how society ought to maximise welfare dictates objectives of competition law in terms of legal and economic standards adopted in the application of competition rules.[582] The analysis of the EU competition law regime in Chapter IV further revealed the problems related to different interpretation of the objectives of EU competition law by the Commission and EU Courts and how this inconsistency has led to problems of legal integrity and consistency.[583]

To put this problem in the context of the Turkish legal framework for competition, the classification of certain objectives as 'primary' and others as 'secondary'

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[580] Preamble, Draft LPC (n 16).

[581] Chapter III, p. 92-128.

[582] ibid.

[583] Chapter IV, p. 129-198.

under the Preamble of LPC lead to problems. For example, does this division mean that in case of a conflict between individual goals the 'primary' objectives of competition law will be adopted at the expense of the 'secondary' goals? Another legal uncertainty is led by the accommodation of all welfare standards, i.e. 'social welfare', 'consumer welfare' and 'general welfare', under the same roof. It is not clear what these objectives mean for the purpose of legal and economic standards in the application of substantive provisions.

Reliance on legislative intent on its own may undermine the scope of objectives pursued by Turkish competition as legal instruments, in general, are designed and adopted in order to meet the needs of societies and their interpretation do evolve over time. For this reason, Section three aims to understand the standpoint of the TCA and the Council of State on this matter. Before an examination of the decision practice of the LPC and the case-law of the Council of State, however, it is necessary to examine provisions of the LPC corresponding to the main competition rules of the EU Treaties.

4.3.3 Relevant Provisions of the LPC

Similar to the EU competition law system, the main competition rules of the LPC comprise of the prohibition of collusive conduct; a rule that allows an escape from this prohibition; the condemnation of unilateral conduct; and, prohibition of combination of entities, which distort competition in Turkish markets.[584] Unlike the structure of the EU competition rules, the LPC splits the prohibition and the exception clauses into two separate provisions, Article 4 and 5 LPC.[585] Before the examination of Articles 4,5 and 6 LPC the author it is necessary to analyse Article

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[584] LPC (n 15).

[585] LPC (n 15) Articles 4 and 5.

2 LPC, the provision which demarcates the scope of competition rules set forth in the LPC. The provision states:

> ‘Scope’ **(**Article 2)
> Agreements, decisions and practices between undertakings operating within the Republic of Turkey, or those conduct affecting markets for goods and services in Turkey, which prevent, distort or restrict competition; the abuse of dominance (in Turkey) by undertakings in a dominant position; any legal transaction or conduct in the form of merger and acquisition which leads to significant impediment of competition (in Turkey); and, injunctions, findings, legal measures and investigations concerning the protection of competition (in turkey) fall within the scope of this legislation.[586]

The text of Article 2 LPC certainly demarcates the scope of LPC, and, therefore, marks the ‘territory’ within which Turkish competition law is applicable. Accordingly, Turkish competition rules are applicable to anti-competitive conduct, which affects the market for goods and services in Turkey. The prohibition and exception clauses are as follows:

> ‘SECTION TWO, CHAPTER ONE
> Prohibited Activities
> Agreements, Concerted Practices and Decisions Limiting Competition
> **Article 4**- Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect <u>or likely effect</u> the prevention, distortion or restriction of competition <u>directly or indirectly</u> in a particular market for goods or services are unlawful and prohibited.[587]
>
> Exception
> **Article 5-** Provided that all conditions listed below are met, the Authority may **...** exempt agreements and concerted practices between undertakings, and decisions of associations of undertakings from the application of Article 4:
> a) Ensuring further development and improvement or economic or technical development of the production or distribution of goods and the provision of services,

[586] LPC (n 15) Article 2.

[587] LPC (n 15) Article 4.

> b) Benefitting the consumer from the above-mentioned (improvements),
> c) Not eliminating competition in a significant part of the relevant market,
> d) Not limiting competition more than what is necessary for achieving the goals set out in sub-paragraphs (a) and (b).[588]
>
> Abuse of Dominant Position
> **Article 6-** An abuse, by one or more undertakings, of a dominant position held throughout or in a part of the country, unilaterally or through agreements or concerted practices with other undertakings, is unlawful and prohibited.[589]

Similar to the competition rules of the EU, which were discussed in Chapter IV, Turkish competition law regime is mainly based on the prohibition of collusive and unilateral anti-competitive conduct.[590] Article 4 LPC[591] prohibits anti-competitive collusion between undertakings, Article 5 LPC[592] provides exemptions to this rule, and, Article 6 LPC[593] prohibits unilateral conduct by undertakings holding significant market power, i.e. a 'dominant position'. Albeit having been divided into two separate provisions, the wording of the prohibition and exception clauses clearly reveals that they are primarily 'modelled' on their European counterpart, Articles 101(1) and 101(3) TFEU.[594] The minor differences being, in terms of the substance of the provisions, the added prohibition of conduct which have as their 'likely affect' the prevention of competition, 'directly or indirectly' in Turkish markets. According to the author, these additional notions are aimed at broadening the scope of the prohibition clause enabling a wide spectrum of conduct to fall within Article 4 LPC.[595] A

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[588] LPC (n 15) Article 5.

[589] LPC (n 15) Article 6.

[590] Chapter IV, p. 129-198.

[591] LPC (n 15) Article 4.

[592] LPC (n 15) Article 5.

[593] LPC (n 15) Article 6.

[594] TFEU (n 356), Articles 101(1) and 101(3).

[595] LPC (n 15) Article 4.

similar approach, perhaps, can be seen with Article 6 LPC[596] as anti-competitive 'concerted practices' between dominant undertakings are included into the text to fall within the prohibition. 'Concerted practices', - as seen in Chapter IV[597] - is not explicitly included in the text of Article 102, [598] may be considered as a 'looser' form of arrangement compared to anti-competitive 'agreements'. This inclusion may, therefore, lead to a wider interpretation under Article 6 LPC.[599] The accommodation of objectives listed within the statement of purpose of the LPC is, nonetheless, in the remainder of this chapter and also under Chapter VI.

4.4 A Debate on the 'Social welfare' versus 'Consumer welfare' Standard as the Ultimate Goal of Turkish Competition Law

Chapter IV extensively discussed the outcomes of the 'more economic approach' led by the Commission.[600] It concluded that while the Commission adopts 'consumer welfare' as the principal objective of EU competition law, the Union Courts' repeatedly held that protecting the structure of European markets and promoting a pluralistic society in the EU are also the fundamental objectives of EU competition law.[601] The analysis conducted so far revealed that the primary objective of Turkish competition law is the 'protection of the process of competition'. This principal objective, however, aims to achieve further 'outcome' objectives such as enhancing 'consumer welfare' and 'social welfare'. However, the analysis conducted in Chapter III revealed, in theory and practice, different meanings have been attributed to the term 'consumer welfare', and the

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[596] LPC (n 15) Article 6.

[597] Chapter IV, p. 129-198.

[598] ibid

[599] LPC (n 15) Article 6.

[600] Chapter IV, p. 129-198.

[601] ibid.

two objectives 'consumer welfare' and 'social welfare' differentiate in terms of their meaning and content because they reflect different views on how society ought to enhance welfare.[602] Based on this problem, this section of Chapter V aims to analyse the position of the TCA and the Turkish Council of State concerning 'consumer welfare' *vis-à-vis* 'social welfare' and to understand the way in which the list of objectives stipulated under Preamble of LPC[603] are perceived as legal and economic standards and accommodated in the application of Articles 4, 5 and 6 LPC.[604]

Since the LPC leads to ambiguity but not clarity, this is the only way to understand the position of 'consumer welfare' under Turkish competition law. This examination shall also clarify whether and to what extent the 'more economic approach' and the objective of consumer welfare as posited by the Commission has been reflected by the TCA and the interpretation of competition rules in Turkey.

The 'International Competition Network Report on the Objectives of Unilateral Conduct Laws' (ICN Report) analysed under the EU competition law regime in Chapter IV includes data and information on the objectives of Turkish competition law, in addition to the other thirty-four individual jurisdictions that participated in this study.[605] As a response to the questionnaire forwarded to each jurisdiction, the TCA stipulated the goals of Turkish competition law as: 'ensuring an effective competitive process' as a goal in its own right; 'promotion of

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[602] Chapter III, p. 92-128.

[603] Preamble, Draft LPC (n 16).

[604] LPC (n 15) Articles 4, 5, and 6.

[605] ICN Report on the Objectives (n 497).

Jurisdictions participating in the study: Australia, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Union, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Mexico, Netherlands, New Zealand, Pakistan, Romania, Russia, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and the United States.

consumer welfare; 'maximisation of efficiency'; and, 'ensuring a level-playing field for SMEs'.[606] In the context of the first objective, the ICN Report provided the following options: 'ensuring an effective competitive process as a goal (in itself)'; 'ensuring an effective competitive process as both a goal and a means'; and, 'ensuring an effective competitive process exclusively as a means to achieve other goals'.[607] As for the second objective the drafters of ICN report admit that, at least for the purposes of the ICN questionnaire, individual competition agencies attributed different economic understandings to the term 'consumer welfare'.[608] The TCA specifically defined the term as 'the welfare of all consumers and the society' measured in terms of 'better quality goods and services at lower prices'. This definition of the TCA within the ICN Report is problematic. Firstly, because, as observed under the Turkish legal framework for competition in Section 5.3 'ensuring an effective competitive process' is not only a goal in its own right but rather both a goal and a means to achieve broader objectives.[609] Secondly, the definition of 'consumer welfare' provided by the TCA (the welfare of all consumers and the society measures in terms of better quality and lower prices) does not coincide with the notion of 'consumer welfare' as defined by neoclassical economics discussed in Chapter III.[610] The third reason is because

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[606] ICN Report on the Objectives (n 497), Annex A.

[607] ibid.

[608] (ICN Report on the Objectives (n 497), p 2.

[609] This includes the 'Constitutional Framework for Social and Economic Order in Turkey' (p 202-218); the 'Statement of Purpose' and 'Preamble' of Draft LPC (n 16); and, 'Purpose' under Article 1 LPC, and Articles 4, 5, and 6 LPC.

[610] Neoclassical economics defines 'consumers' surplus' as 'the monetary gain obtained by consumers because of the difference between what consumers would have been willing to pay and what they actually did pay'. 'Producers' surplus', accordingly, is defined as 'the amount that producers gain from the difference between what they were actually paid for and what they would have been willing to take. The sum of consumers' surplus and producers' surplus is 'total surplus'. It is essential to draw the line between 'customers' and '(end) consumers'. 'Customers' in most markets are not individuals but are manufacturers, distributers, or retailers. In this case, effects on customers' surplus differ from consumers' (at the end of the distribution chain) surplus.

the emphasis on the 'promotion of consumer welfare' by the TCA in the ICN Report casts a shadow on the 'social welfare' objective established in the Statement of Purpose of the LPC.[611] Given that the statement of purpose makes reference to all three notions as the objectives of the LPC, the author seeks to examine the relationship between the goals of 'social welfare', 'total welfare', and, 'consumer welfare' and the extent to which they are pursued and utilised by the TCA under the LPC. The author aims to examine, first the objective of 'social welfare' and then the objectives of 'total welfare' and 'consumer welfare' as a separate discourse.

The earliest decision in which 'social welfare' was expressed as an objective of the LPC was in relation to Ankara's monopoly coal provider BELKO.[612] Commenting on the allegedly excessive pricing of exported coal by BELKO under Article 6 LPC (equivalent of Article 102 TFEU), the TCA first stated that competition rules in general are aimed at preventing the loss in 'social welfare' that occurs as a result of the concentration of economic power.[613] 'Social welfare', the TCA further stipulated, is achieved through the promotion of allocative efficiencies and the redistribution of income.[614] Having recognised that competition agencies are not price-regulating bodies, the TCA held that productive and allocative inefficiencies (i.e. high avoidable costs) caused by BELKO had disrupted income distribution and thus harmed the 'social welfare' of

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There is no common understanding of the term 'consumer welfare'. Robert Bork, who introduced the term 'consumer welfare' to competition law discourse, used the term to refer to the aggregate welfare of consumers and producers.

Recently, however, in competition policy discourse, both lawyers and economists, have used the term 'consumer welfare' to refer to consumers' surplus, and the term 'total welfare' to refer to 'total surplus'

[611] Statement of Purpose, Draft LPC (n 16).

[612] TCA Decision *Belko Ankara Komur ve Asfalt Isletmeleri Sanayi ve Tic Ltd Sti*, File Number: D1/1/H.U.-99/1, Decision Number: 01-17/150-39, Decision Dated: 26.04.2001.

[613] TCA Decision *Belko Ankara Komur* (n 653).

[614] TCA Decision *Belko Ankara Komur* (n 653).

Turkish society.[615] The TCA's position on 'social welfare', i.e. the ultimate objective of Turkish competition law, was 'reiterated' by the appellate court. On appeal to the Council of State, the court concluded: ' In the light of BELKO's absolute monopoly in the relevant market and the nature of the product in question, and thereby their direct impact on the welfare of society and consumer benefit ... intervention on the grounds of competition law is not wrongful.'[616] It is clear from BELKO that the TCA associates 'social welfare' with distributional concerns, and, at the same time, with the welfare of all of Turkish society. More importantly, there is no specific reference to the welfare of producers, customers or consumers as the criterion for judging the legality of excessive pricing imposed by BELKO. Following BELKO, in IŞ-TIM, a decision concerning refusal to supply allegations against Turkey's two separate mobile telecommunications providers Turkcell and Telsim, the TCA established a link between 'protecting the competitive process' and the objective of 'social welfare'.[617] In its decision, the TCA first made reference to 'the freedom of contract and freedom to establish private entities' and 'the right to private ownership' as stipulated in the TC.[618] The TCA than argued that, when put in their economic context these Constitutional rights allow undertakings to enter and function in markets and dispose of their properties, i.e. the right to operate in markets and to determine the buyer, price and amount of products/services.[619] Accordingly, while the 'right to private ownership' allows companies to produce high quality products at the lowest cost possible, the 'freedom of contract and freedom to establish entities' secure the competitive process in Turkish markets.[620] This competitive process, the TCA stated, established and protected by the relevant provisions of TC and

[615] ibid

[616] Danıştay 10. Daire, Karar No: 2003/4770, Karar Tarihi: 15.02.2007.

[617] TCA Decision, *İŞ-TIM Telekomünikasyon Hizmetleri A.Ş* (n 576).

[618] ibid

[619] ibid 1720.

[620] ibid.

LPC, in turn, enhances social welfare.[621] The TCA further stated that in order to ensure the operation of this 'system' and thus to safeguard the 'total welfare' of the whole (Turkish) society, the TC and LPC work hand in hand: Article 167 TC condemns the misuse of freedom and rights enshrined in Articles 35 and 48 TC, whereas the LPC prohibits anticompetitive conduct.[622] The TCA concluded that, all three provisions aim to protect 'public welfare' but not the interest of individuals.[623] In other words, it is submitted that, the freedom to establish private entities together with the right to ownership provides the Constitutional framework for a free market system in Turkey and the State ensures the functioning of this system through competition rules.[624] In essence, the ultimate aim of this broader system is to enhance 'social welfare'. Therefore, Turkish competition law, as a part of this broader framework, aims to ensure the functioning of a free market system in Turkey and thus to enhance the welfare of Turkish society, i.e. 'social welfare'. After IŞ-TIM, in a case concerning price-fixing allegations against Turkey's three domestic courier companies, the TCA rejected the arguments that the economic crises particularly affecting the domestic courier services should be taken into account when assessing the amount of a fine to be imposed.[625] Responding to this argument, the TCA stated a price fixing agreement not only leads to a transfer of welfare from consumers to producers, but also harms the welfare of the whole society (social welfare) and this cannot be tolerated in a competition law system that ultimately aims to enhance social welfare.[626] Successively in MOYTAŞ[627] and TENCEL HOLDING[628] the TCA reiterated its position on 'social welfare' as the ultimate objective of LPC.

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[621] ibid.

[622] ibid.

[623] ibid.

[624] ibid at 1750.

[625] TCA Decision, *Aras Kargo Yurtici ve Yurtdisi Tasimacilik A.S. ve MNG Kargo Yurtici Yurtdisi Tasimacilik A.S. ve Yurtici Kargo Servisi A.S.* File Number: 2008-4-264, Decision Number: 10-58/193-449, Decision Dated: 03.09.2010.

[626] ibid

In the light of these early decisions, one can argue that 'social welfare' was perceived as the 'ultimate objective' of Turkish competition law by the TCA. Nonetheless, several questions remain unanswered. Most importantly, what is the precise meaning of 'social welfare' for the purposes of the LPC? Furthermore, is 'social welfare' the standard for assessing the legality of allegedly anticompetitive conduct? If so, is 'social welfare' measured by changes in total surplus,[629] i.e. does an increase (decrease) in total surplus translate into an increase (decrease) in 'social welfare'?[630] Over the last ten years, nevertheless, the TCA has further clarified the scope of 'social welfare' and 'indicated' the adoption of social welfare as a standard in assessing cases under the LPC. To begin with, the TCA provided further clarification in assessing conduct under Article 5 LPC, the Turkish provision equivalent to Article 101(3) TFEU, which allows anti-competitive conduct to escape from the prohibition clause. For the first time, in PFIZER,[631] and then repeatedly in several subsequent decisions,[632] the TCA stated

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[627] TCA Decision, *Seval Mesrubat Paz. San. ve Tic. Ltd. Sti, and Senturkler Gida Mesrubat Tekel Ur. Paz. San. ve Tic. Ltd. Sti, v. Moytas Gida Tasima Hay. Mad. Tur. Teks. San. ve Tic. Ltd. Sti and Moybak Gida Uretim Dagitim ve Paz. San. ve Tic. Ltd. Sti*, File Number: 2003-3-97, Decision Number: 04-17/126-28, Decision Dated: 26.02.2004, p 15.

[628] TCA Decision, *CVC Capital Partners Group and Lenzing AG*, File Number: 2005-3-109, Decision Number: 05-44/621-156, Decision Dated: 08.07.2005, para 160.

[629] See p 26-38.

[630] For the relationship between 'social welfare' and 'total welfare', see: A. Mas-Colell, M. D. Whinston, J. R. Green, *Microeconomic Theory* (Oxford University Press 1995). For the 'social welfare function', see: P. A. Samuelson, 'Reaffirming the Existence of 'Reasonable" Bergson-Samuelson Social Welfare Functions' (1977) 44 Ecoomica 81-88.

[631] TCA Decision, *Pfizer Ilaclari Ltd. Sti. ve Dilek Ecza Deposau Ithalat ve Ihracat Tic. A.S.*, File Number: 2007-1-22, Decision Number: 07-63/774-281, Decision Dated: 02.08.2007, 1330.

[632] For instance, TCA Decision, *Roche Mustahzarlari Sanayi A.S.*, File Number: 2008-1-6, Decision Number: 08-29/352-113, Decision Dated: 17.04.2008; TCA Decision, *GlaxoSmithKline Ilaclari Sanayi ve Tic. A.S.*, File Number: 2008-1-44, Decision Number: 08-40/535-201, Decision Dated: 20.06.2008; TCA Decision, *Atlantik Gida Pazarlama Sanayi ve Ticaret A.S.*, File Number: 2008-3-124, Decision Number: 08-66/1059-414, Decision Dated: 20.11.2008; TCA Decision,

that for an exemption to be granted under Article 5 LPC, the first of four cumulative conditions (Article 5(a) LPC-contribution to economic progress) requires a 'substantial contribution to social welfare'. The scope and meaning of the social welfare requirement under Article 5(a) LPC was then defined by the TCA as 'economic progress not only enjoyed by the relevant undertaking itself but also economic progress reflected upon (end) consumers, competitors of the undertaking in question, the relevant market in which the undertaking operates and thus the (national) economy.[633] In the author's view, this indicates that 'social welfare', under the LPC, measured in terms of surplus incorporates producers' surplus, customers' surplus, and consumers' surplus in the relevant market, i.e. total surplus. In DOĞAN GAZETECİLİK, a case concerning the 'failing firm defence' under Article 7 LPC,[634] the TCA first posited that the prohibition of anti-competitive agreements, and legal rules on competition in general, operate as a tool to attain the ultimate objective of enhancing social welfare.[635] The TCA went on to say that, in competition law discourse and practice, despite the creation or strengthening of a dominant position certain mergers/acquisitions are approved on the grounds that the maximisation of social welfare (as a result of the efficiency gains realised through the proposed

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Merkez Gida Pazarlama Sanayi ve Ticaret A.S., File Number: 2008-3-126, Decision Number: 08-66/1061-416, Decision Dated: 20.11.2008; TCA Decision, *Lastik Sanayicileri Dernegi*, File Number: 2010-3-79, Decision Number: 10-67/1422-538, Decision Dated: 27.10.2010.

[633] ibid

[634] Article 7 LPC: 'Mergers or Acquisitions'. 'Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited. (TCA) shall declare, through communiqués, the types of mergers and acquisitions which have to be notified to (TCA) and for which permission has to be obtained, in order them to become legally valid'.

[635] TCA Decision, *Dogan Gazetecilik A.S.*, File Number: 2007-2-141, Decision Number: 08-23/237-75, Decision Dated: 10.03.2008.

acquisition) outweighs the harm to the competitive process (as a result of the creation or strengthening of a dominant position).[636] In essence, the TCA weighed the proportion of loss in social welfare in the absence of the proposed acquisition of the 'failing firm' against the anticompetitive effects of the creation or strengthening of a dominant position in the relevant market. Eventually, the TCA held that there will be no affect on social welfare in the case of the acquisition, and thus condemned the transaction.

