**Юриспруденция. Текст 1.**

**FREE LAW JOURNAL - VOLUME 1,NUMBER 2 (18 APRIL 2006)**

**SERVICE OF THE INDICTMENT ON THE ACCUSED IN ACCORDANCE WITH THE NEW CODE OF CRIMINAL PROCEDURES OF THE REPUBLIC OF TURKEY**

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The new Turkish Code of Criminal Procedure (CCP) Law No. 5271 came into force on June 1, 2005 upon its publication in the Official Gazette dated December 17, 2004.

Article 176 of the CCP stipulates that the indictment shall be served to the accused together with a summons by the court. Since the indictment includes the accusation, the service of the indictment ensures that the accused is informed about the accusation1.

Article 176 of the CCP stipulates that the summons and the appended indictment shall be served on the accused at least a week before the date of hearing. Article 208 of the former Code of Criminal Procedures (CCP) No. 1412 envisaged that the accused shall reserve the right to request the suspension of the hearing before the indictment is read in the event that the summons and the indictment are not served to him/her within the specified time limit. The new Code does not involve such a provision. Therefore it is obviously the responsibility of the court, with or without the demand of the accused, to monitor whether this time limit is taken into consideration or not.

If a week’s time is not sufficient for preparing the defence especially in a criminal case which includes a physical fact that is comprised of complex components, the accused shall be provided with more time in line with the characteristics of the fact. In other words, one week time limit is the “minimum” time limit to be allocated.

This one-week time frame is one of those “protective periods”2. The right which it protects is the right of the accused to defence. It protects the right of the accused to defence, as a rule, by prohibiting the carrying out of the hearing less than a week after the date the indictment and the summons are served to the accused. The one-week compulsory time frame between the service of the indictment and the date of hearing is envisaged for the preparation of defence. The Legislator accepts that the accused has sufficient time to prepare his/her defence against the accusation if the minimum time frame of one week is respected.

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The person who is served with the indictment has to sign a document which bears the date of service. This document shall prove that the indictment has been served and there is at least one week between the date of service and date of the trial.

As stated above, the court should suspend ex officio the hearing even if the accused does not declare that the period between the service of the indictment on himself and the date of hearing is less than one week and ask for the suspension of the hearing. However, we suppose that the hearing may continue without suspension if the accused clearly states that he is ready for defence and there is no need to suspend the hearing.

Since the obligation to have a minimum period of one week between the service of the indictment and the date of hearing is envisaged to ensure that the required preparations for defence are made, acting contrary to this obligation will transform a judgment that is against the accused into one which is contrary to law. Criminal procedure is conducted on the basis of the method of contradiction and adversary principle. Defence is an essential element of this method and principle. Therefore the violation of the right to defence surely affects the judgment4. However, if the restriction of the right to defence is related to the evaluating, arguing and contradicting of an evidence by the defence and if the said evidence is not taken into consideration by the court in the judgment of conviction, it can be accepted in such a case that the restriction of the right to defence does not affect the judgment.

For the moment we would like to focus on different alternatives on whether the right to defence is restricted or not in cases when the court does not adjourn the hearing but continue with the trial.

If the hearing is concluded in one single session and a judgment of conviction is made, there is no doubt that the right to defence is restricted.

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If the accused is interrogated by the court more than once but that first interrogation was in breach of law because of the violation of the protective period, the verdict of quilt should be unlawful as long as the court has taken that interrogation into consideration and has not ruled out the that statement (testimony) of the defendant. In other words, the right to defence is considered to be restricted if the statement from the first interrogation is not ruled out and is *also* taken into consideration for the judgment even if the accused is re-interrogated in another session after the one that the interrogation is made. Because there is always the *objective* possibility that the statement which the accused made at the hearing without having adequate time to prepare his defence could be different if he had been allocated adequate time to prepare his defence. Therefore the fact that the consequent defences of the accused are also taken into consideration while the statement of the accused which is obtained from the interrogation is evaluated will not change the result we have achieved6. It should be accepted that there is a huge difference between making a statement that supports the defence during the interrogation or at least making a statement which does not harm the defence and making a statement which does not support and even harms the defence and then trying to compensate the previous mistakes or defects with consequent defences.