After PFIZER (and subsequent decisions on Article 5(a) LPC) it could be argued that the 'social welfare' objective under Turkish competition law corresponds to 'total surplus' as defined in neoclassical economics. Furthermore, other decisions of the TCA clearly utilise the term 'total welfare' as connoting 'total surplus'. In TÜRK TELEKOM, for instance, when Turkey's incumbent telecoms company based its arguments on 'total welfare' in support of its allegedly anticompetitive conduct, the TCA stated that 'total welfare' arguments are accepted so long as total welfare is attained particularly as a result of the conduct under investigation.[637] TÜRK TELEKOM was held to have infringed Article 6 LPC as the conduct in question did not enhance total welfare contrary to TÜRK TELEKOM's assertions. In COCA-COLA, on the other hand, the TCA explicitly stipulated that the rationale behind condemning predatory pricing under Article 6 LPC is the adoption of 'total welfare' as a standard.[638] Accordingly, even if the undertaking in question does not succeed in recouping its losses in the long run, predatory pricing is condemned because the loss incurred in 'producer surplus' harms total welfare.[639] This loss in total welfare, the TCA argued, is

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[636] ibid at 1050.

[637] TCA Decision, *Turk Telekomunikasyon A.S.*, File Number: 2003-2-13, Decision Number: 05-10/81-30, Decision Dated: 10.02.2005, 1550-1580.

[638] TCA Decision, *Coca-Cola Satis ve Dagitim A.S.*, File Number: 03/1/T.E.-01/1, Decision Number: 04-07/75-18, Decision Dated: 23.01.2004, p 42.

[639] ibid

prevented by the prohibition of predatory pricing under Article 6 LPC.[640] Moreover, both in DIGITÜRK[641] and MARS SİNEMA[642] the TCA stated that in a situation where different consumer groups are subject to different prices based on price elasticity of demand, '... if price discrimination enables a group of consumers to reach to the product/service the conduct cannot be held anticompetitive as it enhances total surplus, in other words it increases total welfare...'[643]

From the above, one may suggest that the uncertainty concerning the objectives underlying the LPC has been resolved in favour of the 'social welfare' objective measured in terms of 'total surplus'. Subsequent decisions of the TCA, however, seem to 'maintain' the ambiguity concerning the objectives of the LPC in general, and, perhaps 'deepen' the controversy relating to the legal test adopted by the TCA in assessing cases under the LPC. In ROCHE, the TCA clearly 'admitted' the ambiguity relating to the objectives of the LPC, and, particularly, to the standard of welfare ulitised in assessing the legality of cases under LPC.[644] Commenting on the difficulty in generalising all price discrimination practices as anti-competitive, the TCA made the following statement: '(economists argue) ... in certain cases price discrimination actually enhances total output and increases social welfare rather than harming it... For this reason, it is hard to make an *a priori* assumption that price discrimination is beneficial or harmful to the welfare of society. Moreover, the ambiguity as to whether consumer welfare or total welfare is to be adopted as the standard to assess the legality of behavior clouds the decision-making process. (The LPC) does not point to any direction (in

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[640] ibid

[641] TCA Decision, *Digital Platform İletisim Hizmetleri A.S.*, File Number: 2010-2-287, Decision Number: 11-09/166-55, Decision Dated: 16.02.2011, paras 260-290.

[642] TCA Decision, *Mars Sinema Turizm ve Sportif Tesisler Isletmeciligi A.S.,* File Number: 2011-2-402, Decision Number: 12-03/93-32, Decision Dated: 26.02.2012, paras 40-70.

[643] ibid

[644] TCA Decision, *Roche Mühtahzarları A.S.* File Number: 2005-1-170, Decision Number: 08-61/996-388, Decision Dated: 30.10.2008.

terms of the welfare standard) either.'[645] Ultimately, in IZOCAM, commenting on the assessment of exclusive purchasing agreements under Article 4 LPC, the TCA stated: 'Since the criterion used (in assessing the legality of exclusive purchasing agreements) is either social welfare or consumer welfare, in a situation where the relevant conduct restricts competition more than the efficiencies claimed, then the agreement will be scrutinized (by TCA). In this context, the position of the undertaking and its competitors', and their market shares (in the relevant market) are highly important. Both the EU Commission and TCA takes into account the nature of the agreement and the dynamics of the relevant market and if (in the light of this information) it is likely that the loss in social welfare is compensated through the efficiencies, in this case the agreement is exempted (from Article 4 LPC, Article 101 TFEU)'.[646] In the author's view, both ROCHE and IZOCAM clearly establish, as opposed to the TCA's assertion, that 'consumer welfare' is neither the ultimate objective of LPC nor the absolute criterion, i.e. legal test, in the assessment of cases under Articles 4, 5 and 6 LPC. In other words, the TCA's position in the ICN Report runs counter to its own decisions discussed above and to the Council of State's decision in BELKO.[647] Admittedly, the TCA has made reference to 'consumer welfare' on several occasions. No decision, however, indicates what is meant by 'consumer welfare', nor clarifies whether it is measured in terms of 'consumer surplus' or 'total surplus', and if it constitutes the criterion in assessing legality of conduct under the LPC. Nevertheless, it is observed that the TCA has used 'consumer welfare' 'sparingly' as a guide in the assessment of cases, and made the assumption of harm to 'consumer welfare' in the existence of various conditions. For instance, the TCA assumes harm to 'consumer welfare': in tying and bundling practices if the undertaking in question strengthens its dominant position through the conduct, or competitors of dominant undertaking are forced to leave the market, or conduct

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[645] ibid

[646] TCA Decision, *Izocam Ticaret ve Sanayi A.S.*, File Number: 2008-2-156, Decision Number: 10-14/175-66, Decision Dated: 08.02.2010.

[647] Danıştay 10. Daire, Karar No: 2003/4770, Karar Tarihi: 15.02.2007.

erects barriers to entry;[648] in selective distribution agreements which restrict the resale of products to only authorised dealers and thereby limit the ability of end-consumers to access the relevant product or service that requires special assistance during purchase; in exclusive distribution agreements which do not enhance inter-band competition;[649] in a margin squeeze case if the conduct forces competitors to leave the market or creates barriers to entry or restricts the operation of competitors in the relevant market;[650] in a merger proposal which leads to the creation of a dominant position and thereby enables the dominant undertaking to increase prices and limit production;[651] in a refusal to supply case - save for to the indispensability and elimination of competition requirements - if the refusal hinders the production of new products or services in the downstream market.[652]

4.5 Conclusion

Having previously analysed the objectives of EU competition law in Chapter IV,[653] Chapter V focused on the objectives of competition law at the national level in Turkey. To that end, it analysed the two most significant legal instruments

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[648] TCA Decision, *Euroka Sigorta A,S Türkiye Garanti Bankasi A.S*, File Number: 2009-4-75, Decision Number: 09-23/492-118, Decision Dated: 20.05.2009, para 230; TCA Decision, *AXA Sigorta A.S. Turev Sigorta Acentasi*, File Number: 2009-4-119, Decision Number: 09-34/786-191, Decision Dated: 05.09.2009, para 220.

[649] TCA Decision, *Unilever Sanayi A.S*, File Number: 2004-3-155/2008-3-68, Decision Number: 08-33/421-147, Decision Dated: 15.05.2008, para 2790.

[650] TCA Decision, *Vodafone Telekomunikasyon A.S.*, File Number: 2009-2-288, Decision Number: 10-21/271-100, Decision Dated: 04.03.2010, para 160.

[651] TCA Decision, *Vaillant Saunier Duval Iberica SL*, File Number: 2007-2-106, Decision Number: 07-65/804-299, Decision Dated: 21.08.2007, para 440.

[652] TCA Decision, *Sanayi ve Ticaret Bakanligi*, File Number: 2010-2-83, Decision Number: 10-45/813-271, Decision Dated: 24.06.2010; TCA Decision, *Teknoform Klima Bak Ins. Taah. Tic. Ltd. Sti.*, File Number: 2010-2-2, Decision Number: 10-29/446-169, Decision Dated:08.04.2010, para 390.

[653] Chapter IV, p. 129-198.

concerning Turkish competition law, the TC 1982 and the primary legislation for competition in Turkey, the LPC. The analysis of the TC 1982 with a particular focus on Articles 5, 35, 48 and 167 TC, which this author referred to as the 'constitutional framework for competition in Turkey', revealed one important point. Turkish competition law is centred within a wider framework, which aims to ensure 'economic democracy' in Turkey. In other words, Turkish competition law works as a 'catalyst' within this wider framework and facilitates the orderly functioning of Turkish markets through the maintenance of 'competitive markets'. This is reiterated in the introduction of the statement of purpose of the LPC. Competition law, as a system, in Turkey is indispensible for 'effectuating' and maintaining 'free' markets in Turkey. The lack of necessary institutional, legal, economic traditions and specific measures prior to the adoption of the TC, perhaps, requires an emphasis on this objective to Turkish competition law, i.e. to facilitate the functioning and orderly working of a 'free' market in Turkey. It is this reason behind the author's objection to the TCA's position in the ICN Report. The author argues that 'ensuring an effective process of competition' is not merely a goal as posited by the TCA, but is both a goal and a means to achieve other broader 'outcome' objectives. 'To facilitate the functioning and the orderly working of a 'free' market in Turkey' is one of the outcome objectives aimed to achieve competition law. Why is this important? A clear and correct understanding of the objectives of Turkish competition law is indispensible for a coherent application of national competition law that is compatible with the TC. Another important conclusion concerning the TC is the existing legal lacuna, i.e. the lack of a reference to 'competition rules' in the TC. The absence of a legal framework for competition in Turkey until 1994 may help explain this lacuna, as the TC was adopted in 1982. Since Turkey's EU candidacy became official, much of the national legislation has gone under review with a view to harmonise domestic law with EU law. For this, and other reasons, the existing constitution – the TC - requires be aligned with the revised national law and other socio-economic developments. In the light of the current endeavours in Turkey for replacing the existing Constitution with a new constitutional framework, the author proposes a change in Article 167 TC to fill-in this lacuna and therefore

enhance the legal certainty and clarity concerning the precise role and objectives of competition rules within the wider constitutional framework.

The analysis of the LPC, and particularly the statement of purposes of the LPC, strengthened the author's argument on the objectives on Turkish competition law. Accordingly, 'ensuring an effective competitive process' in Turkey is not only an objective of competition rules but is also a means to reach other 'outcome' objectives. Problems, however, arise with the inclusion of various 'outcome objectives' in the statement of purpose of the LPC. For instance, the incorporation of 'social welfare' and 'consumer welfare' leads to legal uncertainty as the two concepts are not identical and may lead to different outcomes when adopted as the objective of an individual competition law system. The analysis of the decisional practice of TCA and the case-law of the Turkish Council of State in Section 3 mainly aimed at clarifying the relationship between the two objectives and their position in the interpretation of competition rules in Turkey. It became clear that both the Council of State and the TCA have referred to the terms 'social welfare' and 'consumer welfare' multiple times in their decisions. However, consumer welfare, as opposed to what the TCA asserts in the ICN Report, is neither the outcome objective of Turkish competition law nor the standard utilised in assessing the legality of conduct under LPC. Consumer welfare, therefore, is only used 'sparingly' as a guide in the assessment of cases. In the author's view, 'social welfare' as the outcome objective, is not only consistent with the decisional practice of TCA and the case-law of the Council of State, but also coherent with the broader constitutional framework, i.e. the TC. In this case, it is hard to overlook the Commission's position on 'consumer welfare' and its influence on the TCA through the 'harmonisation' process. However, the TCA, as the competent government agency to apply competition rules, is under the legal obligation to ensure the interpretation of competition rules in accordance with the 'letter and spirit' of the TC and the LPC. Only decisions brought in front of the Administrative Court of Ankara (court of first instance) and the Turkish Council of State (court of appeal) are subject to review. If parties do not appeal, the TCA's interpretation rules.

The inclusion of both the welfare of consumers and the welfare of Turkish society within the preamble of the Draft LPC, in the author's view, was a deliberate decision of drafters of the LPC inasmuch as *'(mindful) ... of the special problems presented by the development of the Turkish economy*' as stated in the Association Agreement by the EU.[654] As argued by Stucke, competition law also represents the more efficient and democratic means to achieve human development such as greater justice, higher quality of life a more humane ordering of social relationships.[655] In Turkish competition law, therefore, the welfare of consumers is seen as one of the elements necessary for 'achieving human development' but not as the outcome objective or the standard in assessing the legality of conduct under competition rules.

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[654] Association Agreement (n 1).

[655] M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (n 32)

5 BROADER PUBLIC POLICY OBJECTIVES OF TURKISH COMPETITION LAW (BOX-II)

'Development- which includes education and opportunity and all other aspects of human dignity and welfare- is the top economic priority (of developing countries). Yet development is elusive. It is often said that all economic policies, including competition, must be designed in aid of development.'[656]

5.1 Introduction

This Chapter aims to examine the role of public policy objectives in Turkish competition law. As postulated in Chapter V, the 'Broader Legal Framework for Competition in Turkey' reflects the proposition that Turkish competition law is more than just a set of stand-alone legal principles but rather part of a wider legal framework that interconnects various legal, economic and political goals in Turkey.[657] According to the 'The Roadmap on the Goals of the EU and Turkish Competition Law Systems' submitted in Chapter III, public policy objectives represent the third and last group of objectives grouped under the Turkish competition law system, namely the 'constitutional objectives', 'legislation and soft law instruments', and broader 'public policy objectives'.[658] In light of the methodology presented under 'The Roadmap on the Goals of the EU and Turkish Competition Law Systems' Chapter VI seeks to provide an analysis of 'non-efficiency' public policy objectives and the way in which public policy goals have

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[656] E. Fox, 'In Search of a Competition Law Fit for Developing Countries', February 2011, NYU Center for Law, Economics and Organisation, Law and Economics Research Paper Series, Working Paper No. 11-04, 2.

[657] The 'Broader Legal Framework for Competition in Turkey', p 218.

[658] 'The Roadmap on the Goals of the EU and Turkish Competition Law Systems', p 126.

been accommodated under the Turkish competition law system. In essence, this analysis aims to provide a systematic explanation of similarities and differences between the accommodation of public policy objectives under the EU and Turkish competition law systems.

- **6.2 A Discussion on Concepts of Industrial Policy and Public Policy**

There is no general consensus or a single definition on the meanings of industrial policy and public policy, neither in the law nor in the political or economic context. The abundance of existing work in the field, based on legal, economic or political perspectives, however, may help develop a general view of the terms of 'industrial policy' and 'public policy'.

From an economic standpoint, Cruzon Prize's conception of 'industrial policy' reflects 'any state measure designed primarily to affect the allocation of resources between industrial activities, in other words to impose a new direction on market structures'.[659] While this definition provides an understanding of the scope of measures that may fall within industrial policy, another group of economists define the rationale behind adopting industrial policy as '... an attempt by a government to shift the allocation of resources to promote economic growth'.[660] Johnson, on the other hand, elucidates the notion of industrial policy from a political perspective and argues that industrial policy is concerned with '... the initiation and co-ordination of governmental activities to leverage upward the productivity and competitiveness of the whole economy and of particular industries in this economy... (and) the infusion of goal oriented, strategic thinking

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[659] V. Cruzon-Price, *Competition and Industrial Policies with an Emphasis on Industrial Policy* in AM El-Agraa (ed.), The Economics of European Community (3rd edn, Philip Allan 1990) 157.

[660] P. Krugman, M. Obstfeld, M. Melitz, *International Economics: Theory and Policy* (9th edn, Pearson Education 2011) 281.

into public economic policy.'[661] Finally, in an attempt to understand the reconciliation of competition policy with industrial policy from a legal point of view, Sauter draws three conclusions in relation to the meaning and content of 'industrial policy': first, industrial policy concerns various forms of state involvement in the economy in the pursuit of social and economic goals alike; second, it focuses on undertakings and improving the framework in which they function; third, the fundamental purpose of industrial policy in any given jurisdiction is to facilitate industrial change or structural adjustment of the economy.[662] In light of the above views, industrial policy can be referred to as national policy decisions and state measures focused on the structure of national markets with a view to accomplishing an array of social, political and economic goals including, but not limited to, enhancing employment levels, economic growth, and facilitating regional cohesion and international competitiveness etc. Therefore, proceeding from what competition law and policy is concerned with and aims to achieve and the above discussion on the objectives of industrial policy, it becomes clear that the two may co-exist in the application of various State measures. The remainder of this Chapter aims to understand whether, in the Turkish context, public policy objectives collide with competition rules, and, if so, the extent to which the former is accommodated under the legal framework for competition.

'Public policy', on the other hand, is perceived as much broader in scope compared to industrial policy. Brigman and Davis, who have written extensively on the theme, emphasise the following characteristics of 'public policy': public policy is intentional, it is about making decisions, it is political and structured.[663] But, more importantly, they argue that in terms of its function and role, '... public policy is ultimately about achieving objectives. It is a means to an end. ... (and) a

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[661] C. Johnson, Introduction: '*The Idea of Industrial Policy*' in C Johnson (ed.), *The Industrial Policy Debate* (San Fransisco 1984) 8.

[662] W. Sauter, *Competition Policy and Industrial Policy in the EU* (OUP 1997) 28.

[663] P. Gridman and G. Davis, *The Australian Policy Handbook* (3rd edn, Allen and Unwin 2004).

course of action by governments designed to achieve certain results.'[664] In '*The Dynamics of Public Policy: Theory and Evidence*', Key argues this definition of public policy is the *locus classicus* of the rationalist view of public policy and is the prevailing assumption among policymakers. In the more specific context of competition law, Townley assesses in his work '*Article 81 EC and Public Policy'* the accommodation of public policy considerations under EU competition law. Albeit not providing a precise definition of the term or the scope of 'public policy' for the purpose of his research, Townley refers to 'public policy' goals as 'non-economic' goals, or any policy objective other than 'economic efficiency' or 'consumer welfare' defined in terms of consumer surplus.[665] In the first section of his work, Townley discusses the reconciliation of public policy and competition law in a legal vacuum but not within the context of a specific legal system.[666] He incorporates, from the viewpoint of a competition lawyer, *inter alia* the following goals under 'public policy' objectives: protection of Small and Medium Enterprises; employment policy; consumer protection; industrial policy; research and development; and, environmental policy.[667]

Furthermore, the 'Report on Interface Between Competition Policy and other Public Policies' (ICN Report on Public Policy), submitted at the International Competition Network Conference in 2010, incorporates a more illustrative description of both themes.[668] While competition policy is referred to as all state measures that have an impact on the conditions of competition in markets, public policy is described as policies that are designed to promote *inter alia* general public interest, public security, social and employment policy, economic

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[664] A Key, *The Dynamics of Public Policy: Theory and Evidence* (Edwar Elgar 2006) 24.

[665] C. Townley, *Article 81 EC and Public Policy* (n 360) Part A: Considering Public Policy Objectives in Competition Law, 11-107.

[666] ibid

[667] ibid

[668] Report on Interface Between Competition Policy and other Public Policies, prepared by the Turkish Competition Authority, 9th Annual ICN Conference, Istanbul, Turkey. (ICN Report on Public Policy)

development, competitiveness of national economy, protection of environment, health and security.[669]

Consequently, it is suggested that while industrial policy objectives relate to decisions and actions of national authorities to bring about industrial change and structural adjustment in particular industries, public policy objectives are much wider in scope and care concerned with attaining a broad spectrum of social, political and economic policy objectives. In any case, however, both industrial and public policy objectives refer to a course of action aimed at attaining particular objectives. They are intentional actions and they aim to achieve designated outcomes. Therefore, it is submitted that competition law and policy, in itself, may be considered as a public policy objective among many other potential policy objectives pursued by national policymakers. In this case, similar to the argument on the interaction between competition law and policy and industrial policy, it is hard to overlook the reconciliation of competition policy objectives and other public policy goals under the legal for framework for competition, which the rest of this Chapter aims to analyse.

- **ICN Report on the Interface between Competition Law and Public Policy (ICN Report on Public Policy)**[670]

The problem of the interplay between competition law and other public policy objectives is indeed the central theme of the ICN Report on Public Policy.[671] The ICN Working Group designated for this particular research project, the TCA in this case, posits that although the reconciliation of competition rules on the on hand and other public policies on the other has been commonly considered as a problematic and challenging issue, limited research has been conducted on this

[669] ibid

[670] ibid

[671] ibid

issue.[672] The ICN Report on Public Policy, based on this statement, aims to highlight this gap in literature and stimulate further debate on this complex matter equally at the national and multi-national context.

The Working Group, encouraged by the ICN's international setting on competition law and policy, submitted questionnaires to thirty three jurisdictions.[673] Among others, the survey addressed four fundamental questions to each jurisdiction: What are the objectives of competition law? Do you consider public policy goals under competition rules? If so, under which particular competition rules do you accommodate public policy objectives? Do you adopt any legal criteria, legal standard or test in balancing a conflict between competition concerns and public policy objectives? Responses to the first question, the inherent issue of the objectives of competition law, reveals, again, the common understanding among all competition law regimes: the primary objective of competition law is to protect competition.[674] However, many respondent jurisdictions emphasised three mainstream goals: ensuring free competition in markets; enhancing consumer welfare; and, promoting efficiency.[675] This is in-line with the data revealed in the ICN Report on the Objectives of Competition Law discussed earlier in Chapters IV and V.[676] The second question of the survey conducted in the ICN Report on Public Policy, which asks whether individual jurisdictions consider public policy goals under competition rules, led to an affirmative answer by numerous respondent jurisdictions.[677] Associated with this response, however, these jurisdictions raised a concern. Accordingly, although competition rules and other public policy

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[672] ibid

[673] ibid

[674] ibid at p 6.

[675] ibid

[676] ICN Report on the Objectives (n 497).

[677] Jurisdictions that clearly admit the accommodation of public policy goals under competition rules: Barbados; Belgium; Bulgaria; Croatia; Germany, Korea; Mauritius; the Netherlands; Norway; Poland; Romania; Russia; Spain; Singapore; and Turkey.

objectives may complement each other from time to time they do conflict with one and another in many cases.[678] This presses the question of how objectives of competition law and other public policy goals are reconciled and 'balanced' under competition rules. These concerns were alluded to under the third and fourth questions. In terms of the 'place' where public policy goals are accommodated, respondent jurisdictions provided an array of answers. Virtually all substantive provisions on competition, equivalent to Articles 101, 101(3), 102 TFEU[679] and the EU Merger Control regime,[680] seem to have accommodated public policy considerations. More importantly, the report reveals, it is not only the substantive provisions but also other legal instruments on competition that have catered for this purpose.[681] Admittedly, these legal instruments would be in the form of unique and country-specific legal tools. Respondent jurisdictions admitted that, albeit in exceptional cases, national security, public security and public health, plurality of media and prudential concerns have been accommodated under national competition rules.[682] As for the last inquiry, all respondent jurisdictions inform that under their national legal system there is no specific institutional mechanism, criteria, or legal standard or test to balance conflicting competition law and public policy objectives.[683] Most importantly, the ICN Report on Public Policy illustrates an array of case law under Turkish competition law that accommodates public policy objectives.

Overall, albeit having limitations in terms of providing only a general overview on the matter, the ICN Report on Public Policy provides unparalleled insight into the complex issue of assessing public policy objectives under competition law. Undoubtedly, the inclusion of thirty-three jurisdictions in the preparation of the report confines the depth of research conducted and leads a more concise work.

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[678] ICN Report on Public Policy (n 709) p 4.

[679] TFEU (n 362) Articles 101 and 102

[680] OJ [2004] L24/1 Commission Merger Regulation No. 139/2004.

[681] ibid

[682] ibid at p 14.

[683] ibid at p 27.

Nonetheless, the report has significant importance in that it acknowledges the coexistence of competition concerns and other public policy objectives not only under Turkish competition law but provides examples from several other competition law systems. Besides, it reveals the existence of a gap concerning the issue of accommodation of public policy objectives under competition law, and the need for further research on this topic both under individual jurisdictions and at an international level.

Most importantly, and in relation to the central research question of this PhD thesis, the ICN Report on Public Policy 'confirms' the proposed 'map' on the objectives of Turkish competition law, which was submitted in Chapter I, and the thesis of this 'map' that national economic, legal and public policy objectives are linked to Turkish competition law and these non-competition objectives are considered in the application of competition rules in Turkey.

This, nonetheless, prompts questions as to how, in the Turkish legal context, the link between 'non-competition' public policy objectives and competition rules is established, and as to the legal framework under which a 'balance' between non-competition and competition objectives are struck. The ICN Report on Public Policy, although 'recognising' the engagement of public policy objectives, does not shed light on the legal assessment that reconciles non-competition objectives with those of competition law. Therefore, further research hereinafter aims to go deeper and understand, *inter alia,* the complex legal problems of: which public policy goals are accommodated; whether the law draws a hierarchy among non-competition objectives as well as between public policy and competition objectives; under which substantive provisions on competition and other legal instruments are these objectives reconciled; and, whether there may be a legal test or standard adopted in balancing the conflict between pure competition concerns and public policy objectives.

6.3 Re-thinking Townley: Public Policy Goals Under the EU Turkish Competition Law

In Chapter IV, the analysis of the case-law of the EU Courts and the Commission revealed that public policy objectives have been accommodated under the EU competition law system.[684] In light of the complex background of the EU Courts' case-law as well as the process for the 'modernisation' of EU competition law, which promotes a more 'economics based' approach EU competition law, concerns have been voiced by academic scholarship in favour of less emphasis on public policy goals under EU competition law analysis.[685] In his work '*Article 81 EC and Public Policy'*, Townley aims to challenge this view.[686] As a first step, Townley provides a theoretical rationale for the incorporation of public policy objectives into EU competition law. In this respect, he establishes the link between EU competition rules on the one hand, and the policy linking provisions and the overarching goals of the EU Treaties on the other. On the basis of the analysis of EU case-law, he provides examples of how and when public policy goals have been incorporated in EU competition rules under both the prohibition, Article 101(1) TFEU, and the exception, Article 101(3) TFEU, clauses.[687] Overall, he concludes that while the legal process through which the 'balancing' exercise remains unclear and vague, the EU institutions should embrace the balancing of public policy objectives against the goals of EU competition law and the EU Treaties.

As discussed above, similar to Townley's work, the rest of this chapter aims to answer questions concerning the analysis of 'why', 'when', and how the Turkish competition law system accommodates public policy considerations. In this respect, this PhD thesis acknowledges Townley's contribution to the field and

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[684] Chapter IV, p 129-198.

[685] ibid.

[686] C. Townley, *Article 81 EC and Public Policy* (n 360).

[687] TFEU (n 362) Articles 101(1) and 101(3).

seeks to draw on upon, where necessary, his methodology in terms of the way in which he examines the question at hand. At the same time, however, as opposed to Townley's work, this PhD thesis is one that requires the analysis of not only one substantive provision of competition legislation, but also of the broader competition law regime as a legal framework in Turkey. For this reason, albeit similarities in terms of methodology, the two research projects differentiate in terms of their scope and focus. Whereas Townley confines his research to a particular EU competition law provision, i.e. Article 101 TFEU, this chapter shall be broader in scope and focus on Turkish competition law as a whole in order to analyse and understand how, why, and when public policy goals are accommodated under the Turkish competition law system.

6.3.1How Industrial and Public Policy Goals are Accommodated under Turkish Competition Law: The Legal Basis for the Consideration of Industrial and Public Policy Objectives

As examined in Chapter V, Article 1 of the Law on the Protection of Competition (LPC), clearly stipulates the 'purpose' of the legislation.[688]

Accordingly, the overall objective of the LPC is to:

> ... prevent agreements, decisions and practices that hinder, distort and restrict competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market; and, to ensure the protection of competition with the provision of necessary legal instruments and supervision.[689]

Furthermore in Article 2 LPC the 'scope' of the LPC is stipulated as:

> ...agreements, decisions and practices of undertakings that hinder, distort and restrict competition between any undertakings operating in or affecting markets for goods and services in Turkey, and the abuse of dominance by undertakings dominant in the market, and any kind

[688] LPC (n 15) Article 1.

[689] ibid.

> of legal transaction and behaviour having the nature of mergers and acquisitions which shall hamper competition to a significant extent; and, legal instruments in terms of legal measures, findings, supervision (of markets), and relevant regulation, adopted for the purpose of protecting competition, all fall within the scope of this legislation.[690]

In further provisions of the LPC, the TCA is designated as the competent 'authority' ensure the application of the LPC as the leading competition legislation of Turkey, and to assure the attainment of objectives established in Article 1 LPC. Article 20 LPC states: '... the authority (TCA) is established to assure and maintain healthy and functioning competitive markets (in Turkey), to ensure the application of this legislation and perform duties appointed to it by this law'.[691]

Essentially, it may therefore be concluded that the TCA is empowered with two distinct sets of legal tools in attaining the objectives of Turkish competition law. The first one is the prevention of anti-competitive conduct through the substantive provisions of the LPC, i.e. Articles 4, 5, and 6 LPC.[692] These so-called 'prohibition' clauses, Articles 4 and 6 LPC, have been examined in the previous chapter.[693] The second one is the protection of competition by virtue of legal tools other than the substantive provisions of the LPC, i.e. 'legal instruments in the form of legal measures, findings, supervision (of markets), and relevant regulation'. Although Articles 1 and 2 LPC empower the TCA to utilise certain 'legal instruments', further examination is necessary to understand when, under which conditions, and in what form these instruments shall be adopted by the TCA.[694] In any case, Articles 1 and 2 LPC compartmentalize two main sets of legal tools which ensure the protection of competition and the prevention of

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[690] LPC (n 15), Article 2.

[691] LPC (n 15), Article 20.

[692] LPC (n 15), Articles 4, 5, and 6.

[693] LPC (n 15), Articles 4 and 6.

[694] LPC (n 15), Articles 1 and 2.

anticompetitive conduct whereas Article 20 LPC[695] empowers the TCA to utilise these legal tools. In other words, the TCA is provided with two sets of legal tools under which it is able to pursue the objectives of Turkish competition law. The accommodation of the 'consumer welfare' was analysed in Chapter V.[696] Alas, the second set of legal tools is not clearly defined by the LPC and, therefore, it shall be examined simultaneously with public policy objectives under Turkish competition law.

6.3.2When Public Policy Goals are accommodated under Turkish Competition Law

In an attempt to understand the legal basis for the accommodation of public policy objectives, Section 1 observed the dichotomy between legal tools provided under the substantive provisions of the LPC *vis-a-vis* legal instruments outside these clauses. Accordingly, the question of when public policy objectives are accommodated shall be examined under this bifurcated approach.

5.4 Public Policy Goals Under Substantive Provisions of the LPC

5.4.1 Under Articles 4 and 6 LPC (Under the Prohibition Clauses)[697]

An in-depth assessment of the case-law reveals that, albeit under exceptional circumstances, public policy objectives have been considered under Article 4

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[695] LPC (n 15), Article 20.

[696] Chapter V, p 199-246.

[697] LPC (n 15), Articles 4 and 6.

LPC. As discussed in the previous chapter, this is the provision which prohibits anti-competitive conduct that prevents, distorts, or restricts competition in Turkish markets, i.e. the substantive provision that equates to Article 101(1) TFEU. The leading case on this matter is School Milk Project.[698] In School Milk Project, the TCA assessed bid-rigging allegations in relation to a tender process initiated by the General Directorate for Social Welfare and Funds under the Turkish Prime Ministry (the DGSWF).[699]

The 'School milk project' was adopted as a social policy in Turkey since year 2001 and aims to continuously provide free dairy milk pupils attending nursery or primary school. However, participants for the tender process set for year 2003 were accused of submitting bids below market prices, equally allocating the estimated total value of the tender bid, and agreeing not to bid against each other.[700] In response, participants argued that they had been advised by the DGSWF to submit low prices and allocate equally the total amount of milk supply among each other.[701] The DGSWF admitted that it had an influence on the participants and encouraged them to submit lower process, but refused their influence on the collusion between participants. More importantly, the statement of the Turkish Minister of State in relation to TCA's inquiry on the matter emphasized the non-profit and pure public policy nature of the School Milk Project, and the contribution of participants in achieving this objective.

The TCA, while recognizing the non-profit nature and public policy objectives of the said project, stated the collusion still fell under Article 4 LPC.[702] At the same time, the TCA clarified that there was no specific legal mechanism addressing the suitability of tender bids to competition rules and that Article 4 LPC equally

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[698] TCA Decision, *Okul Sutu*, Decision Number: 04-05/54-15, Decision Dated: 19.01.2004.

[699] ibid

[700] ibid.

[701] ibid

[702] ibid

applies to public and private undertakings and their conduct.[703] Nonetheless, having regard to mitigating circumstances and the contribution of participants in achieving this public policy objective the TCA significantly reduced the fines imposed on the undertakings in question.[704] The importance of *School Milk Project* for this discussion is that it reflects the way in which public policy objectives were balanced against the fundamental objective of Article 4 LPC, which was 'protecting the process of competition' in this case, if not demonstrating how public policy concerns effected the judgment in substance.

For example, in a similar manner the 'Regulation on Fines' of 2009 includes *inter alia* public authorities' influence on anti-competitive conduct as a mitigating factor in determining the fines imposed upon undertakings in question.[705] In the case of public authorities' influence on the anti-competitive conduct and therefore the breach of Article 4 or 6 LPC, the Regulation on Fines states, the fine may be reduced at a rate of one fourth to three fifth in favour of the appellants.[706] Although the Regulation on Fines does not clearly illustrate the exact scope and meaning of 'influence' of public authorities on arrangements, it is suggested that this should be interpreted as public authorities' intervention for the purpose of achieving public policy objectives such as promoting employment opportunities, supporting social and welfare projects etc. Therefore, the involvement of public authorities on the grounds of public interest, which yields to the restriction of competition, albeit not effecting the judgment in substance, has an impact on procedural law.

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[703] ibid

[704] ibid

[705] Regulation on Fines Against Anti-Competitive Agreements, Concerted Practices and Decisions and the Abuse of Dominant Position, Law No. 27142, Enacted on 15.02.2009. Section two, Mitigating Factors, Article 7. (Regulation on Fines Against Anticompetitive Conduct)

[706] ibid.

- **A Critical Analysis Concerning Public Policy Objectives under Articles 4 and 6 LPC**

School Milk Project clearly sets precedence and allows public policy considerations under Article 4 LPC in terms of procedural law, if not substantively.[707] Even though conduct between undertakings in question was held to breach competition law, public policy concerns led to significant reductions in fines imposed.

Despite the absence of a precedent case under Article 6 LPC, the scope of the Regulation on Fines, which incorporates both Articles 4 and 6 LPC, evidently leaves margin for the consideration of public policy objectives in future abuse of dominant cases. This means the legal platform for the accommodation of public policy goals under the prohibition clauses of the LPC has already been catered for by case-law and the Regulation on Fines. Nevertheless, while *School Milk (*strike a balance between the 'protection of the process of competition' and public policy concerns, there exits little guidance on how public policy objectives will be scrutinized in future cases. At present, in the light of *School Milk Project*, it may at least be argued that agreements which have the 'object' of restricting competition are unlikely to escape from legal assessment under Article 4 LPC.

Yet, despite public policy objectives are considered under competition rules in exceptional cases, the TCA has not adequately addressed the issue. Given that the Regulation on Fines covers both prohibition clauses, Article 4 and 6 LPC, this legal instrument can be considered as a suitable place to address the issue. Therefore, it could be argued that it is not so much a question as to whether public policy objectives are accommodated under Articles 4 and 6 LPC, so much as it is a question of how, and under which particular circumstances, these objectives shall be considered.

[707] TCA Decision, *Okul Sutu* (739).

5.4.2 Under Article 5 LPC (The Exception Clause)[708]

Article 5 LPC, equivalent of Article 101(3) TFEU,[709] provides an exception to the prohibition of anti-competitive conduct stipulated in Article 4 LPC.[710] If, according to Article 5 LPC,[711] all four conditions required under this clause are cumulatively met, the TCA may exempt anti-competitive conduct from the application of Article 4 LPC.[712] To begin with, therefore, it is vital to reiterate the four cumulative conditions required for an exception to be granted. Article 5 LPC states:

> a) Ensuring further development and improvement or economic or technical development of the production or distribution of goods and the provision of services,
> b) Benefitting consumers from the above-mentioned (improvements),
> c) Not eliminating competition in a significant part of the relevant market,
> d) Not limiting competition more than what is necessary for achieving the goals set out in sub-paragraphs (a) and (b).[713]

The question in this case is whether public policy objectives could satisfy the requirements stipulated in the exception clause. At first glance, it is questionable whether any public policy objective is able to benefit from Article 5 LPC given that all four conditions will have to be fulfilled for an exception to apply.

Nonetheless, a thorough analysis of the case-law is essential to understand the way in which the TCA, and relevant courts in the case of appeal, have interpreted the exception clause and conditions stipulated therein, and whether public policy objectives are considered in this context.

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[708] LPC (n 15), Article 5.

[709] TFEU (n 15) Article 101(3).

[710] LPC (n 15), Article 4.

[711] LPC (n 15), Article 5.

[712] LPC (n 15), Article 6.

[713] LPC (n 15), Article 5.

Compared to Articles 4 and 6 LPC,[714] there is an abundance of case-law demonstrating the accommodation of public policy objectives under Article 5 LPC.[715] A close scrutiny of each case assessed under the exception clause, i.e. Article 5 LPC, reveals the following public policy objectives have been considered to have fulfilled the conditions above and therefore outweighed the anti-competitive effects of the conduct in question: environmental concerns; enhancing employment opportunities; supporting and improving conditions for SME's; promoting export revenues; promoting foreign direct investment and therefore national economic growth; and, the reduction of public expenditures.

- **Environmental Concerns**

In *BP & Shell* the TCA assessed whether an agreement seeking to establish a common storage and distribution centre for the two oil and gas companies breached Article 4 LPC.[716] Having considered that the proposed facility would lead to the elimination of competition between the undertakings, and therefore fall under the prohibition clause, the TCA then went on to examine if the conduct would qualify for an exception under Article 5 LPC.[717] At this stage, against the backdrop of the anti-competitive nature of the agreement, the TCA took into consideration under Article 5(a) LPC environmental concerns and the convenience of the project in terms of its Ecological Footprint.[718] In a similar manner, the TCA granted an exception to a 'Waste Management Protocol' agreed by producers and importers of engine oil mainly by virtue of environmental

[714] LPC (n 15), Articles 4 and 6.

[715] LPC (n 15), Article 5.

[716] TCA Decision, *Shell & Turcas Petrol A.S. ve Mobil Oil Turk A.S.* Decision Number: 07-66/812-307, Decision Dated: 19.01.2004.

[717] ibid

[718] ibid

concerns.[719] Despite serious concerns as to the potential risk of collusion between undertakings as a result of the protocol, it was concluded that the environmental benefits of the conduct outweighed its anti-competitive effects Again, environmental benefits were discussed under the first clause, i.e. Article 5(a) LPC.

- **Enhancing Employment Opportunities**

The *As-San and Intek* case discussed the possibility of granting an exception to two competitors which agreed to cooperate in running a mining reserve.[720] Initially the TCA stated that the 'cooperation agreement' conducted between the competitors did not fall within the scope of Turkish merger control regime, but would have to be assessed under the prohibition clause, i.e. Article 4 LPC.[721] Having decided the agreement breached Article 4 LPC, the TCA went on to examine whether the agreement satisfied the conditions stipulated in Article 5 LPC.[722] In its assessment under the first condition of the exception clause the TCA stated that cooperation among the competitors would 'bring life' to an idle mining reserve, which, in turn, provides employment opportunities to the community.[723] The TCA concluded its assessment based on its preference for employment and other economic opportunities for the locals over competition concerns.

- **Supporting and Improving Conditions for SME's**

The concern for SME's as a public policy was first noted in *Mobil Oil Turk*.[724] In this case an agreement conducted between the supplier of engine oil and its buyers

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[719] ibid

[720] TCA Decision, *As-San Intek* Decision Number: 05-51/751-202, Decision Dated: 15.08.2005.

[721] ibid

[722] ibid

[723] ibid

[724] TCA Decision, *Mobil Oil Turk* Decision Number: 07-29/260-91, Decision Dated: 29.03.2007.

was held to fall within Article 4 LPC because the latter was required to buy all its requirements from the supplier, Mobil Oil Turk.[725] According to the TCA this prevented the competitors of Mobil Oil Turk to enter the market and therefore restricted competition in the market for automotive engine oils.[726] However, the TCA then went on to examine the agreement as a whole, assess what the agreement provided buyers in return for this 'non-compete' requirement, and whether an exemption could be granted under Article 5 LPC. In this context, what the TCA emphasized and discussed in length, under Article 5(a) LPC, were the financial opportunities provided to the buyers and how this leveraged the economic and social conditions for SMEs.[727] In return for buying all their engine oil requirements from Mobil Oil Turk, the SME's were to be granted an interest-free loan. This loan would then be deducted from the SMEs monthly sales bonus awarded by Mobil Oil Turk. The TCA commented on how remarkable this loan scheme was particularly in times of 'bad economy' as the scheme provided an alternative to loans available in financial markets, which the SMEs could not afford in most cases.[728] Given these socio-economic advantages provided to SMEs, despite the anti-competitive effects of the agreement, the TCA granted an exception under Article 5 LPC.[729]

- **The Protection of Certain Industries, Promotion of Export Revenues and National Economy**

In another cooperation agreement, this time conducted between Japan Tobacco International (JTI) and Sunel Ticaret Turk (Sunel), the TCA granted an exemption to the conduct based on industrial policy considerations.[730] The cooperation

[725] ibid.

[726] ibid

[727] ibid

[728] ibid

[729] ibid

[730] TCA Decision, *Japan Tobacco International (JTI) and Sunel Ticaret Turk* Decision Number: 11-47/1178-419, Decision Dated: 14.09.11.

agreement required the Japanese tobacco giant JTI to purchase 'oriental' style tobacco from the Turkish tobacco merchant Sunel, which buys, processes, preserves and exports Turkish tobaccos worldwide.[731] The reason why the agreement fell under Article 4 LPC was due to the following sales condition: JTI would specifically appoint all tobacco growers from which Sunel could supply oriental style tobaccos to be then processed and preserved in accordance with JTI's instructions.[732] This would significantly restrict competition between growers of oriental tobacco in Turkey.[733] Nevertheless, the TCA analysed and pointed out two important issues: the importance of tobacco growth and exports for society and Turkish economy in general; and, the recent problems faced by the Turkish tobacco industry.[734] In this context, the TCA repeatedly emphasized that Turkey is the number one grower of 'oriental' style tobacco in the world.[735] Accordingly, this was such a high volume of tobacco growth that it provides household income to more than two hundred thousand families in Turkey and employment opportunities for one and a half million inhabitants altogether.[736] On the other hand, the TCA drew attention to recent problems faced by Turkish tobacco industry, its adverse affects on unemployment, and how this led to social and economic drawbacks in general.[737] Based on data provided by the Turkish Tobacco and Alcohol Markets Regulation Agency (in Turkish TAPDK), a significant decline was observed in the trend for tobacco growth and exports between years 2003 and 2010.[738] The TCA linked this catastrophe to *inter alia* the privatisation of TEKEL, the previously state-owned 'Turkish Tobacco and Alcoholic Beverages Company', and certain other ill-fated public policy goals which discouraged abundant tobacco growth and sales in Turkey and worsened

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[731] ibid.

[732] ibid.

[733] ibid

[734] ibid

[735] ibid

[736] ibid.

[737] ibid para 14.

[738] ibid para 14, graph 1.

off local tobacco growers and merchants.[739] This, in turn, automatically declined figures for tobacco exports. In the light of the economic and social distress prevailing in the industry, the TCA considered the JTI and Sunel cooperation scheme as an opportunity to improve conditions for tobacco growers, merchants and escalate tobacco export revenues.[740] Therefore, on these grounds, an exemption was granted under Article 5 LPC despite the agreement's anti-competitive effects.[741]

Similarly, the TCA granted exemption under Article 5 LPC to cooperation between competitors both operating in the markets for the extraction and sales of mineral perlite in Turkey.[742] The TCA explicitly stated that in its legal assessment under Article 5 LPC cooperation between competitors may be exempted provided that it generates export revenues.[743] In its assessment the TCA took into account that Turkey is very rich in its perlite mineral reserves and there is significant global demand for this natural source.[744] It stated under Article 5 LPC, although the conduct eliminates competition among rivals in this market, it promotes export revenues notably.[745]

- **A Critical Analysis Concerning Public Policy Objectives under Article 5 LPC**

[739] ibid.