This evaluation by us is also supported by the provisions of Article 38 of the Constitution stipulating that “Findings obtained in contradiction to law can not be regarded as evidence” and of Article 217/2 of the CCP stipulating that “The charged crime can be proved with all evidences which are obtained in accordance with the law” since interrogation is the method to obtain the evidence called ‘the statement of the accused’. As the accused is interrogated in the presence of a violation of the legal period between the service of the indictment and the date of hearing, the statement of the accused obtained by interrogation is contradictory to law.

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**CONVERGENCE BETWEEN THE EU AND US MERGER CONTROL SYSTEMS IN THE LIGHT OF THE ENFORCEMENT OF THE NEW EU MERGER REGULATION**

**ALEXANDR SVETLICINII**

Increasing number of international mergers, fostered by the process of globalization in international trade, has sharpened the existing problems associated with application of the laws of several jurisdictions. Because of the extraterritorial application of the antitrust laws in many jurisdictions, international mergers must get approval from all enforcement authorities concerned if the merged company is going to operate in the particular country. At the present stage, differences in merger control laws create significant impediment for international mergers. A well known *GE/Honeywell* case is an illustrative example of the consequences that differing merger control mechanisms can cause. In this regard, the initiation of a full-scale merger control reform in EU should be viewed as an attempt to converge the differing substantive and procedural regulations in order to facilitate bilateral approval of the proposed mergers. The fact that EU has followed American example in this reform is not surprising. Due to the scale of economic relations between EU and US, this convergence was intended to remove existing impediments in the business transactions between two parties.

This legislative reform, effectuated in 2004, consisted of four major elements:

* Revision of the merger regulation and modification of the substantive test;
* Adoption of the guidelines for the assessment of horizontal mergers
* Introduction of a set of best practices for the merger investigations; and
* Internal and procedural reforms.

Substantive Test

One of the key divergences that were present between the European and American merger control systems was differing approaches towards the substantive test that would allow assessing the compatibility of the proposed merger with the current antitrust regulations. Namely, old EC Merger Regulation had a “dominance” test as a main factor in determining the compatibility of the merger with the community competition law. It provided that “a concentration that creates or strengthens a dominant position as a result of which the effective competition would be significantly impeded in the common market or a substantial part of it shall be declared incompatible with the common market”.

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New 2004 EU Merger Regulation has changed the substantive test, which made it more similar with the American one. However, the wording of the Article 2(3) should not mislead the reader by creating an impression that by applying new test Commission will always arrive to the same results as its American counterparts. Before turning to the discussion of the reasons of this misleading impression, let us first analyze the new substantive test more closely. The new wording of the substantive test follows: “A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”8 So, the substantive test has departed from the previously used “dominance principle” and approached “significant lessening of competition” standard used in US for merger assessment.

However, the question of the implementation of the newly introduced substantive test remains open. One of the main goals of the convergence process is the predictability of the application of merger control laws. While US have a long record of applying “significant lessening of competition” test, which has been tested by enforcement authorities and courts for many times thus creating a rich pool of precedents, in EU situation is different. It is far from certain whether the Commission will apply new test in the same way.

First of all, however short it is, EU merger enforcement history has been based on the “dominance” principle, which was applied by the Commission in the numerous decisions, including international mergers. Secondly, it is very illustrative that although removed from the façade, a criterion of dominance has remained – “in particular as a result of the creation or strengthening of a dominant position” – as an example of impediment to the competition on the common market.

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Definition of Relevant Market

Besides the comparison of the substantive tests applied in both jurisdictions, it is important to analyze the stages of the assessment process in order to reveal whether the differences on particular stages can prevent enforcement authorities and courts on both sides of Atlantic to come to the same conclusion. First stage in evaluating the anticompetitive impact of merger constitutes in defining relevant market. It should be stated from the beginning that in this respect both EU and US models provide for very similar determination criteria.