[740] ibid

[741] ibid

[742] TCA Decision, *S&B Endüstriyel Mineraller A.Ş and Pabalk Maden San. ve Tic. A.Ş.* Decision Number:10-38/657-224, Decision Dated: 27.05.2010.

[743] ibid, para 210.

[744] ibid

[745] ibid

It is apparent from the existing case-law that, as opposed to Articles 4 and 6 LPC, there is an abundance of case law concerning public policy objectives under the exception clause stipulated in Article 5 LPC.

It is observed that, although the conditions stipulated under the exception clause are cumulative, the TCA adopts a wide interpretation of the 'efficiency' requirement under Article 5(a) LPC as a means to conducting the 'balancing' exercise. Once the condition stipulated in Article 5(a) LPC is satisfied, the TCA assumes the rest of the conditions are met accordingly. This means the legal test under the exception clause is one that focuses on the impact of public policy goals on consumer welfare. It may argued that this approach is the result of the 'convergence' process, triggered by Turkey's EU candidacy requirements, as the TCA clearly acknowledges that legal assessment of public policy goals under the first condition of the exception clause is the common practice of the Commission under EU competition law.[746] In this respect, it is suggested that the remaining three conditions under Article 5 LPC should be applied and the relevant conduct, and public policy goal in question, should be assessed on the merits of each condition required under Article 5 LPC in order to determine how far competition can be restricted under each condition in the process of constructing the balance between competing objectives.

5.4.3 Under Article 7 LPC[747]

In a number of cases the TCA took into account public policy concerns under the substantive provision on merger control, i.e. Article 7 LPC.[748] As examined previously in Chapter V, this provision states that:

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[746] Accession Partnership (n 14).

[747] LPC (n 15) Article 7.

[748] ibid

> '... a concentration which would result in significant lessening of competition in any market for goods or services within the whole or a part of the country (Turkey), particularly as a result of the creation or strengthening of a dominant position, is unlawful and prohibited'.[749]

The provision, and its European counterpart Article 2(3) EU Merger Regulation, prohibits the 'combination' of two or more undertakings on the legal basis that it leads to the creation and strengthening of market power, which, in turn, harms competition. In this context, the TCA has considered public policy concerns under the so-called 'failing firm defence'. The 'failing firm defence' doctrine is applied in a situation where the proposal of an undertaking to takeover another one is endorsed by competition authorities despite possible anti-competitive effects. An 'exemption' is granted to the proposed takeover on the grounds that anti-competitive effects would have occurred in any case, with or without the takeover. In the absence of the proposed takeover the 'failing firm' would exit the market due to financial difficulties, and this, in turn, would undermine competition among the remaining rivals. Moreover, together with the 'failing firm' it assets, which could have otherwise been utilized in the production of goods or services, may also exit the market. This is thought to cause a loss in total welfare in terms of total surplus. On the other hand, if the proposed takeover is endorsed the undertaking to acquire the failing firm would significantly strengthen its market power and alter the structure of the market in its favour, which would, again, harm competition. In essence, the critical component under the 'failing firm' analysis is the assessment of whether in the absence of the takeover competitive conditions in the market would be any worse compared to those conditions following the proposed acquisition. Competition authorities are required to conduct a balancing exercise whereby they compare harm caused by the exit of the failing firm from the market to harm caused by the takeover and thereby the change in the structure of markets. In any case, this requires a

[749] Article 7 LPC corresponds to Article 2(3), OJ [2004] L24/1 Commission Merger Regulation No. 139/2004 (EU Merger Regulation).

counterfactual analysis, i.e. a comparison of the hypothetical post-transaction situation to the market in the absence of the transaction and the 'failing firm'.

The examination of relevant case-law reveals that the failing firm doctrine has had very limited application both at the EU and Turkish competition law levels and there has been few examples of this doctrine being used successfully in both jurisdictions. The pressing question for the purpose of this chapter, nonetheless, is whether and to what extent public policy concerns may take place under the exceptional 'failing firm' defence analysis which is mainly based on the examination of competitive conditions of the market. In the Turkish context, up to date, under the failing firm doctrine an exception for proposed takeovers has been granted only on three occasions. Nevertheless, the leading case which accommodates public policy concerns under the failing firm doctrine is *Dogan Yayincilik*.[750] This case concerned the acquisition of a national daily newspaper, Vatan Gazetesi, by a leading Turkish media group, Dogan Yayincilik. Parties sought for the application of the failing firm doctrine on the grounds that the former undertaking had failed to pay its outstanding debt for consecutive months and would have to leave the market soon if not acquired by the leading media group.[751] At the initial stage of investigation, the analysis of the market and both undertakings' market positions revealed that the proposed concentration would strengthen Dogan Yayincilik's already strong position in the market by raising its market shares from 34,5% to 39% based on its daily number of sales, and from 39% to 63,7% based on it advertising revenues.[752] The proposed transaction was therefore considered to fall under the prohibition stipulated in Article 7 LPC.[753] The pressing question, however, was whether the failing firm doctrine could be discussed and applied to the case at hand.

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[750] TCA Decision, *Dogan Yayincilik* (n 676).

[751] ibid.

[752] ibid

[753] ibid

Having stated that the proposed takeover would strengthen Dogan Yayincilik's position in the market and thereby harm competition, the TCA stated that parties' request for the takeover can only be assessed under the legal test introduced for the failing firm doctrine.[754] Accordingly, this legal test requires the satisfaction of five individual conditions.[755] To begin with, under the first condition of the legal test the TCA aimed to ensure parties had not committed a fraud in their 'failing' firm allegations.[756] In this context, the TCA's primary concern was to prevent a possible misuse of the failing firm defence in case parties had intended to escape from a possible prohibition of the takeover under merger control rules. In reference to an investigation conducted by the South African Competition Authority, the TCA went on to examine two things:[757] first, whether the failing firm, Vatan Gazetesi, had been debited by Dogan Yayincilik even though it was in no financial need; and, second, whether Dogan Yayincilik, instead of asking repayment on time, subsidized the failing firm to enable both undertakings to raise prices artificially.[758] The TCA concluded that there was no evidence of fraudulent business loans, nor was there collusion between the parties aimed at artificially raising prices.[759]

Under the second limb of the legal test the TCA required that the 'fail' of Vatan Gazetesi was, financially, unavoidable in the absence of its acquisition by another undertaking, i.e. if the failing firm is not acquired by another undertaking, it will exit the market.[760] Based on Vatan Gazetesi's losses occurred in the last three years and its total debt versus its assets, the TCA concluded that it would

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[754] ibid

[755] ibid

[756] ibid

[757] South African Competition Authority, *Schumann Sasol and Price's Daelite*, Case No: 23/LM/May01.

[758] TCA Decision, *Dogan Yayincilik* (n 676).

[759] ibid

[760] ibid

definitely be forced out of the market unless it was taken over by another undertaking.[761] Under the third condition the TCA required that, in the light of the market conditions prevailing at the time, there was no better alternative to Dogan Yayincilik to buy Vatan Gazetesi. This meant, the existence of an alternative takeover that would cause less competitive harm, compared to Dogan Yayincilik's proposed acquistion, would 'block' the proposed takeover even if other conditions for the legal test were met. The TCA referred to this condition as a *sine qua non* for the failing firm defence to be considered.[762] Based on two decisions, one by the Commission and the other by the Competition Commission of South Africa, the TCA asked whether the failing firm announced its sales to the public in an open, clear and precise manner in order to reach as many potential buyers as possible.[763] In this context, Vatan Gazetesi was able to satisfy this condition and that there was no better alternative to Dogan Yayincilik. It was able to prove that competitors of Dogan Yayincilik were reluctant to takeover Vatan Gazetesi mainly due to divergent political views, and investors from other markets were reluctant in the absence of foreign investors.[764]

As for the fourth limb of the legal test Vatan Gazetesi had to prove, in the absence of a takeover, their assets would leave the market or that their market share would shift to Dogan Yayincilik anyway.[765] This part of the legal test led to a lengthy analysis by the TCA particularly for two reasons. To begin with, the TCA asked whether and to what extent the exit of Vatan Gazetesi and its assets from the market may impact the welfare of Turkish society.[766] The TCA argued that the exit of the failing firm's assets from the market may harm the welfare of society because, alternatively, the use of these assets, even by a dominant competitor,

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[761] ibid

[762] ibid

[763] South African Competition Authority, *Schumann Sasol and Price's Daelite* (n 800)

[764] TCA Decision, *Dogan Yayincilik* (n 676).

[765] ibid

[766] ibid

could result in increased productivity and lower prices.[767] The TCA mainly compared the 'welfare of society' if Vatan Gazetesi leaves the markets together with its assets, to welfare of society if it is taken over by Dogan Yayincilik. In terms of its assets, the failing firm, Vatan Gazetesi, only had two things: its trademark 'VATAN'; and, its team of journalists, i.e. its human resource. The second, and more compelling question, nonetheless, was whether the journalists' team of VATAN shall count as 'assets' for the purpose of the failing firm doctrine. If not, the fourth condition would not be fulfilled and the TCA will let the exit of Vatan Gazetesi from the market. In the absence of a precedent case at the EU competition law level, the TCA referred to two individual cases assessed under French competition law.[768] In these cases the French authority for competition, the *Autorité de la Concurrence*, discussed whether in the services for auditing and accounting, where the assets of undertakings were mainly its 'human resources', the employees of the failing firm are appraised as 'assets' to comply with the failing firm doctrine.[769] The *Autorité de la Concurrence* rejected the position that employees should be considered as 'assets' for the purpose of the failing firm defence, and, in light of this view, argued competitive conditions would be no worse in the absence of the takeover compared to competitive conditions following the hypothetical takeover.[770] Nevertheless, the TCA adopted a broader approach and handled the issue as a matter of public policy. The problem of 'human resources' was considered by the TCA to have an impact not directly on the competitive conditions of the market but on the socio-economic circumstances of the employees.[771] What the TCA compared in this case was the position of employees in the absence of the takeover, to their position if Vatan Gazetesi is taken over by Dogan Yayincilik.[772] This meant the adoption of a

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[767] ibid

[768] TCA Decision, *Dogan Yayincilik* (n 676) paras 140-1020.

[769] ibid

[770] ibid

[771] ibid

[772] ibid

balancing exercise concerning socio-economic conditions in the absence of and following the proposed takeover. Accordingly, if the failing firm exits the market the team of journalists will be left without their compensation schemes and perhaps with no payment until they are able secure a similar position in one of Vatan Gazetesi's competitors.[773] If endorsed, on the other hand, the takeover would assure Vatan Gazetesi's operation in the market and that the team of journalists keep their posts, which all prevent possible social and economic challenges.[774] Following the balancing exercise, the TCA concluded while the exit of failing firm from the market may lead to 'social harm', the proposed takeover may prevent all these possible socio-economic challenges and this satisfies the fourth limb of the failing firm doctrine.

Under the fifth requirement the TCA analysed the anti-competitive effects of the proposed the takeover in comparison to anti-competitive effects to occur in the absence of the takeover.[775] If anti-competitive effects was to occur in any case then the fifth requirement would be satisfied because there would be no legal or economic basis to 'block' the proposed conduct. This required the TCA to conduct, again, a balancing exercise. But this time the legal balancing exercise pertained pure competition concerns. Following a counterfactual analysis and the examination of the possible anticompetitive effects in both cases, the TCA held that either which way Dogan Yayincilik would have strengthened its dominant position in the market and similar anti-competitive effects would have occurred, and the takeover would not have much influence in this context.[776] Therefore, the fifth condition was satisfied.

In light of the TCA's judgment in *Dogan Yayincilik*, it can be argued that Turkish competition law leaves margin for the consideration of public policy objectives

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[773] TCA Decision, *Dogan Yayincilik* (n 676).

[774] ibid

[775] ibid

[776] ibid

under the failing firm doctrine. However, the legal test adopted under the 'failing firm defense' is stricter compared to public policy goals considered under Article 5 LPC, which equates to Article 101(3) TFEU. The TCA seems to adopt two separate balancing exercises under the failing firm doctrine: one which incorporates public policy considerations; and, another that relates to pure competition concerns. However, in its concluding remarks of the judgment, the TCA emphasizes that its final assessment, based on the two balancing tests, was an overall comparison of 'harm' as a result of the failing from exiting the market, against 'harm' occurred if the takeover is allowed.[777] In light of this assessment of the TCA, it can be argued that, if public policy goals are considered under the failing firm defence, the 'overall' balancing exercise is the one that balances 'harm' to competition following the hypothetical takeover against 'harm' to social welfare - under which public policy is considered - if the failing firm exits the market.

5.5 Public Policy Goals Outwith the Substantive Provisions of the LPC

The goals pursued under the LPC have been examined under Chapter III and previously in Section A of this chapter. In light of this analysis, it is apparent that the LPC has not only pursued 'economic' objectives but have consistently and vigorously pursued public policy objectives under its substantive provisions. Nonetheless, in the broader scheme of the Turkish competition law system, the LPC and substantive provisions within this legislation are not the only legal tools under which public policy goals may be accommodated. A *prima facie* examination of the Turkish competition law system reveals the presence of legal instruments beyond the substantive rules of the LPC that have the scope for

[777] ibid

accommodating public policy objectives. For the purpose of practicality, these legal tools are grouped under four strains: the 'TCA Reviews'; 'Five-Year Development Programmes'; and, 'Applicable Reports of the TCA'.

- **The Legal Basis for Instruments Outwith the Substantive Provisions of the LPC: 'TCA Reviews'; 'Five-Year Development Programmes'; and, 'Applicable Reports of the TCA'**

This section aims to address the legal basis for the adoption of these tools. Among the four fundamental legal instruments only the 'Five-Year Development Programme' is adopted by the Turkish Ministry of Development, whereas the remaining three are drafted and adopted by the TCA as the competent authority. Based on this bifurcation, the examination shall be conducted in two segments.

'TCA Reviews' and 'Applicable Reports of the TCA'
Substantive rules under the LPC, i.e. Articles 4, 5, 6 and 7 LPC,[778] are clearly worded-and precise as to the way in which they provide the prohibition and exception clauses. Moreover, Article 20 LPC[779] clearly mandates the TCA to apply Articles 4, 5, 6 and 7 LPC. With legal authority provided under Article 20 LPC, the TCA has interpreted the substantive rules accordingly.

However, an examination of the LPC reveals the lack of any particular provision that addresses any legal instruments other than the substantive provisions. In this connection, the TCA sheds light on the issue on its website and provides a wide interpretation of Article 20 LPC.[780] According to the TCA, Article 20 LPC mandates the TCA as the primary authority to ensure the application of the LPC and attain objectives pursued under this legislation.[781] In order to ensure the

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[778] LPC (n 15) Articles 4, 5, 6, and 7.

[779] LPC (n 15) Article 20.

[780] www.rebaet.org.tr

[781] ibid

proper application of this legislation and attain these objectives, the TCA highlights, it shall employ necessary legal instruments where appropriate.[782] Accordingly, these legal tools shall, in turn, help ensure the efficient allocation of resources and enhance social welfare.[783]

Although referring to Article 20 LPC, the TCA does not provide clear guidance on what is meant by 'legal tools' or when and how these instruments shall be adopted. Nevertheless, in numerous 'TCA Reviews', 'Industry Reviews', and 'Applicable Reports of the TCA' the TCA makes reference to Article 30 LPC as the relevant legal basis for these legal tools.[784] While Article 30 LPC as a whole stipulates a list of the rights and obligations alluded to the TCA, Article 30(f) LPC specifically grants the right to the TCA Directorate '*...to deliver reviews in relation to competition law and policy and the relevant legal framework*'.[785]

In any case, there is not much guidance under the existing law as to when and how these legal tools shall be employed. Compared to the substantive provisions of the LPC, both Articles 20 and 30 LPC are widely worded and are open to interpretation. Besides, as opposed to the substantive rules, Articles 20 and 30 LPC are not 'transplanted' into the Turkish competition law system from its European counterpart. They are country-specific and unique to the Turkish legal system. This means that the TCA and Turkish Courts play an important role in determining the scope of these legal tools.

'Five-Year Development Programmes'

The 'Five-Year Development Programmes' (FYDP), on the other hand, stand out in terms of their purpose, scope, content and legal basis. The FYDP find their

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[782] ibid

[783] ibid.

[784] LPC (n 15) Article 30.

[785] LPC (n 15) Article 30(f).

legal roots as early as in the Turkish Constitution of 1961 (TC 1961).[786] Reflecting the preferred economic system of the time, i.e. the so-called 'mixed' economic model, the TC 1961 while granting a breadth of social and economic rights to individuals incorporated, at the same time, clauses on the provision and maintenance of economic and financial order in Turkey. The 'hybrid' economic model is generally referred to as one that maintains elements of both a state-planned economic model and a market economy. Common consensus under Turkish legal scholarship and case-law of the Turkish Constitutional Court affirms that 'mixed economy' was the chosen economic model of the time.[787] The TC 1961 explicitly granted the right to private property and the freedom to work and contract, but, at the same time, contained specific and precise provisions that required the State to plan social and economic order in Turkey.[788] For this purpose, the State is 'asked' to draft and adopt 'development plans'. Article 41 TC 1961 reads:

> Social and economic order (in Turkey) shall be planned with a view to providing a humanely standard of living (for Turkish society) and based on the principles of justice and efficiency. It is the duty of the State to enhance economic, social and cultural development through democratic means; to this end, the State shall raise national savings, utilise national sources in accordance with the primary needs of the (Turkish) society, and formulate development plans.[789]

The Turkish Constitution of 1982 (TC 1982), the current constitution in place, despite putting more emphasis on the fundamental elements of a market economy,

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[786]' TC 1961 (n 547).

[787] Turkish Constitutional Court, Decision Date: 23-25.10.1969, Decision Number: E.967/41-K.969/57.

Z. Usal 'Avrupa Birligi ve Turkiye-AB Iliskileri Hakkinda Dogru Bilinen Yanlislar' (Ikitisadi Kalkinma Vakfi Yayinlari, Istanbul 2005); K. Recber, Turkiye Avrupa Birligi Iliskileri' (Alfa Aktuel, Bursa 2009); U. Tekinalp, 'Gumruk Birligi'nin Turk Hukuku Uzerindeki Etkileri' (1996) 1-2 Istanbul Universitesi Hukuk Fakultesi Mecmuasi 28.

[788] TC 1961 (n 547), Chapter IV, 'Economic and Social Order', Article 41.

[789] ibid

i.e. ensuring the healthy functioning of monetary and capital markets and markets for goods and services, retains the tradition of the adoption of 'development plans'.[790] Article 166(1) TC 1982 states:

> It is the duty of the State to plan economic, social and cultural development, to secure steady and harmonious development of industry and agriculture throughout the nation, to assess national resources in order to facilitate their efficient allocation, and, to establish a relevant institution for (*the implementation of*) these purposes.[791] (emphasis added)

The constitutional framework for and legal background of FYDP's clearly reveal, regardless of the current far more complex social, economic and legal setting in Turkey compared to those prevailing in 1960's, TC 1982 continues the legacy of its predecessor. However, as examined on Chapter V, TC 1982 provides at the same time a constitutional framework for the 'healthy and functioning' operation of a free market economy in Turkey.[792] This is not to posit an outright conflict between provisions on market economy *versus* the FYDP's, but rather to propose further analysis in following sections as to the relationship between the two and the accommodation of competition law and policy under the FYDP's.

TCA Reviews

As examined above, the TCA states that it is legally mandated under the umbrella of Article 20 LPC to utilise legal instruments to carry out tasks imposed upon it by the LPC. In this connection, the 'TCA Reviews' (Reviews) have been one of the legal instruments employed by the TCA. Since its first Review in 2000, the TCA has adopted a hundred and ninety one Reviews all of which are submitted to the public and can be reached at the TCA website.[793] According to the list

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[790] TC (n 73)

[791] TC 1982 (n 73), Article 166(1).

[792] Chapter V p. 1199-246.

[793] www.rekabet.gov.tr

provided by the TCA, there are two different categories of Reviews in terms of their relevance and content: 'Reviews on Privatisation Matters' and 'Reviews concerning various Legislation'. For the purpose of the theme of this PhD thesis, the focus shall be on the former one.

- **TCA Reviews on Privatisation Matters**

The Legal Framework

The TCA defines the concept of privatisation as '*...the transfer of the ownership and management of economic production units from the public to the private sector*'.[794] In most cases, following the privatisation process, the public monopoly effectively turns into a 'private' monopoly. For example, in the case of Turkey, the TC 1961 adopted a 'hybrid' economic model which granted property rights, the right to ownership, establish economic bodies etc. to individuals, but at the same time right retained state ownership in key industries and sectors mostly in the form of public monopolies. Following the TC 1982, the privatization process accelerated immensely and most of the public monopolies in Turkey have been privatised since then. For this reason, the application of competition rules and the involvement of competition authorities play an important role during and after the privatisation procedure in order to ensure and maintain competitive market conditions in the market which the monopoly operates.

In this connection, the TCA emphasizes that the primary goal of the privatisation process is not merely the transfer of public assets and rights to the highest bidder, or to a single buyer in case of exclusive buyers, but to improve conditions for production of goods and services and ultimately to enhance efficiencies in the hands of the private undertaking.[795] Based on the TCA's understanding, it can then be argued that the economic rationale behind the privatization process is to

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[794] ibid

[795] ibid

‘rescue’ the economic entity from the ‘inefficient’ owner. i.e. the state, and leave it to the hands of the efficient private management. Therefore, ‘supervision’ of privatisation procedures by national competition authorities and the assessment of these transactions under competition law are critically important and have been accepted as common practice in ‘transition economies’.

In addition to Articles 20 and 30 LPC, which provides the general legal basis for adopting Reviews, the TCA has adopted the ‘Communiqué Setting the Procedures and Principles of Pre-Notification and Authorisation Applications Submitted to the Turkish Competition Authority in order to render Acquisitions through Privatisation Transactions Legal Enforceable’ (Communiqué on Privatisation) to set in detail the principles for assessing privatization matters in Turkey.[796]

Objective of the Communiqué on Privatisation

Article 1 of the Communiqué on Privatisation states:

‘... In accordance with Article 7 of the LPC, this communiqué primarily aims to set principles and procedures for pre-notification and authorisation applications submitted to the TCA which render privatisation transactions, conducted by Turkish Privatisation Directorate (TPD) or other government authorities, legally enforceable’.[797]

This means that the privatization process is conducted by the relevant administrative authority, i.e. Turkish Privatisation Directorate, but is subject to ‘pre-notification’ and ‘authorisation’ mechanisms to be handled by the TCA. These two separate mechanisms trigger legal assessment of the privatisation transaction under competition rules specifically.

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[796] Communiqué Setting the Procedures and Principles of Pre-Notification and Authorisation Applications Submitted to the Turkish Competition Authority in order to render Acquisitions through Privatisation Transactions Legal Enforceable, Communiqué Number: 2013/02, Dated: 18.04.2013. (Communiqué on Privatisation)

[797] Communiqué on Privatisation (n 839).

Article 27(f) of the Communiqué on Privatisation mandates the TCA to ‘ ... adopt communiqués and other relevant regulations to enable to application of the (LPC) properly’,[798] whereas, as examined in Chapter V, Article 7 LPC deals with competition rules concerning combination of undertakings in the form of mergers, acquisitions, joint ventures etc.[799] Therefore, the Communiqué on Privatisation aims to set principles on how two authorities, the TCA and the TPD, shall handle privatisation cases in the light of competition rules.

Scope of the Communiqué on Privatisation

The Communiqué on Privatisation refers to the term ‘acquisition’ particularly because the privatisation process, at least in the Turkish legal context, is typically conducted through the acquisition of the public entity by another private undertaking. Nonetheless, not all privatisation transactions through acquisition are required to be assessed under the principles of Turkish competition law. Article 2 of the Communiqué on Privatisation, under the heading ‘Scope of the Communique’, stipulates that the following transactions fall within the scope of this communiqué: first, if the acquisition of all or a part of the shares or assets of a public undertaking leads to a permanent change in control of this public entity: second, regardless of the means through which acquisition is conducted, if the acquisition of the public undertaking leads to a change in its decision making bodies.[800] This means that regardless of the way in which the public undertaking is acquired, the key component of the transaction is whether or not it leads to a change in control over the public undertakings. On the other hand, Article 3 of the Communiqué on Privatisation on ‘The Requirement for Pre-Notification’ states that privatisation transactions within the scope of this communiqué, as per

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[798] Communiqué on Privatisation (n 839) Article 27(f).

[799] LPC (n 15) Article 7.

[800] Communiqué on Privatisation (n 839) Article 2.

Article 2 LPC, concerns public undertakings with a turnover exceeding thirty million Turkish Liras shall be notified to the TCA.[801]

It is clear from the text of Articles 2 and 3 of Communiqué on Privatisation that two sets of conditions are stipulated by the Communiqué on Privatisation: one in relation to the permanent change of control in the privatised public undertaking, and another concerning the turnover threshold.[802] However, the structure of the communiqué which places condition one under the 'Scope of the Communique' and condition two under 'The Requirement for Pre-Notification' prompts the question as to whether transactions that satisfy the first condition but fall short of the turnover requirement shall be assessed under competition rules at all. If so, does this mean they will be assessed under a mechanism other then 'pre-notification' and 'authorisation'? In light of this ambiguity, interpretation of these rules by the TCA and the TPD, and relevant case-law plays an important role in understanding whether the provisions are specifically structured this way or whether it is just a 'miscalculation' of the law-maker.

In any case, the Communiqué on Privatisation sets a two-stage assessment procedure for the appraisal of privatisation matters under competition rules: 'pre-notification' to the TCA;[803] and, second, seeking 'authorisation' from the TCA.[804] It is these individual stages under which the TCA conducts legal assessment and, if ever, a balancing exercise of objectives of competition law versus public policy goals.

First Stage of Assessment: Pre-Notification

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[801] Communiqué on Privatisation (n 839) Article 3.

[802] Communiqué on Privatisation (n 839) Articles 2 and 3.

[803] Communiqué on Privatisation (n 839) Article 4.

[804] Communiqué on Privatisation (n 839) Article 5.

Articles 3 and 4 of the Communiqué on Privatisation sets the basic principles for the stage-one assessment: The TPD is required to notify the TCA acquisitions, as defined in Article 2 LPC, of public undertakings with a turnover exceeding thirty million Turkish Liras.[805] This takes place before the announcement of tender specifications to public.[806] In its pre-notification the TPD shall include details about the public undertaking subject to the privatisation process, its operation in the market, and information about the specific market in which the undertaking operates.[807] Upon this application, the TCA shall assess the effects of the potential privatisation process on the competitive conditions of the market and provide its 'Review' to the TPD in forty business days.[808] Following this, the TPD shall, based on the TCA's Review, draft and announce the tender specifications to the public.[809]

The scope legal assessment conducted by the TCA's under the first stage is stipulated in Article 3(1) of the Communiqué on Privatisation.[810] The provision states:

> '... Upon (the TPD's) request, the TCA shall provide its opinion on the effect of the privatisation transaction on the (competitive conditions of) market ... this shall be an assessment that is based on the general principles of Turkish competition law and the specific concerns under Article 7 LPC, and which lays the foundations of (the TPD's) tender specifications'.[811] (emphasis added)

In view of the above provisions, one can argue that once a potential privatisation transaction falls within the scope of the communiqué the TDP is legally required to pre-notify the TCA and seek a Review. This means the absence of pre-

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[805] Communiqué on Privatisation (n 839) Articles 3 and 4.

[806] ibid

[807] Communiqué on Privatisation (n 839) Article 4(1).

[808] Communiqué on Privatisation (n 839) Article 4(2).

[809] ibid

[810] ibid

[811] Communiqué on Privatisation (n 839) Article 3 (1).

notification and a Review will result in a void privatisation transaction. This is an absolute nullity as privatisation transactions are matter of public policy. However, as for the content of the Review and its legal implications for the privatisation transaction the law seems to be less straightforward. Upon pre-notification of the individual case, the TCA shall review the proposed privatisation transaction under Turkish competition law and submit its 'opinion' to the TPD in forty days. Under the current legal framework, the TDP is not legally required to fully adhere to the Review but is asked to draft and adopt tender specifications based on the TCA's assessment. Divergence from the Review may, nonetheless, have implications for the legal assessment at second stage. In any case, unlike in the absence of pre-notification of a Review, deviation does not lead to the nullity of the transaction.

Second Stage of Assessment: Authorisation

Privatisation transactions which fall under the notification requirement are legally enforceable only after further 'authorisation' from the TCA is obtained.[812] Article 6 of the Communiqué on Privatisation requires that, following the announcement of tender specifications and the tender bidding process but certainly before the TPD's 'final approval', the TDP shall seek 'authorisation' from the TCA.[813] Although the approval is the final procedure and concludes the privatisation process this does not render the transaction legally enforceable prior to authorisation from the TCA is secured.

At this stage, the TDP prepares individual files for each bidder that includes in-depth information on the bidder and their proposition, along with their assessment and proposition for that privatisation particularly, to be submitted to the TCA.[814] Upon submission, which triggers the second stage of legal assessment, the TCA

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[812] Communiqué on Privatisation (n 839) Article 6.

[813] ibid

[814] ibid

shall conduct the legal assessment under Article 7 LPC specifically.[815] In this case, the TCA can either authorise the transaction as compatible with competition rules, 'block' the transaction, or block the privatisation but at the same time submit 'conditions' for further assessment by the TPD.[816] As opposed to the TCA's Review at first stage, authorisation, non-authorisation, or 'conditional authorisation' decisions are legally binding. In the case of non-authorisation or conditional authorisation, the privatisation transaction cannot be enforced. However, as the 'non-authorisation' and 'conditional authorisation' are administrative decisions in nature, parties to the transaction retain the right to appeal against these decisions at the Administrative Court of Ankara. If the Administrative Court of Ankara annuls the TCA's decision, the same privatisation project will have to be initiated from start. Alternatively, the TDP may revise its proposal accordingly and re-submit to the TCA for authorisation.

Based on the legal framework and two-tier scheme introduced for the assessment of privatisation matters, one can argue that the lawmakers' intention is to ensure the privatisation transaction is, from very the start, drafted and planned in line with competition rules. The first stage of competition law assessment and the Review, albeit not legally binding, gives scope the TCA to conduct legal assessment, not only under Article 7 LPC but also under the 'general' principles of Turkish competition law, which can then be reflected onto tender specifications before its announcement to the public and the bidding process takes place. Therefore, the 'Review' is utilised as a legal tool to ensure compatibility of the privatisation process with competition rules from the very beginning. Although the TCA's 'non-authorisation' or 'conditional-authorisation' Decisions submitted under the second stage can be challenged at the Administrative Court of Ankara, the Review at the first stage may ensure coherence between competition rules and the privatisation transacation at early stages and prevent a 'non-authorisation' or 'conditional-authorisation' Decision at the second stage.

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[815] Communiqué on Privatisation (n 839) Article 7.

[816] ibid

From a more practical point of view, having tender specifications drafted in line with the Review and competition law in general, allows competition law concerns to be raised from the start of the privatisation and prevents possible irreversible legal or financial damages. Privatisation schemes are costly and time-consuming projects and, in most cases, are concerned with infrastructure or other backbone industries, or public services, such as the telecommunications services, energy and gas facilities, national airlines, and the operation of national harbours and ports etc. In this context, the Review process may prevent a potential conflict between the TCA and the TPD.

The second stage of assessment, however, also has significant importance in that it takes place after the tender bidding process and all the proposals submitted by potential buyers of the public undertaking. In this case, the TCA has a clearer picture of potential buyers and therefore is able to make a more 'factual' assessment of the case under competition rules. This means both the first and second stages are significant in their own ways in terms of competition law assessment and striking a balance between the objectives of competition law and public policy concerns. However, a clear understanding of relevant case-law shall provide deeper understanding of the legal framework and how each legal mechanism has been interpreted by the TCA, the TPD, and the Administrative Court of Ankara as the relevant high court.

- **Relevant Case-Law**

As much as setting the legal framework set by the Communiqué on Privatisation, it is important understand to relevant case-law. The central aim of this section is to shed light on two things: the scope of legal assessment conducted by the TCA under individual 'pre-notification' and 'authorisation' stages; and, whether and to what extent the TCA conducts a balancing exercise under this legal framework.

In line with the framework set above, the TCA treats the two separate phases under two different legal mechanisms. While the first phase, initiated by pre-notification of the privatisation process, leads to the adoption of a 'Review' by the TCA; the second stage, which seeks authorisation from the TCA, leads to the adoption of a TCA 'Decision'. The difference between a 'Review' and 'Decision' mainly relates to their legal impact on the progress of the privatisation process. While the TPD is able to move forward with the privatisation process regardless of the content of the Review, it cannot proceed in the absence of an authorisation obtained from the TCA.

Case-Law: Stage One Reviews

Although all cases assessed under the Communiqué on Privatisation can be found in the TCA database, only those leading to a 'conditional-Review' or 'Non-Authorisation' provide legal reasoning and the TCA's legal assessment under individual cases. Therefore, the reconciliation of the public policy of privatization with competition concerns, if any, can only be examined under 'conditional-Review' and 'Non-Authorisation' cases.

According to the list of all relevant cases provided by the TCA, since 2000, out of a hundred and ninety-one Reviews of the TCA thirty-eight have been adopted under the Communiqué on Privatisation.[817] Based on these Reviews concerning privatisation matters, it is clearly observable that public undertakings have been privatised in various different forms. In some cases, privatisation was conducted through block or partial sales of public shares or the sales of the entire public undertaking as a whole, while others aimed at privatising the use, maintenance and operation of public businesses or just the marketing and distribution of goods and services.

[817] www.rekabet.gov.tr. Information based on the TCA database as of 17.06.2016.

Among thirty-eight Reviews adopted under the Communiqué on Privatisation, in fourteen cases the TCA submitted 'Conditional Reviews'. [818] The term 'Conditional Review' reflects the TCA's exact wording used in the Reviews and its translation into English from Turkish. This clearly deviates from the lawmaker's choice of terminology used in the text of Article 5 of the Communiqué on Privatisation and scope of the provision in general. As examined previously, the provision states '...the TCA shall provide its opinion on the effect of the privatisation transaction on (competitive conditions of) market'. In this, or any other provision in the Communiqué on Privatisation, no reference is made to the submission of 'conditions' or a 'Conditional Review' at the first stage of assessment.

The TCA's first case under the Communiqué on Privatisation led to the submission of a Review with pre-conditions.[819] In this particular case concerning the privatision of the operation and management of certain ports within Marmara Sea (Marmara Sea Ports), the TCA imposed 'conditions' at the first stage of competition law assessment. Upon the TPD's pre-notification, the TCA stipulated the pre-condition that all ferries, including rivalries' ferryboats, should maintain the right to use ports for their own passengers along with the private undertaking which acquires, with the privatisation, the right to use the harbours for its own business purposes.[820] The TDP was advised to take these conditions into account whilst drafting tender specifications and at the later stages of the privatisation process.[821]

In another case, at the pre-notification stage the TPD went beyond the submission of information necessary under Article 4(1) of the Communiqué on Privatisation,

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[818] www.rekabet.gov.tr

[819] TCA Decision, *Marmara Sea Ports* Decision Number: 00-16/157-79, Decision Dated: 02.05.2000.

[820] ibid

[821] ibid

which basically seeks information on the public undertaking in question and the market within which it operates, but also provided up-front information on bidders for the relevant tendering process.[822] Based on this extensive pre-notification file, the TCA emphasised a potential breach of competition law concerning one particular private undertaking and stipulated that the TCA may not authorise this project at the second stage.[823]

Examination of cases following the Marmara Sea Ports project clearly reveals a pattern in relation to 'pre-conditions' and a diverse range of conditions submitted by the TCA at the first stage of assessment. A number of Reviews submitted conditions concerning structural changes to the privatisation transaction. For instance, in the privatisation of TEKEL (Turkish Tobacco and Alcoholic Beverages Company) the TCA suggested the separation of individual cigarette brands and the preparation of individual transactions for each brand.[824] Similarly, in the privatisation of certain motorways and public connection points, the TCA 'pre-conditioned' the sales of the Bosphorus and the FSM (Fatih Sultan Mehmet) Bridges separately instead of a single transaction.[825] Likewise, the TCA required, as a condition, individual privatisation transactions for the privatisation of six harbours in Turkey.[826] Again, during the privatisation of the management and use of four salt lakes in Turkey the TCA asked the TPD to conduct separate transactions for each salt lake to prevent one undertaking acquiring all facilities.[827]

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[822] TCA Decision, *Atakoy Marina Isletmeleri A.S.* Decision Number 01-08/74-M, Decision Dated: 13.02.2001.

[823] TCA Decision, *Atakoy Marina Isletmeleri A.S* p 2.

[824] TCA Decision, *Tekel Turk A.S.*, Decision Number: 07-08/44-M, Decision Dated: 22.01.2007.

[825] TCA Decision, *Fatih Sultan Mehmet ve Bogazici Kopru A.S.*, Decision Number: 08-06/66-M., Decision Dated: 17.01.2008,

[826] TCA Decision, *Izmir, Mersin, Iskenderun, Derince, Bandirma, Samsun Limanlari*, Decision Number: 05-31/376-M, Decision Dated: 06.05.2005,

[827] TCA Decision, *Tuz Golu*, Decision Number: 03-32/396-M, Decision Dated: 15.05.2003,

Nonetheless, in the remaining cases the TCA's conditions went beyond structural changes and incorporated other requirements to maintain competitive markets following the privatisation transaction. In the privatisation of Turkish Airlines, the TCA, as a pre-condition, required certain rules stipulated by the Turkish Directorate General of Civil Aviation (TDGCA) to be annulled before the completion of the tendering process.[828] In this case, the TCA specifically asked the TDGCA, the Turkish state authority entitled to regulate rules, conditions, and requirements concerning the civil aviation market in Turkey, to waive restrictions imposed upon competitors of Turkish Airlines.[829] The TCA held that these rules drafted and adopted by the TDGCA allows competitor passenger airliners in domestic market only to fly destinations where Turkish Airlines does not operate, or only on those days Turkish Airlines does not operate, or only when Turkish Airlines cannot meet passenger demand. These set of rules, accordingly, hinder the process of competition and would have to be abolished before tendering process.[830] Similarly, in view of the apparent likelihood that shipbrokers would be interested in acquiring the state-owned Salipazari Harbour, the TCA submitted a Review with conditions. In this case, the TCA asked the TPD to specifically incorporate into tender specifications that following the privatisation process the undertaking which acquired Salipazari Harbour would have no influence on vessels in relation to their choice of shipbroker.[831] In another case, the TCA submitted that following the privatisation of motor vehicle test centres in Turkey, an independent administrative commission, rather than the private entity to

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[828] TCA Decision, *Turk Hava Yollari A.S.*, Decision Number: 00-211-116, Decision Dated: 06.06.2000.

[829] ibid

[830] ibid

[831] TCA Decision, *Salipazari Limani* Decision Number: 06-51/665-M, Decision Dated: 13.07.2006.

acquire the test centres, should determine prices for motor vehicle tests in advance.[832]

Stage Two- 'Authorisation' and 'Non-Authorisation'

In the light of the legal framework set by the Communiqué on Privatisation, the two most significant differences between stage one and stage two assessments can be noted as: one, privatisation transactions are not legally enforceable without a stage-two 'Authorisation', while stage-one 'Reviews' do not have this impact;[833] two, stage-one assessments are to be conducted under Article 7 LPC, while there is no such limitation under stage-one assessment.[834] This section aims to focus on relevant case-law in order to have a better understanding of how the legal framework set for stage two assessments, and the main features of this framework highlighted above, are perceived by competent enforcement agencies, the TCA and the TPD, and how this reflects on the scope of legal assessment conducted at this stage.

Among all cases assessed under the Communiqué on Privatisation, under the stage-two mechanism, while four judgments of the TCA led to 'Non-Authorisation', one led to a 'Conditional Authorisation', and two cases were conducted under the principles of Article 4 and 5 LPC, instead of an assessment under Article 7 LPC like all other judgments.[835] For example, during the privatisation of 'distribution of electricity services' in the Asian continent of Istanbul and around other geographic locations in Turkey, the TCA did not

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[832] TCA Decision, *Arac Muatene Hizmetleri* Decision Number: 4-60/857-M, Decision Dated: 20.09.2004

[833] Communiqué on Privatisation (n 839) Article 5.

[834] LPC (n 15) Article 7.

[835] www.rekabet.gov.tr

authorise block-sales of this operation to a single private undertaking.[836] Accordingly, the proposed privatisation would have led to the creation of a dominant position in the market for the distribution electricity services and therefore breached Article 7 LPC.[837] Upon the 'refusal' of the privatisation project, the TPD re-reviewed the project, initiated once again a tendering process, and promoted the distribution and sales of this operation to separate buyers. In another case concerning the privatisation of electricity distribution facilities, this time the TCA conducted its legal assessment under Article 4 and 5 LPC but not under Article 7 LPC.[838] In this case, three separate undertakings proposed to form a separate fourth undertaking, a joint venture, for the sole purpose of bidding in the tender process and competing for the acquisition of electricity distribution services.[839] For the TCA it was not really the joint venture itself that would breach competition law, but rather the risk of coordinated behaviour between the undertakings that formed the joint venture and that would breach Article 4 LPC.[840] The TCA posited that coordinated behavior and therefore the breach of competition law was inherent in, following the proposed transaction, the presence of both the joint venture and its founding undertakings in the same as well as the neighbouring markets. Although the joint venture did not create a dominant position within the meaning of Article 7 LPC, the risk of collusion between the join venture and its founding undertakings and therefore the breach of Article 4 LPC constructed the TCA's central argument. Nevertheless, the TCA went on and addressed the question under the exception clause, Article 5 LPC. Similar to the application of the exception clause in other public policy objectives, an

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[836] TCA Decision, *Aydas Elektrik Daigitim A.S.* Decision Number: 04-78/1114-281, Decision Dated: 09.12.2004.

[837] ibid

[838] TCA Decision, *Bogazici Elektrik Dagitim A.S.* Decision Number: 00-32/1114-281, Decision Dated: 09.12.2009.

[839] ibid

[840] ibid

exception was granted for this transaction.[841] On the other hand, in the privatisation of Turkey's national steel and iron manufacturing company the TCA argued that the acquisition of the public entity by a 'collective initiative', established again by a group of undertakings operating in the field, was incompatible with Article 4 LPC and an exemption would not be granted.[842] The only case that the TCA granted a 'conditional-authorisation' under stage-two assessment, was concerned with the privatisation of Mersin and Hatay Harbours.[843] These are main hubs situated on the south-east coast of Turkey and stretching all the way to the national borders with Syria. The TCA objected to the acquisition of these two central ports by PSA Akfen Group as this private undertaking already operated a neighbouring harbour on the south coast and fell within Article 7 LPC.[844] Nevertheless, the TCA stated that the acquisition of the ports by the next highist bidder would not give rise to a 'non-authorisation' and was compatible with competition rules.[845] The acquisition of state-owned cement manufacturing facilities,[846] and, in another case, three separate salt lakes, by a single undertaking were not authorised as incompatible with Article 7 LPC. The TCA required the privatisation and sales of these facilities to separate undertakings, which would not jeopardise the competitive process in those relevant markets.[847]

In the privatisation of Burgaz Icki, the state-owned alcoholic beverages production and distribution facilities, the TCA did not authorise acquisition by MEY Icki on the grounds that the latter would strengthen its already strong position in the market for the beverage vodka, and create a dominant position in

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[841] ibid

[842] TCA Decision, *Kardemir A.S.* Decision Number: 13-71/964-411, Decision Dated: 19.12.2013.

[843] TCA Decision*, Mersin Limani* Decision Number: 05-70/967-261, Decision Dated: 20.10.2005.

[844] ibid

[845] ibid

[846] ibid

[847] ibid

the market for Turkey's 'national' drink raki as well as in the market for gin.[848] Along with the second application for authorisation, Mey Icki proposed the divestiture of its entire vodka brand, including the trademark, production and distribution facilities, following the privatisation transaction. In response to Mey Icki's proposal, the TCA granted authorisation this time with a list of conditions to ensure the Mey Icki's vodka facilities were sold in a timely and effective manner following the privatisation and ultimately to assure the maintenance of the process of competition in markets for vodka.[849]

On different note, based on its authority granted under Articles 9 and 16 of the LPC, the TCA acted *ex officio* and fined several undertakings and their company directors after they acquired a state-owned financial leasing company.[850] According to the TCA, parties to the transaction violated the Communiqué on Privatisation because the privatisation arrangement was neither 'pre-notified' to the TCA to obtain a stage-one Review, nor was it sent for 'authorisation' to seek a stage-two assessment.[851]

Remarkably, the TCA, on many occasions, clearly stated its position concerning the scope of its 'authority' on privatisation matters. During the privatisation of the marketing and distribution of Turkish tobaccos produced by TEKEL, the TCA stated although the privatisation transaction did not fall within the ambit of the Communiqué on Privatisation and did not require 'pre-notification' or 'authorisation', the parties and the TPD will have to ensure compatibility with the Block Exemption Communiqué on Vertical Agreements. In another case concerning the privatisation of a shopping centre, the TCA stated that since the turnover of the state-owned entity did not exceed the required threshold there was

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[848] TCA Decision, *Mey Icki A.S.* Decision Number: 10-49/900-314, Decision Dated: 08.07.2010.

[849] ibid

[850] ibid

[851] TCA Decision, *Toprak Finansal Kiralama A.S.* Decision Number: 06-59/779-228(b), Decision Dated: 24.08.2006.

no need for pre-notification.[852] Nevertheless, it went on to argue that the TPD, in its tender specifications, would have to clearly establish the following 'condition': '...if, following the tendering process, the TCA considers the privatisation arrangement to be incompatible with the LPC it may not authorise the transaction or may bring forward conditions or further requirements'.[853] In a similar manner, the TCA stated that although at the time of pre-notification the privatisation transaction did not fall within the benchmark stipulated in the Communiqué on Privatisation, once potential buyers for the state-owned entity are identified the TCA has the right to assess the transaction under the principles of Turkish competition law.[854]

- **A Critical Analysis of Relevant Case-Law and the Legal Framework set by the Communiqué on Privatisation**

In light of the legal framework and relevant case-law examined above, the following commentary is made.

The first criticism relates to the wording of the Communiqué on Privatisation particularly in terms of defining the scope of legal assessment to be conducted at each stage of privatization cases. In light of the fact that the current legal framework is not the first regulation in its field but the successor for previous two communiqués, Communiqué No. 1998/4 and Communiqué No. 2010/4, one would expect more coherent and clear rules and a precise legal framework for assessment. The problem in this context centrally relates to the 'disparity' between the law and its application. For example while Article 2 of the Communiqué on Privatisation stipulates only privatisation through 'acquisitions'

[852] TCA Decision*, Atakoy Turizm Tesisleri Ticaret A.S.* Decision Number: 05-06/46-19, Decision Dated: 18.01.2005.

[853] ibid

[854] ibid

falls within the scope of this communiqué,[855] Article 3 states only those transactions concerning a public undertaking with a turnover exceeding thirty million Turkish Liras will have to be 'pre-notified' to the TCA.[856] Following this, Article 5 states those privatisation matters which require pre-notification needs 'authorisation' from the TCA to become legally enforceable.[857] When we look into relevant case-law, however, it is observed that the two requirements are cumulative and trigger both mechanisms, stage one 'pre-notification' and stage two 'authorisation'. Another problem relating to the scope of application is the TCA's interpretation on the scope of its 'jurisdiction'. Although Article 3 stipulates a turnover threshold, the TCA reiterates in many cases that even if the transaction does not fall within the scope of the Communiqué on Privatisation it may, once potential buyers are identified, not authorise the transaction or stipulate conditions for authorisation.[858] In one case, the TCA explicitly admitted the transaction did not fall within the scope of the Communiqué on Privatisation and there was no need for pre-notification or authorisation but at the same time asked the buyer and the TDP to ensure compatibility with the Block Exemption Communiqué on Vertical Agreements.[859] This clearly leads to a contradiction between the regulation and the case-law. For the sake of ensuring clarity and coherence between law and practice, the Communiqué on Privatisation should instead incorporate one provision on the scope of the applicability and consider a more flexible approach for the thirty million Turkish Lira benchmark.

Second is the conflict between what the Communiqué on Privatisation requires the TCA to 'deliver' in privatisation cases and what the TCA actually has delivered in its judgments. Article 3(1) of the Communiqué on Privatisation

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[855] Communiqué on Privatisation (n 839) Article 2.

[856] Communiqué on Privatisation (n 839) Article 3.

[857] Communiqué on Privatisation (n 839) Article 5.

[858] Communiqué on Privatisation (n 839) Article 3.

[859] Block Exemption Communiqué on Vertical Agreements, Amended by the Turkish Competition Authority, Number: 2003/3 and 2007/02, Dated: 25.05.2007.

clearly states under stage-one the TCA will only provide an 'assessment' under the principles of competition law which shall provide guidance to the TPD in the preparation of tender specifications.[860] However, the TCA has, over the years, developed the tradition of delivering 'conditional-Reviews' during its stage-one legal assessment under the Communiqué on Privatisation. In a similar manner, the TCA's has imposed a 'conditional Authorisation' under stage-two assessments. Neither 'conditional-Review' nor 'conditional-Authorisation' takes place in the Communiqué on Privatisation and they have been established over time through case-law. The only clarity the legal framework provides is the legal binding effect of stage two 'Authorisations'. In this case, one wonders, if only stage two conditional Auhtorisations are legally binding, what is the purpose of imposing conditions during stage-one legal assessment? Admittedly, stage-one conditions may help the TPD during the preparation and announcement of tender specifications in accordance with competition rules. However, from a legal point of view, this has no binding effect. The best example for this perplexity is *Marmara SeaBuses* case.[861] In this privatisation project the TCA stipulated a conditional-Review following pre-notification. The parties to the transaction, the buyer and Istanbul Metropolitan Municipality, overlooked conditions stipulated by the TCA and conducted the tendering process anyway. When the TDP asked for authorisation, the TCA approved the transaction nevertheless. Following the privatisation, several investigations were initiated against Marmara SeaBuses by the TCA concerning allegedly excessive pricing activities.[862] In this case, one wonders the rationale behind stipulating conditions at the first stage. The overall criticism in this context is that there is a lack of coherent and clear-cut principles concerning the scope of TCA's legal assessment under each limb of legal assessment this can be subject to further scrutiny by the law-maker.

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[860] Communiqué on Privatisation (n 839) Article 3(1).

[861] TCA Decision, *Istanbul Deniz Otobusleri Sanayi Ticaret A.S.* Decision Number: 10-78/1061-M, Decision Dated: 16.12.2010.

[862] ibid

The third problem relates to Article 6 of the Communiqué on Privatisation,[863] which makes specific reference to and requires application of only Article 7 LPC[864] under stage-two assessment, and the TCA's interpretation of this provision. In the application of Article 6 Communiqué on Privatisation, although the TCA has mainly relied on Article 7 LPC[865] during legal assessment, it occasionally drew upon the prohibition and exception clauses under Articles 4 and 5 LPC.[866] This was the situation in *electicity distribution*[867] and *steel and iron* privatisation cases.[868] For this reason, it is proposed that the Communiqué on Privatisation makes a general reference to the 'principles of Turkish competition law' in the assessment of privatisation cases by the TCA, rather than pointing out particular provisions of the LPC. This will provide freedom to the TCA to legally assess privatisation transactions under the LPC, regardless of what stage it is related to, and enable coherence between the Communiqué on Privatisation and relevant case-law.

The fourth relates to the debate on whether and to what extent a 'balancing exercise' is conducted under the Communiqué on Privatisation. In view of the legal framework and relevant case-law under the Communiqué on Privatisation, it is proposed that in privatisation cases under the Communiqué on Privatisation the TPD and the TCA together aim to strike a balance between public policy goals *vis-à-vis* competition law and policy goals. In the particular context of privatisation matters this is a balancing exercise between fiscal and monetary goals on the one hand, and the objective of protecting the process of competition on the other. This balance, it is submitted, takes place at all stages of legal

[863] Communiqué on Privatisation (n 839) Article 6.

[864] LPC (n 15) Article 7.

[865] ibid

[866] LPC (n 15) Articles 4 and 5.

[867] TCA Decision, *Aydas Elektrik Dagitim A.S.* (n 818); TCA Decision, TCA Decision, *Bogazici Elektrik Dagitim A.S.* (n 881).

[868] TCA Decision, *Kardemir A.S.* (n 885)

assessment under the Communiqué on Privatisation and is conducted by the TCA and the TPD simultaneously. Unlike competition law cases initiated under the LPC, the Communiqué on Privatisation entails both authorities' reciprocal action from the start of the judgment until the finalization of the privatisation transaction. The only commentary on this issue in Turkish literature, presented by Ekdi, the President of the 'Vth Chamber for Investigation and Enforcement' at the TCA, suggests that in privatisation cases the two authorities prioritise different set goals.[869] While the TPD adopts a short-term perspective, i.e. the objective of increasing public funds, the TCA embraces a long-term goal in the form of enhancing consumer welfare. He argues that in privatisation transactions the more 'monopoly rights' provided with acquisition, the more private undertakings are willing to pay.[870] Clearly, the TPD's interests, to raise public funds in the short term, does not, to a large extent, conflict with the private undertakings'. This, from a competition law point of view, however, may give rise to problems. Based on the author's earlier discussion above and Ekdi's proposition on authorities' short-term *versus* long-term perspectives, it is posited that the legal exercise conducted under Communiqué on Privatisation is mainly concerned with striking a balance between monetary and fiscal objectives *vis-à-vis* the objective of protecting the process of competition. Particularly, conditions proposed by the TCA, both during stage-one and stage-two assessments, seek to ensure this balance.

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[869] B. Ekdi, 'Ozellestirme ve Rekabet-I: Neden?' (Privatisation and Competition-I: Why?), President of the 5th Chamber for Investigation and Enforcement at the TCA.
http://www.rekabet.gov.tr/tr-TR/Rekabet-Yazisi/Ozellestirme-ve-Rekabet-8211-I-Neden
B. Ekdi, 'Ozellestirme ve Rekabet –II: Nasil?' (Privatisation and Competition-II: How?), President of the 5th Chamber for Investigation and Enforcement at the TCA.
<http://www.rekabet.gov.tr/tr-TR/Rekabet-Yazisi/Ozellestirme-ve-Rekabet-8211-II-Nasil>
[870] ibid

‘Five-Year Development Programmes’ and ‘Applicable Reports of the TCA’

In principle, the FYDP is a far-reaching legal instrument aimed at facilitating coherence between various State policies (monetary, financial, legal, social, cultural etc.) on the one hand, and the core objective of enhancing economic, social and cultural development in Turkey on the other.[871] Article 166(2) TC 1982, the current constitution in place, explains the objectives of FTDP’s as below:

> ‘(Development) plans are aimed at adopting measures to facilitate national savings and production, price stability, and to enhance (national) investments and employment; provide (national) investments that safeguard the interest and necessities of (Turkish) society and the efficient utilisation of (national) resources. Development initiatives shall be based on these (development) plans.’[872]

The FYDP does not focus on a particular field, discipline, or region but aims at the implementation of various key policies at the national level with the contribution of an extensive range of public authorities simultaneously.[873] In fact, the ‘IXth Development Plan’ (IXth DP), defines the nature of the document as ‘…Turkey’s principal policy instrument, which adopts a holistic approach and aims to ensure economic, social and cultural transformation in Turkey.’[874] It can therefore be argued that the FYDP incorporates an extensive range of county-specific policies all of which impinge upon each other. In order to ensure a pluralist approach and a harmonious application of the FYDP following its

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[871] Turkish Ministry of Development, State Planning Organisation.
www.dpt.org.tr

[872] TC (n 73) Article 166 (1).

[873] The ‘IXth Development Plan of Turkey (2007-2013)’, Official Gazette No: 26215, Dated: 01.07.2006 (IXth DP).
See also: Turkish Ministry of Development, ‘IXth Plan (2014-2018)’, Guidance Book on Ad Hoc Commissions, July 2012.

[874] IXth DP (n 916).

adoption, the drafters of the FYDP, the Turkish State Planning Organisation under the Turkish Prime Ministry of Development, draw upon various 'Ad Hoc Reports' at early stages of the preparation of this policy document. Each Ad Hoc report aims to address issues and concerns in that particular discipline and discuss how it can contribute to achieving the fundamental objectives of FYDP's. Competition law and policy is one of the disciplines to produce Ad Hoc Reports for the purposes of the FYDP. Since 1994, the TCA has drafted and submitted three individual 'Ad Hoc Report on Competition Law and Policy'.[875]

The IXth DP boldly states its objectives as ensuring '... sustainable economic development, a fair distribution of income, enhanced competitiveness at the global level, an intelligent society, the completion of the alignment process for EU membership'.[876] On the other hand, the currently effective 10th DP states its priority as '...long-term, steady and inclusive economic development in order to enhance the welfare of Turkish society and ensure their fundamental rights and freedom are met'.[877] Having established the fundamental objective of the FYDP's as 'enhancing economic development', question remains as to how competition law relates to this fundamental goal. The Xth DP clearly establishes a link and states that enhanced productivity and efficient allocation of resources have a direct impact on economic development, and these objectives cannot be pursued in the absence of economic freedom and private entities.[878] It was discussed in Chapter III that economic freedom and the right to establish and operate private entities are secured under the current constitution, TC 1982. Turkish competition law, among other objectives, aims to ensure there are no barriers to private entities

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[875] Turkish State Planning Organisation, 'VI^Ith Development Programme, Ad Hoc Report on Competition Law and Policy' Ankara, 1996; Turkish State Planning Organisation, 'VIIIth Development Programme, Ad Hoc Report on Competition Law and Policy' Ankara, 2000; Turkish State Planning Organisation, 'IXth Development Programme, 2007-2013, Ad Hoc Report on Competition Law and Policy' Ankara, 2007.

[876] IXth DP (n 916).

[877] X^th DP (n 916) emphasis added.

[878] ibid

to operate in Turkish markets. Therefore, objectives of competition law, such as ensuring economic freedom, enhancing productivity and efficient allocation of resources, are perceived as tools to achieve long-term economic development and enhance the welfare of Turkish society. The currently effective FYDP, although not based on an 'Ad Hoc Report on Competition Law and Policy' like its predecessors, incorporates a provision on the role of competition law in reaching the fundamental objectives of the Xth DP, and points out various industries in this respect.[879] Article 616 of the Xth DP states, in order to achieve economic development

> '...competition rules shall be applied effectively. To this end, agreements, concerted practices, and decisions that restrict competition, the abuse of a dominant position, and mergers and acquisitions that restrict competition significantly are all prohibited.'[880]

Following this, the document argues for a rigorous application of competition rules to ensure lower prices and higher quality of goods and services in various industries and markets such as: food and agriculture;[881] electronic communications;[882] science, technology and innovation;[883] energy;[884] transportation and logistics;[885] intellectual property rights;[886] construction;[887] and, tourism.[888]

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[879] ibid

[880] Xth DP (n 916) Article 616.

[881] Xth DP (n 916) p 98-102.

[882] Xth DP (n 916) p 95-98.

[883] Xth DP (n 916) p 85-87.

[884] Xth DP (n 916) p 176.

[885] Xth DP (n 916) p 105-107.

[886] Xth DP (n 916) p 94-95.

[887] Xth DP (n 916) p 114-117.

[888] Xth DP (n 916) p 182-184.

Competition law and policy, together with other fundamental economic and social policies, has been incorporated within all the FYDP's since the adoption of Turkey's first legal framework on competition in 1994. Nonetheless, as opposed to substantive rules on competition or the legal framework set for privatisation matters examined previously in this chapter, the FYDPs do not accommodate a balancing exercise between competition law and other public policy objectives. Essentially, it sets a link between competition law and other policy objectives, and ultimately to the primary objective of enhancing development in Turkey and establishes a 'web' of various policy goals. This relates to the discussion which took place in Chapter I, and confirms the 'map' on the objectives of Turkish competition law submitted accordingly. Competition law, as much as it accommodates public policy goals, also help achieve these non-competition law objectives.

5.6 Conclusion

In light of relevant national case-law, it became apparent that public policy objectives have been considered under the legal framework for competition law in Turkey. This confirms the thesis proposed in Chapter I that Turkish competition law does not represent stand-alone legal principles, but reconciles with overarching 'constitutional' objectives as well as with political and public policy goals.

Examples of how public policy objectives can be incorporated under competition rules demonstrated that the two competing objectives were reconciled not only under the substantive rules of competition, particularly under Articles 5, 6 and 7 LPC, but also under the Turkish legal framework for privatisation and the FYPD adopted in line with Turkish Constitution of 1982.

Nevertheless, in light of the relevant legal instruments and case-law on the matter, it was noted that there is a lack of clarity and consistency concerning the framework for assessing whether a 'restriction of competition' exists and the way

in which the 'balancing exercise' should be conducted. One of the problems is concerned with establishing 'the' objective of competition law against which public policy goals are to be balanced. While in some cases non-competition objectives were balanced against the objective of 'protecting the process of competition', cases which conducted the balancing exercise under Article 101(3) reconciled the objective of 'enhancing efficiency' with public policy concerns. Furthermore, there is a lack of clarity concerning 'when' public policy objectives can be considered under competition rules. For example, should we expect competition intervention when there is a reduction of the consumer welfare or the total welfare standard? This is important in terms of ensuring the legitimacy of decisions assessed under competition rules, both by the TCA and the Administrative Court of Ankara as the appellate court.

In terms of the 'relationship and influences' between the Turkish and the EU competition law systems, as understood and defined by Watson, in the specific context of the assessment of public policy objectives against pure competition concerns, although one can note certain similarities, Turkish competition law seems to depart from its EU counterpart by virtue of 'privatisation' cases as well as the FYDP. The current discussion takes place against a complex background of national case law concerning the manner in which public policy objectives are reconciled with competition concerns under the legal framework for privatisation matters. The apparent 'disharmony' between the legal framework and relevant case-law calls for 'review' of the Communiqué on Privatisation which establishes a clear framework for legal assessment. Ultimately, problems associated with the 'balancing' public policy objectives against competition concerns can be solved by establishing 'the objective' of Turkish competition law and the standard(s) adopted in assessing what constitutes a 'restriction of competition' under Turkish competition law. A framework for assessment is necessary for the determination of an 'ultimate objective' against which each and individual policy objective can be 'weighed' in order to allow for a comparison of inherently diverse objectives and highlight country-specific legal, social, economic and public policy concerns that differs from that of the EU.

6 CONCLUSION

CONCLUSION

This thesis aimed to analyse one particular question: ‘Is the European Union Competition Law Regime Suitable for the Republic of Turkey: Does One-Size Fit All?’ The depth and nature of this research question, and the adopted methodology, have led to the examination of the question under six individual chapters, each with its own specific objective but ultimately all inter-connected to each other. This final conclusion seeks to re-visit each chapter with a view to extracting findings reached under each individual chapter, and to understanding how these findings relate to and connect with one and another, and, to ultimately, proposing final conclusions.

Chapter I:[889] The very first piece of the thesis, Chapter I, centrally aimed at understanding the broader context within which the research question takes place and to drawing the contours of the problem. Most importantly it wanted to understand how the issue of the adoption of a ‘model’ competition law has been perceived in academic literature. Firstly, the examination of the important question under Chapter I, ‘Is Turkey Alone?’ lead to the fundamental observation that the legal phenomenon of the adoption a foreign ‘model’ competition law by jurisdictions with little or no exposure to this particular field of law has not been not limited to the example of the Turkish competition law regime, but extends beyond this jurisdiction remarkably.

The most striking outcome of this global legal phenomenon for the purpose of this thesis has perhaps been two things: an extensive and substantial body of scholarship generated in the field; and, a body of work conducted by international bodies and institutions to produce normative standards as a response to this legal development in practice. Among others, ‘*The Internalisation of Antitrust Policy*’

[889] Chapter I, p 24-60.

by Dabbah,[890] '*The Design of Competition Law Institutions: Global Norms, Local Choices*' by Fox and Trebilcock,[891] and '*Global Competition: Law, Markets, and Globalization*' by Gerber have not only displayed legal problems that have emerged with the practice of adopting model competition laws but have also introduced a new strain of scholarship which is mainly referred to as 'the internationalisation of competition law'.[892] This strain of scholarship, which centrally proposes a more coherent and unified approach in the provision of 'international' legal principles on competition coupled with the work of international bodies such as the OECD and UNCTAD that aim to provide a platform for developing 'internationally recognised' normative principles in the field are considered as a reflection of what has developed in practice and an insight into legal problems that been generated by practice.

Nevertheless, questions remain as to how these conclusions relate to the central research question of this thesis. In this context, three fundamental observations extracted from legal scholarship and work of international institutions on 'the internationalisation of competition law', all examined under Chapter I, influence the direction of this thesis and the way in which the proceeding chapters shall examine the central research question.

Firstly, it is concluded, the problem that this thesis aims to examine, i.e. the adoption of the EU competition law 'model' by Turkey, appears to have been a legal issue faced by many jurisdictions globally. This problem has emerged an extensive body in literature, produced by both scholars in the field and by non-governmental international institutional, and has led to the appearance of a new strain of scholarship that is referred to as the 'internationalisation of competition law'. While this extensive body of work is insightful in terms of informing legal

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[890] Maher M. Dabbah, *The Internationalisation of Antitrust Policy* (n 78).

[891] E. Fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (n 96).

[892] D. Gerber, *Global Competition: Law, Markets, and Globalization* (n 78).

problems that prevail in this particular area of competition law, it also reveals the lack of any study that examines whether and to what extend these 'model' competition laws are suitable for and applicable by individual jurisdictions, and a competition law 'model' is perceived at the national level. This means that the legal study and research at hand is an attempt to fill in an existing gap in this context.

Secondly, one of the most controversial and problematic legal issue in the context of 'the internationalisation of competition law' appears to be the matter of the 'objectives of competition law'. Despite an extensive body of work by scholars and international institutions in support for the harmonisation of competition law under a more coherent and principled approach, divergences seem to prevail mostly in regard to the objectives pursued by individual competition law regimes. Perhaps, this relates back to the problem of the lack of a study conducted at the national level with respect to the suitability of 'model' competition laws. If the divergences in objectives law mainly stem from the 'political dimension' of competition law, a policy choice adopted by individual jurisdictions in accordance with their socio-cultural background and setting, as posited by relevant scholarship, this particular problem may be considered as a viable and unique method for the examination of whether and to what extend 'model' competition laws are suitable for and applicable by 'host' jurisdictions.

Thirdly, examination under Chapter I reveals that any study on competition law requires an initial understanding on economic concepts and normative principles on competition. Based on this observation, this issue shall be examined in later chapters.

Chapter II:[893] While Chapter I aimed at examining how in practice the adoption of model competition laws has emerged and its reflection on written literature,

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[893] Chapter II, pages 61-91.

both in terms of academic scholarship and work of non-governmental international bodies, Chapter II turned its face to the theoretical aspect of the matter in order to understand the way in which legal and social theorists explain and perceive the recent legal practice we have observed in Chapter I.

In this light, Chapter II examined all related theories on the matter and drew this broader picture: Theoretical explanations in relation to the practice of the 'adoption of foreign laws' mainly belong to one of three central strains of scholarship. Legal and social theorists have discussed this problem under: the law and development movement; the theory on law and society; and, evolutionary theories of law. Primarily, under all the three strains of scholarship one observation is made. Although the practice of adopting a model competition law relates back to the near past, as observed in Chapter I, social and legal theorists explain that this is not a practice of 'modern' times. This is mainly demonstrated by theorists with the influence of the *Corpus Juris Civilis* on the development of civil law in continental Europe, and the spread of Roman law from continental Europe to Quebec, Louisiana, South America, South Africa and Japan.[894]

In the particular context of the Turkish legal system, nonetheless, Friedman explains the theory behind Ataturk's legal reform process, and the 'injection' of several continental European laws into the Turkish legal system, with the theory on 'law and development'. His theory relies on the assertion that the Turkish example of 'borrowing of law' by way of 'law reform' and relies on the premise that modernisation of law eventually leads to social and economic development. In essence, Friedman[895] relies on the guiding assumption of 'law and

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[894] A. Watson, 'The Definition of Furtum and the Trichotomy' (n 146); A. Watson, 'The Development of Marital Justifications for Malitiosa Desertio in Roman-Dutch Law' (n 146); A. Watson, 'Some Cases of Distortion by the Past in Classical Roman Law' (n 146); A. Watson, 'The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership' (n 146).

[895] Friedman, p 62-66.

development' theorists Trubek and Galanter,[896] who postulate the instrumentality of law in the transformation of society and economic development. Accordingly, law can be consciously designed to achieve particular social purposes and works as both an instrument and element of social change. This premise relies on the assertion that some legal systems are better than others with respect to a particular aspect described as 'modernity' as they reflect the most advanced ideals and values and this will eventually be reflected on the jurisdiction borrowing this legal system. Although Trubek and Galanter's assertion provides a plausible theory that explains the practice of adopting foreign laws, particularly those conducted as a part of a national 'modernisation process', it lacks to set a theoretical link between law and development and the explanation of how law is able to facilitate this transformation in societies and eventually economic development.

Rodrik, however, successfully fills in this gap with 'Getting Interventions Right', in which he searched for Korea and Taiwan's exceptional economic performance during the 1960's.[897] His explanation for the question, 'Why have so many developing countries with similar legal and economic reform programmes failed miserably, while South Korea and Taiwan's have flourished?', centrally relies on the vital role of 'social indicators' in the broader scheme of things.[898] Key to his findings is the unique 'social infrastructure' of South Korea and Taiwan, such as school enrolment and literacy rates, the abundance of relatively skilled labour, and exceptionally high degree of equality in income and wealth, and its affect on these countries' economic and legal reform programme.[899] Rodrik's multi-disciplinary research and his findings are unique and exceptional in that he uncovers the missing element in legal reform programmes, the component that prevents adopted 'foreign law' from facilitating social and economic transition. Rodrik's

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[896] Trubek and Galanter, p 66-72.

[897] Rodrik, Getting Interventions Right (n 128).

Rodrik, p 72-74.

[898] ibid

[899] ibid

proposition is that the link between 'modern law' and development is social infrastructure, which binds the two together and ultimately facilities development, both economically and socially.

While Trubek and Galanter's theoretical framework for 'law and development' and Rodrik's 'Getting Interventions Right' together provide a convincing theoretical explanation for the 'adoption of foreign laws', Watson makes a persuasive argument on the way in which 'comparative legal work' should be carried out and presents a methodology in this context. Most strikingly, his criticism on 'incidental descriptive work' exposes how comparative work in the 'conventional' sense lacks a systematic explanation of differences and similarities between legal rules and legal approaches in various legal systems. As a response to this problem, Watson introduces 'legal transplants' as a legal study based on his perception that 'comparative legal work' is a broader study of the relationship and influences between rules of individual legal systems, and the most coherent and principled approach for tracing this relationship is the examination of 'actual influences' that have taken place between one legal system and another. Ultimately, he relies on his extensive research on the 'growth of law', 'legal development', the examination of how legal systems grow and develop over time, what factors lead to this change, and, whether and to what extent society's needs influence this development, to come to the following concluding remark: actual influences on any legal system take place over a period of time, and, for this reason, comparative law will have a large historical component.

While the first two strains of scholarship discussed under Chapter II provided theories explaining the 'transplants of law', as described by Watson, and how this relates to social and economic development, the third line of scholarship, the school of 'law and society', proposed social theories on whether and to what extent law responds to social change and development, and vice versa. In this connection, the most striking and influential theoretical explanations stretches from Weber's separation between 'modern' and 'non-modern' systems of law based on the notion of formal rationality; Durkheim's premise on the role of individuals of society as a vehicle in developing modern law and modern society;

and, all the way, to Main's theory 'from status to contract', i.e. his thesis that explains the movement of modern progressive societies with the recognition of individuals' rights and obligations in society. The more contemporary theories on 'modern law and modern society', such as Parson's proposition and description of 'universalistic legal systems', further explained by Galanter's 'traits of modern law', on the other hand, attempt to make a straightforward description of the characteristics of modern legal systems instead of providing theories on the affiliation between law and society. Fundamentally, their theory explains uniformity, universality, predictability, and rationality as the fundamental traits of modern legal systems.

Overall, therefore, Chapter II contributes significantly to the construction of this thesis with three fundamental outcomes. Firstly, 'the theory on law and development' constructed by Trubek, and Merryman provides the premise behind the 'borrowing of foreign law': national legal reform process in most jurisdictions incorporates the adoption of foreign laws on the premise that it leads to development. And although this proposition lacks the explanation of how law facilitates development, Rodrik's successful observation in this context fills in this theoretical gap and exposes the critical role of the cultural dimension of law and how it plays as a catalyst between 'modern law' and development. This conclusion, albeit conceptually different, relates back to the observation made under Chapter I on the importance and role of the political dimension of competition law and how it has been neglected in legal literature and research. The proposition by 'law and development' theorists, however, submits a theoretical explanation to the premise behind Turkey's, and many other jurisdictions', adoption of a 'model' competition law, and the analogy can be made that the EU competition law 'model' has been adopted in by jurisdictions in order to further social and economic development. Rodrik's conclusion, on the other hand, relates back to the observation made under Chapter I on the relevance and importance of the 'cultural dimension' of law and its possible implications for the objectives of any competition law regime.

Secondly, Watson's criticism on 'incidental descriptive work' and his proposition on 'comparative legal studies' exposes difficulties associated to legal studies that involve the examination of more than one jurisdictions and further present a plausible methodology for the assessment of whether and to what extent the EU competition law is suitable to Turkey. In this light, the comparative legal work for the purpose of this thesis aims to examine actual influences of EU competition law on the Turkish competition law regime that took place over a period of time, with a particular focus on the objectives of each competition law regime, and, will, therefore, hold a historical component. As proposed by Watson, in this context, as a part of this methodology, the questions of how, when, and why the 'transplant' has been made shall be examined to uncover patterns and divergences that have occurred over a period of time between the two legal systems.

Thirdly, the proposition of a 'universalistic legal system' and description of the traits of 'modern law' by social theorists, such as Parsons' Durkheim and Weber, resonate to the more contemporary works of Dabbah and Gerber on the internationalisation of competition law examined under Chapter I, and both strains of scholarships provide theoretical frameworks against which the 'model' EU competition law system can be legally assessed in later chapters.

Chapter III:[900] Chapter III is mainly based on the insightful remarks concluded under previous chapters, both in terms of its methodology and its subject of examination. The first section of Chapter III relates to Watson's proposed methodology on 'comparative legal work', analysis and provides the historical component of this thesis: the bilateral relationship between the EU and Turkey. This relationship starts with the Association Agreement of 1963 (AA), which aims to the establish an 'economic association' or a 'common economic unit' between the EU and Turkey (Parties) based on a closer coordination of economic

[900] Chapter III, pages 92-128.

policies.[901] Its objective to establish 'economic co-operation' differs from 'economic integration' as utilised and interpreted under EU law. Even though the AA and its Additional Protocol incorporate provisions on social objectives, such as the 'freedom of movement of workers', it is clear from the interpretation of the AA by the 'Council of Association for the EU and Turkey' and by the case-law of the EU Courts that the AA is intended to carry out a 'sole economic purpose'.[902] In the specific context of competition law, however, it is still the first piece of bilateral legal document to require the approximation of the competition rules of Turkey with that of the then European Community, and that competition rules of the Treaty of Rome are made applicable between the Parties. Regardless of whether, in effect, the AA lead to the adoption of a competition law regime in Turkey, it still stands as the initial legal basis for the 'transplant' of competition law. Nevertheless, the lack of this legal transplant, was filled in 1994 to comply with Decision No. 1/95 of the EU-Turkey Association Council of 1995 (Decision No. 1/95),[903] when Turkey adopted its first competition statute the Law on the Protection of Competition (the LPC).[904] Similar to the objective under the AA to form an economic association between the Parties, Decision No. 1/95 frames the rules of, this time, a 'customs union' arrangement. However, even though the Parties refer to the Decision No. 1/95 as a 'customs union' arrangement, it is questionable whether it can be referred to as a customs union agreement in the traditional legal sense. In addition to provisions typically found in customs union arrangements, Decision No. 1/95 incorporates legal provisions that require Turkey to apply similar rules and implementing measures to those of the EU's commercial and customs tariff policies in relation to third countries,[905] and particularly to align its domestic law with those of the EU in the fields of intellectual, industrial and commercial property rights, and competition and state

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[901] Association Agreement (n 1).

[902] Opinion of Advocate General Bot delivered in, Case C-371/08 *Nural Ziebell* (n 220).

[903] Decision 1/95 (n 2).

[904] LPC (15)

[905] Decision No. 1/95 (n 15), SECTION III 'Commercial Policy', Article 12(1).

aid law.[906] This broad scope of Decision No. 1/95 brought by another legal 'reform process' in Turkey similar to that of Ataturk's modernisation process. Yet, following Turkey's recognition as an EU 'candidate', and, the adoption of the Accession Partnerships and the 'National Programmes Concerning the Adoption of the *Acquis Communautaire*' of 2001, 2003, and 2008 respectively,[907] the Turkish 'legal reform process' extends to include not only the *acquis communautaire* (*acquis*) for competition rules but also the *acquis* in many other areas of law.[908] Although legal problems exist with the these bilateral documents, such as the lack of, to date, 'implementing rules' on competition, required by the AA and Decision No. 1/95, that would apply to conduct with an impact on both the EU and Turkey, and also the controversial discussion in Turkey concerning the ambiguity of the legal nature of Decision No. 1/95, with the progress made over the years Parties agreed on the 'Negotiating Framework'.[909] This is the final document in the sphere of bilateral agreements between the Parties and imposes on Turkey the adoption and setting of further legal and institutional framework in Turkey, and, more importantly, to ensure the timely and effective implementation of the *acquis* at the national level. Undoubtedly, this 'modernisation process' has led to the most extensive and in-depth 'borrowing of laws' in Turkish legal history, again, with the premise that it facilitates legal, economic and social development.

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[906] Decision No. 1/95 (n 2), CHAPTER IV, 'APPROXIMATION OF LAWS', Section I, 'Protection of intellectual, industrial and commercial property', Article 31.

[907] The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2001/2129, 19 March 2001; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No: 2003/5930, 23 June 2003; The Council of Ministers Decision on the 'Turkish National Programme on the Adoption of the *Acquis Communautaire*', No:2008/14481, 10 Nov 2008.

[908] See (n 266).

[909] The 'Negotiating Framework', Luxembourg, 3 October 2005. The Negotiating Framework can be reached at: < http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf>.

The second section of Chapter II further elaborates and expands more on methodology. While it still follows Watson's theory on 'transplant of law' and his methodology for 'comparative legal work', it further examines whether and to what extent a research methodology conducted with a particular focus on the objectives of the two competition law systems, i.e. of the EU and Turkey, is feasible in terms of assessing the suitability of the EU competition law 'model' to Turkey. In light of the analysis of theories behind the objectives of competition law, conceptually and normatively, recent academic conferences and legal scholarship, and, the work of international bodies on this particular matter, it highlights the relevance and suitability of the objectives of competition law as a method for the purpose of this thesis[910], but, more fundamentally, encapsulates the relevance and usefulness of this topic with a quote from Maurice Stucke: 'competition law serves different purposes for different constituents depending on the circumstances surrounding the relevant competition law regime in a given jurisdiction'.[911] Based on this analysis, it concludes affirmatively that the comparative legal study at hand shall be conducted through the examination of the objectives of the EU and Turkish competition law regimes.

Having established the legal basis for the 'transplant' of EU competition law in Turkey, and convincingly argued the relevance of the objectives of competition law for the purpose of this thesis, section three lays out a 'roadmap' to follow. This roadmap centrally relies on the concluding remarks under Chapters I, II and III, and a *prima facie* examination of legal instruments establishing the competition law regime in Turkey.

The roadmap for assessing the suitability of the EU competition law regime to Turkey: A comparative legal study based on the objectives of the two competition law regimes

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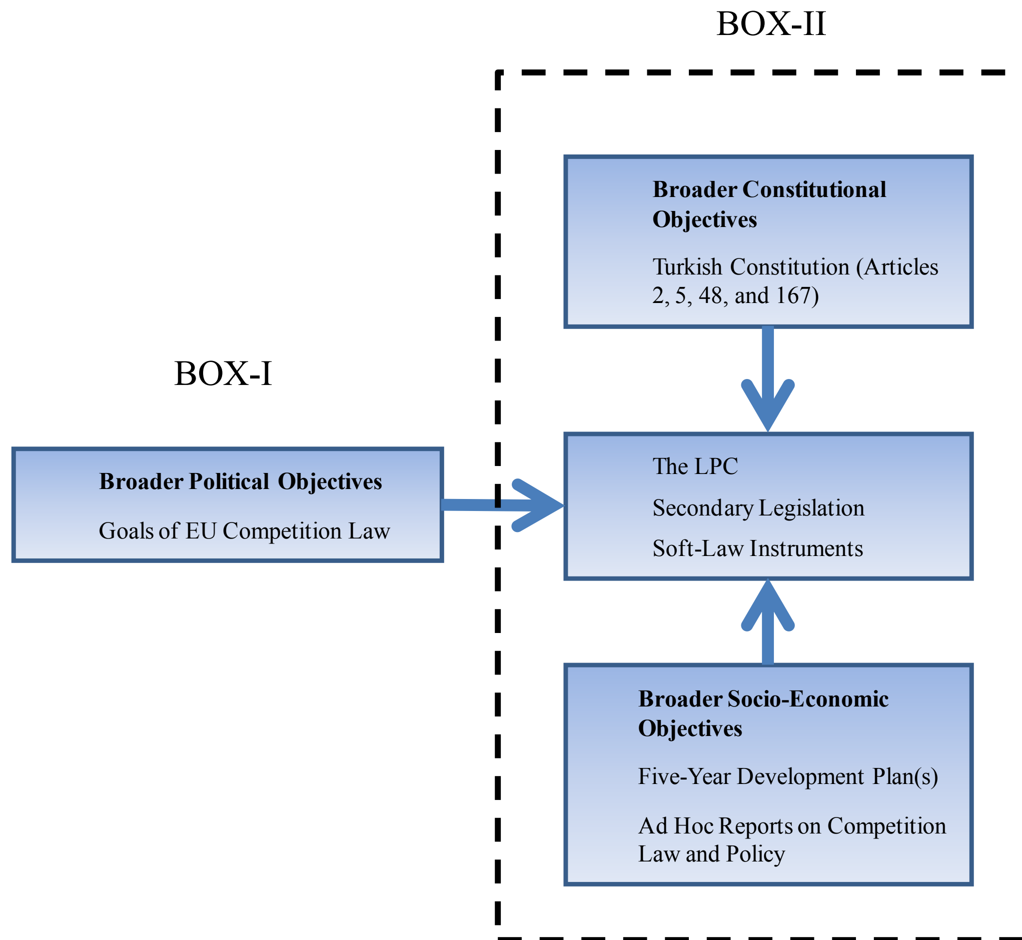
[910] Academic scholarship and Academic conferences (n 290).

[911] M. E. Stucke, 'Reconsidering Competition and the Goals of Competition Law' (n 32).



According this roadmap, the remainder chapters shall examine the objectives of first the EU and then Turkish competition law system.

The third and final section of Chapter III examines relevant economic terminology and legal doctrines that have been concluded earlier under Chapter I as an indispensible part of any competition law study. Initially, the analysis of fundamental definitions and concepts reveals the inter-disciplinary nature of competition and the relevance of both economic and non-economic objectives under competition law analysis. More importantly, however, it exposes contradicting objectives underlying each economic theory and how this may lead to a conflict under competition analysis.

In this context, mainstream neoclassical economic theory explains that among the two fundamental economic theories, allocative and productive efficiencies, while allocative efficiency focuses on the optimal allocation of the resources of an economy, under the productive efficiency criterion efficient firms who produce at a lower cost will not be prevented from taking business away from less efficient ones. Conflict between the two efficiency objective occurs when achievement of productive efficiency is not a Pareto improvement, as the less efficient firms are made worse off. Innovation economics, on the other end of the spectrum, however, defines dynamic efficiency as a process of innovation and technological progress in a market achieved through invention, development, and diffusion of new products. Again, when the Pareto-criterion is satisfied neither with productive efficiency nor with dynamic efficiency the two objectives will clash.

At this point, Chapter III sheds light on the question of how efficiency gains relate to 'welfare standards', and, to, the more important matter of, the objectives of competition law in general. The two fundamental remarks in this context are that, first, there is no commonly accepted or agreed efficiency objective under competition, and, second, the problem of trade-offs between individual efficiency goals relates to notion of 'welfare standard'. This means that, neither theoretically nor normatively, there exists a 'choice' of efficiency objective, and the 'standard of welfare' is measured against the designated efficiency goal. Thus, 'welfare standards' represent a particular efficiency criterion under which prosperity is measured.

This clarification leads to further questions concerning the demarcation between the 'consumer welfare' *versus* the 'total welfare' standard. Relevant literature clearly reveals the paradox between the two standards, particularly in the context of the objectives of competition law, mainly caused by the criterion of whether the transfer of surplus between consumers and producers are allowed: while the consumer welfare standard is based on the theory that the redistribution of wealth in the form of wealth transfer from consumers to producers is incompatible with the 'consumer welfare goal' under competition law, the theory of 'total welfare

standard' allows the transfer of surplus between consumers and producers as it is primarily concerned with the totality of surplus.

If individual efficiency objectives and welfare standards cannot be pursued at the same time, as submitted by the theory of neoclassical economics, question remains as to which economic and non-economic objective(s) are adopted by the EU and Turkish competition law regimes and how they are accommodated under competition rules. The examination in this chapter of theories underlying economic objectives, i.e. efficiency gains, objectives behind each efficiency goal in terms of its perception of surplus transfer, and how these objective relate to and form 'welfare standards', submit the necessary background work the following chapters to analyse how these objectives are perceived under the EU and Turkish competition law regimes. This observation designates the fundamental questions in relation to the economic objectives of these two competition law regimes: whether a 'consumer welfare' standard based on the Pareto-criterion, or a 'producer welfare' with a 'total surplus' concern has been adopted; what are its implications for the meaning and application of the EU and Turkish competition law regimes; and, how do these economic objectives relate to non-economic goals?

Chapter IV: This chapter illustrates the first leg of the 'roadmap' submitted in Chapter III, and, in this line, aims to answer the following question: What are the objectives of the EU competition law regime? Although, in abstract, this question may resonate to a 'narrow' problem concerning the demarcation between the 'economic' and 'non-economic' objectives and how these objectives are pursued under the EU competition law system, the entire discussion under Chapter IV has led to a much extensive theme with broader implications for the meaning and application of competition rules in the EU.

First of all, the unique legal, institutional, and political framework founded by the EU Treaties, within which competition rules operate as an essential component, has led to the interpretation of competition rules in the light of the broader objectives framework and particularly of the 'single market' goal. The market

integration objective, clearly not defined under the neo-classical economic theory, is the first indicator of public-policy objectives under the EU competition law system. Moreover, cases such as *Meca Medina* and *Wouters* have displayed how public policy objectives, based on a public interest test, have been accommodated under competition rules and balanced against the objective of ensuring the competitive process.

Non-efficiency objectives shortly discussed in Chapter III, but left to be examined in the particular context of EU competition law, has appeared in Chapter IV in various forms. A number of objectives pertinent to the doctrines of 'fairness' and 'equality' are observed under relevant case-law mainly in the form of the 'right to enter markets', 'maintenance of the competitive structure of markets' and the 'prevention of exclusionary effects'. Markedly, these objectives have been perpetually and constantly adopted by EU Courts over the years and can be referred to 'establish case-law'.

The fundamental problem on the economic objectives of EU competition law, however, emerges in the context of efficiency objectives and the 'consumer welfare' goal. Since the Commission embarked upon the 'more economic approach' to EU competition law, inconsistencies have arisen between the EU Courts and the Commission on the definition of the notion of and the role of 'consumer welfare' in this context. The Commission's 're-defined' notion of 'competitive harm' now rests on a delimited 'consumer welfare standard', whereas EU Courts have retained their understanding that 'consumer surplus' is not the exclusive objective and legal criterion in the application of EU competition law. Even though EU Courts have regularly had recourse to mainstream economics and have conducted formal economic analysis under competition rules their understanding of 'consumer harm' is not limited to the welfare of consumers in the form of reduction of 'consumer surplus' as defined by the neo-classical economic theory, but has a broader meaning to include indirect harm to consumers such as harm to the competitive process or to the structure of competitive markets, or exclusion of competitors. This means that the same conduct may be subject to a different legal and economic assessment by the

Commission when compared to the assessment conducted by EU Courts. Undoubtedly, this is problematic in terms of legal clarity, unity, transferability, and may lead also to problems of procedural unfairness under the EU legal and institutional framework under the EU competition law system. More importantly, it casts shadow on the suitability of the EU competition law system as a 'model law' for other jurisdictions. The 'traits of modern law' defined by early social theorists Durkheim and Weber, as well as contemporary legal theorist Galanter, all refer to uniformity, predictability, rationality as common and indispensible feature of modern of law that is suggested to enhance social and economic development. Thus, the existing problem concerning inconsistencies between the Commission and EU Courts is not only problematic for the EU competition law regime itself, but also for jurisdictions adopting the EU competition law model. In the case of Turkish competition law, for example, inconsistencies between the Commission and EU Courts concerning the objectives of EU competition law lead to problems because of the limited role of Turkish Courts as the first instance and appeal courts over the decisions of the TCA. Unlike EU Courts, Turkish Administrative Courts are not able to conduct a comprehensive review of the TCA's legal analysis. This means that, as a part of the EU *acquis communautaire* the TCA is able to adopt standards of either the Commission or the EU Courts, or perhaps even both views, and this approach would not be subject to legal review by Turkish Courts. This is a problematic situation especially in jurisdictions like Turkey which suffer from the proper functioning of the principle of the 'rule of law' and are susceptible to misuse of powers allocated to administrative authorities. Undeniably, no competition law system is free of legal uncertainties and challenges. However, ensuring clarity and consistency as fundamental tenets of a 'model law' may assist and encourage 'adopting' jurisdictions with a 'weaker' institutional and judicial system to build a credible legal system.

Another remarkable conclusion under Chapter IV, the examination of the objectives of EU competition law, has led to the observation that the way in which objectives of competition law, in the form of economic and legal standards, are applied, strongly relates to individual jurisdictions' reading and interpretation of substantive rules. This is best illustrated with EU Courts' division between 'by

object' and 'by effect' restrictions of competition, its further expansion of the legal test for 'competitive harm' based on this distinction, and application of legal and economic standards accordingly. Key to this observation is conclusion that the way in which objectives and standards of competition law, depends on how substantive rules are understood and interpreted. The mere provision of substantive rules in a 'model' competition law may leave this point unattended and lead to complications and legal uncertainty in the application of rules by the host jurisdiction.

Ultimately, in light of the observation of both economic and 'non-economic' objectives adopted under the EU competition law regime, and how these objectives function in the application of competition rules, Chapter IV submits a paradigm on the 'objectives of the EU competition law regime'. Rather than a classification based on 'efficiency' *versus* 'non-efficiency' concerned objectives, this paradigm groups the objectives on the basis of their role and function in the application of competition rules. According to this chart, the first group, referred to as the 'intermediary objectives of EU competition law', is formed by goals that function as economic and legal 'standards' in assessing the legality of conduct under competition rules. These objectives are key elements of this paradigm in that they all contribute towards achieving the ultimate objective of EU competition law as stipulated under Protocol No. 27, i.e. 'ensuring undistorted competition'. These two groups of objectives, which represent the instrumental role of competition rules, ultimately work for the attainment of the 'end goal' of the broader European legal, economic and political system, promoting 'the well-being of the people of Europe'.

Chapters V and VI:[912] Under BOX II of the roadmap, these chapters examine the objectives of the Turkish competition law system. Chapter V analysis initially sets the constitutional basis for competition law in Turkey with reference to the Turkish Constitution of 1961 and 1982 and the primary legislation on competition.

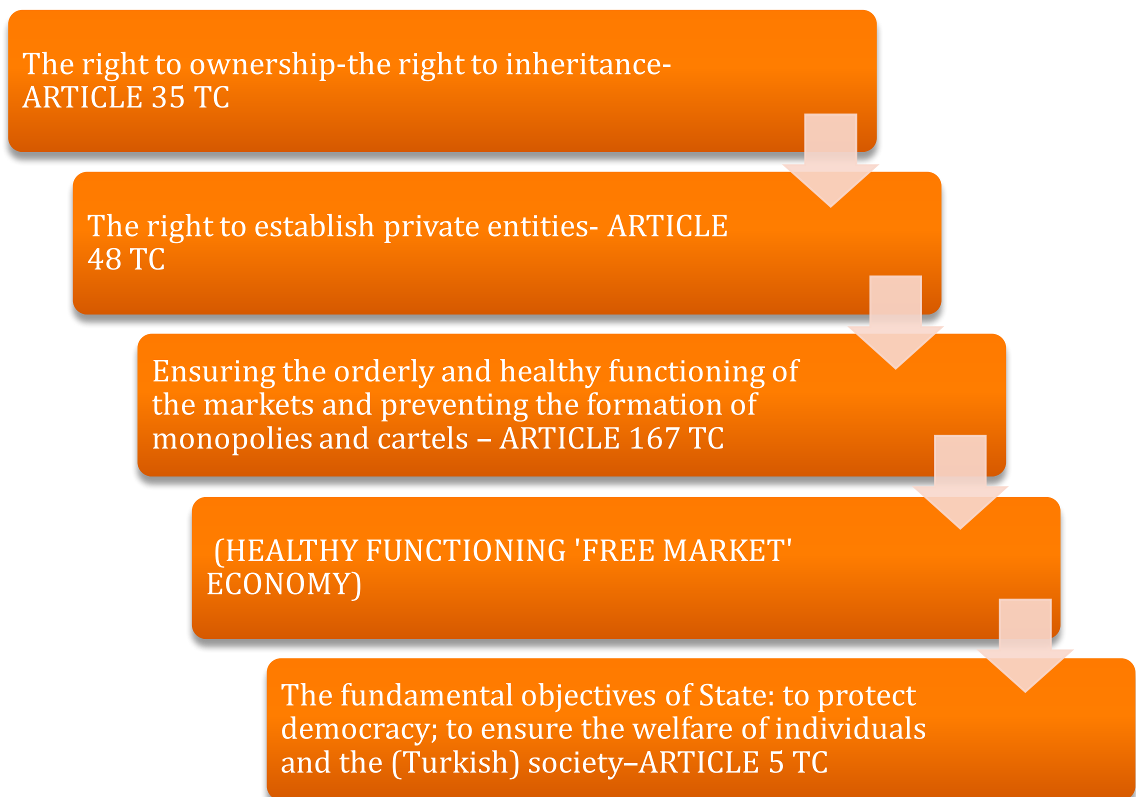
And although the Turkish Constitution of 1961 marked the beginning of a new political and economic thinking in Turkey, it established a 'planned economic system' that did not contain the necessary legal and economic foundations for the establishment of competitive Turkish markets within which competition rules would have applied. This leads to questions concerning the appropriateness and legal effectiveness of the Association Agreement of 1963, at that time, and particularly its provisions that require the adoption of common and national rules on competition to be applied between the parties at the national level in Turkey respectively.

On the other hand, the Turkish Constitution of 1982 (TC 82) introduces the 'Social State' model as the societal order that the State aims to establish and ensure, and provides the legal constitutional foundations of a free market economy in Turkey. While provisions on economic rights and obligations of individuals, which, in a way, relate back to the earlier discussion on the evolutionary theorists' proposition on the connection between the recognition of individuals' rights and obligations on one hand and the development of 'modern law' on the other, Article 167 TC 82 specifically stipulates State's obligation to ensure the orderly and healthy functioning of markets and to prevent cartels and monopolies. Somewhat similar to the institutional, social and legal framework under the EU Treaties, each individual provision of the TC 82 ensures the achievement of 'ultimate' objectives. Principles concerning individuals'

[912] Chapter V (p 199-246) and Chapter VI (247-306).

economic rights and obligations, and the State's obligations to ensure these economic rights and the healthy and orderly functioning of Turkish markets (Articles 35, 48 and 167 TC) all aim to ensure the ultimate objectives stipulated in Article 5 TC, i.e. ensure economic democracy and enhancing welfare of Turkish society.

This relationship was then illustrated in a paradigm with a view to understanding the instrumental role of competition law in Turkey and the constitutional framework within which competition rules operate in Turkey.



As it can be clearly noted from the chart above, the TC 82, albeit setting this constitutional framework, does not explicitly explain or illustrate how the healthy functioning of the free market will be ensured. At this point, a proposition is made for the amendment of the TC 82.

Following this, Chapter V makes a fundamental observation under the Law on the Protection of Competition (the LPC), the primary Turkish legislation on competition, which, in its statement of purpose, makes reference to a list of both efficiency objectives and public policy goals. The problematic matter in this context is the adoption of a series of efficiency objectives, welfare standards and public policy objectives under this statement of purpose with no indication as to their role in the application of substantive rules. While the statement of purpose does make a clear distinction between the 'primary', i.e. efficiency goals and welfare standards, and 'secondary' objectives, i.e. public policy goals, this statement of the law-maker does not coincide with principles of the neoclassical economic theory as examined in Chapter III.

Under this statement, the law-maker of the LPC wants to achieve all three efficiency goals, allocative, productive and dynamic efficiencies, which, in their understanding, will eventually enhance both consumer and total surplus. However, Chapter III clarified that the Pareto-criterion is not applicable under all cases and welfare standards depend on the type efficiency-criterion is adopted. In addition to this conundrum, an up-front list of public policy objectives, comprising of the protection of 'Small and Medium Enterprises' (SMEs), enhancing market liberalisation and privatisation, combat inflation, promote entrepreneurship and fairness, leads to confusion and uncertainty as to their role in ensuring the protection of competition.

This, undoubtedly, shifts the focus of Chapter IV to the case-law of the Turkish Competition Authority (TCA) and Turkish Courts under national competition rules in order to understand if clarity has been brought to the role of efficiency gains and whether this paradox has been resolved in favour of a single welfare objective. Unexpectedly, however, this analysis reveals the introduction of the notion of 'social welfare' by the TCA, which was later endorsed by Turkish Courts, and the lack of a coherent approach in relation to the 'economic' objectives, i.e. efficiency goals, of Turkish competition law. While in many cases reference has been made to 'social welfare' as the ultimate objective of Turkish competition law, the TCA fails to present an economic explanation behind this

‘end-goal’ and on which efficiency criterion this objective is based. There have been cases where the TCA relates the ‘social welfare’ objective to: allocative efficiencies and the redistribution of income (BELKO); fundamental constitutional rights of the freedom of contract and the freedom to establish entities (İŞ-TİM); and, the loss in producer surplus (TÜRK TELEKOM). In some recent cases, the TCA attributed to the ‘consumer welfare’ objective, however, again, with no plausible economic explanation. This ambiguity and lack of a coherent and systemic approach on the role of efficiency gains and welfare standards in assessing the legality of cases have indeed been acknowledged by the TCA itself in IZOCAM and ROCHE.

Notably, another striking observation is the role of Turkish Courts as the first instance and appeal courts over the decisions of the TCA. Compared to EU Courts’ mandate, in that it is able to undertake a comprehensive review of the Commission’s legal analysis and to examine evidence posed by the Commission such as market definition and market power analysis, the Administrative Court of Ankara retains a ‘narrow’ ‘control of legality’. Clearly, this prevents the Turkish appeal court to provide further clarification on the problem of the ‘social welfare’ objective adopted by the TCA.

Chapter VI, which devotes its analysis entirely to public policy objectives, makes a division between public policy objectives accommodated under the substantive competition rules in Turkey, and, public policy considerations under other legal instruments of the Turkish competition law system. Strikingly, as opposed to the observation under efficiency goals and welfare objectives of Turkish competition law, the conclusion is made that public policy objectives have been successfully invoked under both categories of legal tools. The TCA has profoundly invoked public policy considerations, particularly under the exception clause, Article 5 LPC, and concluded that non-efficiency objectives, such as environmental concerns, improving conditions for SMEs and employment and other social opportunities, and, contribution to national export revenues and to the economy in general, are able to outweigh ‘harm to competition’.

A broader interpretation of the failing firm defence with stronger emphasis on its public policy aspect, compared to its perception under the EU competition law system, the existence of specific legal tools for privatisation matters under the Turkish competition law system, and the inclusion of competition rules within the 'Five-Year Development Programmes' may all be concluded as a successful demonstration of how the TCA has constructed the balance between the objective of undistorted competition, as worded under the TFEU, *vis-à-vis* non-efficiency objectives.

Nonetheless, in reconciling public policy objectives with the restriction of competition the TCA needs to take into consideration two points that have come to develop under the EU competition law system. The first one relates to the Commission's recent departure from the accommodation of legitimate 'non-efficiency' objectives under the exception clause Article 101(3) TFEU. The second point is concerned with the EU Courts' line of case-law in which it has applied the *Wouters* doctrine and balanced legitimate non-efficiency objectives against the restriction of competition with the consequence that there is no infringement of Article 101(1) TFEU. These developments illustrate that under the EU competition law model there are avenues, other than the prohibition and exception clauses, under which non-efficiency objectives can be assessed against a restriction of competition.

The TCA is able to further its process of harmonisation and bring Turkish competition law more in line with the EU system with less focus on substantive competition rules in the context of public policy objectives. Indeed, the existence of legal tools such as the 'TCA Reviews', 'Applicable Reports of the TCA', and the 'Communiqué on Privatisation' allows more room for the TCA to accommodate various country-specific public policy and legitimate non-efficiency objectives outside the LPC.

AN OVERALL CRITICAL ANALYSIS IN THE LIGHT OF CONCLUSIONS DRAWN FROM EACH CHAPTER: IS THE EU COMPETITION LAW REGIME SUITABLE TO TURKEY?

The bilateral relationship between the EU and Turkey, which is based on a long-standing political dialogue, is unique. From a legal perspective, Turkey's rights and obligations under this bilateral relationship, in its capacity as a sovereign State, stand out from the legal status of former and existing EU candidate countries. Even though the Accession Partnership is not a legally binding document for Turkey, and constitutes a legal framework of unilateral measures stipulated by the EU, the Association Agreement of 1963 and the Customs Union of 1997 are clearly defined and recongised as international agreements under Article 271 TFEU. Thus, both agreements have a binding effect on parties and prevail over the Accession Partnership in terms of its legal binding effect.

From a public international law standpoint, as it stands, Accession Partnerships reflect only pre-conditions concerning Turkey's EU candidacy requirements and does not have an impact or alter the legally binding effect of the Association Agreement and the Customs Union. In the case of Turkey's full accession to the EU as a Member State, the objective of the Association Agreement will be automatically fulfilled. This is the existing procedure under EU law. The fundamental problem, however, relates to the long-standing negotiations concerning Turkey's EU accession, which may or may not conclude with an EU membership. This political 'puzzle' seems to have led to increasing ambiguity concerning the legal implications of the Association Agreement and undermined the rights and obligations of the parties. What does this mean for competition law? Primarily, the 'implementing rules' on competition, which would apply between the EU and Turkey in competition law related cases, need to be addressed to avoid uncertainty and unfairness concerning competition law issues that fall within the authority of both jurisdictions. Admittedly, the Accession Partnerships have led to an immense 'convergence' on Turkish substantive competition law instruments with that of the EU. Nonetheless, the analysis of Turkish case-law clearly reveals a lack of co-operation between the EU and

Turkey in the field of competition law, which otherwise would have taken place with the adoption of implementing provisions on competition. The convergence of Turkish competition law, i.e. the 'transplant' of EU competition law into Turkey, would have been more meaningful and effective if parties had complied with this requirement. As Advocate General Bot stated in *Ziebell*, the Association Agreement is based on a pure economic purpose. In this context, the adoption of implementing provisions on competition is undoubtedly coherent with 'spirit and the letter' of the agreement.

Another set of fundamental conclusions are drawn from the analysis of the EU competition law regime. The particular problem of the 'objectives of competition' seems to have appeared following the so-called 'modernisation of EU competition law' pioneered by the Commission. For almost two decades, academics, enforcers and practitioners in the field have debated the role of 'economic analysis' and the tools of neo-classical economics in the interpretation of substantive competition rules. While academics like Akman argued that 'efficiency' had been the sole goal of the drafters of the Treaty of Rome, others argued the importance of public policy and 'non-efficiency' objectives accommodated under EU competition law. During research and field search conducted in Turkey, and mainly at the library of the Turkish Competition Authority, the lack of a sophisticated academic debate under Turkish competition law literature became more apparent.

What does the extensive EU case-law on the matter of the objectives of competition law tell us? Economic analysis and the 'efficiency' objectives are not afar from the EU competition law regime. EU Courts have relied upon the tools of neo-classical economics to assess and set standards concerning the anti-competitive nature of conduct. Courts have relied on the tools of economics in understanding possible negative impact on the competitive process. Nonetheless, EU Court's view on how EU society ought to enhance welfare is one that is explained best with allocative efficiencies and total welfare, i.e. the welfare of the whole society with a concern to individual undertakings and end-consumers. This position is best demonstrated with the ECJ's recent judgment in

Konkurrensverket. Even though the Commission's departure from public policy objectives, particularly following its so called 'economics-based approach' to EU competition law, cases such as *Wouters* and *Mecca Medina* further revealed and re-established the accommodation of public policy objectives under EU competition law.

However, it is observed, the debate on the objectives of EU competition law relates not only to welfare standards and the role of efficiencies, but also to the 'object/effect' dichotomy under Article 101(1) TFEU and the interpretation of the prohibition clause. From *European Night Services* to the *Irish Beef* the EU Courts seems to have shifted its emphasis from the 'single market imperative', and the objective of 'high degree of competitiveness'' as accorded by the then EU Treaties, to a more contextual and effects-based analysis under the 'highly competitive social market economy' objective as amended with the Lisbon Treaty. There is no resonance of either the object/effect dichotomy or the interpretation of competition rules law in the Turkish competition law system.

One final observation under the EU competition law system relates to the position of the Commission concerning its recent 'more economic approach' to EU competition law, particularly its restrictive interpretation under the exception clause Article 101(3) with a focus on efficiency objectives. This position of the Commission seems to depart from the EU Courts 'broader' interpretation that allows the accommodation of 'non-efficiency' considerations under the exception clause. The incompatibility between the Commission' and the EU Courts' interpretation, and problems of legal consistency and integrity, raise particular concerns in relation to its 'suitability' as a 'model' competition law.

As the final marker, what does the analysis of the objectives of Turkish competition law expose concerning the suitability of the EU competition law to Turkey? Does one-size fit all? To begin with, the constitutional legal framework for competition under the Turkish Constitution (TC) allows the discussion that in Turkey competition law serves both as an objective in itself, i.e. economic

democracy, and also as a means to and end, i.e. means to enhance well-being and development.

As discussed above, in Turkey there is no EU-like debate on the objectives of competition law and on the role of efficiencies in assessing the legality of conduct under competition rules. The list of welfare and non-welfare goals and the division of primary and secondary objectives stipulated in the Preamble of the LPC have led to uncertainty as to their appropriate use in the application of substantive rules. Nevertheless, the emphasis on non-efficiency objectives such as enhancing employment opportunities, promoting economic freedom, liberalisation and privatisation, and entrepreneurship, indicates divergence from the objectives of the EU competition law system.

Case-law of the Turkish Competition Authority (TCA) supports this position and the accommodation of non-efficiency objectives. The role of the TCA in the privatisation and liberalisation of state owned enterprises and services, again, reveals the broader policy objectives of Turkish competition law towards achieving social and economic development. Clearly, as a 'younger' competition law regime with different policy objectives to address issues such as development, economic democracy, economic liberalization, and fairness, Turkish competition law embraces a different 'agenda' compared to the EU competition law regime. This might explain the lesser focus on 'efficiency' concerns and no emphasis on the interpretation of the object/effect dichotomy.

Even though substantive competition rules are consistent and overlap with that of the EU significantly, Turkish competition law is ascribed to achieve a broader spectrum of socio-economic objectives. These objectives have a predominant 'development' dimension rather than concerns for 'efficiency'. Turkey's 'economy-in-transition' also requires a different set of priorities compared to the EU competition law regime. A focus on ensuring the openness of markets and economic democracy in Turkey as described in the TC, sets only a few examples in this context.

Another important reference in this context is Rodrik's proposition on the cultural dimension of law, which he experimented with the South Korea and Taiwan's legal systems and economic prosperity. If culture plays such an important role in the successful application of laws and in the achievement of development, how can one expect for the EU competition law regime, a legal system that was drafted and has developed over time in the heart of Europe by European enforcers, to be suitable for Turkey? The lack of implementing rules on competition to this date and the 'reluctance' of the EU in taking a step for this purpose undermines the sole economic objective of the Association Agreement and hinders the appropriate application of EU competition law in Turkey.

Nonetheless, Turkish competition law can still benefit from co-operation with its Middle Eastern and Asian counterparts to analyse and discuss policy objectives of competition law with a 'development dimension', which better suits Turkey's current socio-economic objectives and enforcement priorities in competition.

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