In US relevant market determination is guided by the provisions of 1992 Horizontal Merger Guidelines issued jointly by FTC and Department of Justice. Both agencies are using so-called “monopolist test”, which implies that hypothetical monopolist will be exercising “small but significant and non-transitory” increase in prices for certain groups of consumers.10 Then according to the reaction of consumers in certain area or in relation to certain products, relevant market will be determined. Thus, here the determination of a relevant market is based on the analysis of the change in demand response of each group of buyers. Enforcement agencies also analyze whether this price increase would be profitable for the hypothetical monopolist or not, since in certain cases different groups of buyers might react on the price increase differently. The reaction of these so-called targeted buyers helps to delineate additional relevant markets.

In EU, Commission Notice on the relevant market also provides the determination criteria based on the demand response from the consumers: “a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

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Calculation of Market Shares

Next step in the process of assessing the proposed merger consists in the determination of market concentration or in other words calculation of market shares, including those that the merging firms currently possess.

In the US, the level of market concentration is calculated using the so-called Herfindahl-Hirschman Index (HHI), a numerical data, which reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. The ranges in the concentration of a particular market allow the antitrust enforcement agencies to decide whether prospective merger is likely to increase market power of the remaining undertakings and have other adverse competitive effects. Thus, markets with HHI below 1000 are reared as unconcentrated, HHI between 1000 and 1800 identifies moderately concentrated markets and HHI above 1800 is the sign of the highly concentrated market. If the merger would produce HHI increase of 100 points I the moderately concentrated and 50 points increase in the highly concentrated markets, it will raise significant competitive concerns that would lead to the further investigations.16

In EU, Commission is also using HHI for the purposes of calculating the market shares. Very similarly, if the HHI is below 1000, proposed merger will very likely require no substantial analysis, since it is a low concentrated market. However, in the moderately concentrated markets, EU Commission applies slightly different thresholds. Thus, if HHI is between 1000 and 2000 and the potential increase is below 250, or if HHI is above 2000 and the increase is below 150, the concerns are also less likely to be identified if certain additional mitigating factors are present.17

Very much alike, Commission, FTC and Department of Justice in their respective Horizontal Merger Guidelines are aware of the fact that the determination of the post-merger market concentration using HHI method is not perfect, since it is possible to understate or overstate the likely future competitive significance of a merger due to the changing market structure, economic growth, introduction of innovations and other factors.

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Anticompetitive Effects

There are however, other elements of the merger control systems of EU and US that raise more concerns among the proponents of the further convergence. One of the most differentiating factors that are observed between two systems is the attitude towards anticompetitive effects. For the purposes of competition law and in the economic theory as well, two kind of anticompetitive effects are recognized: unilateral effects which amount to the domination and coordinated effects which amount to the collusion between the undertakings that cooperating decrease the overall competition on the particular market. It is important to analyze how both systems are treating unilateral and coordinated effects and their impact on the competition because it is another factor which indicates the degree of convergence between EU and US models.

In the US, federal antitrust policy has been always concerned with horizontal mergers because they may facilitate express or tacit collusion or oligopoly behavior on a particular market. Since the horizontal merger involves two o more firms that might be competitors on the same market it has two-fold anticompetitive consequences. There is less competitors on the market than before and post-merger firm usually will have a larger market share than either of the partners had before mergers. This situation facilitates “coordinated interaction” or in other words makes anticompetitive cooperation among the remaining firms easier. While US antitrust doctrine recognizes that mergers might create potential single-firm’s monopolization of the market, this requires much higher concentration than one that creates oligopoly.

In EU the emphasis on the non-coordinated, single-firm dominance effects was always predominant. Although possible anticompetitive coordinated effects were also recognized in the European judicial practice, the relationship between these two factors has been somewhat controversial, at least before the recent merger control reform.

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The main problem with recognition of the coordinated anticompetitive effects under old EC Merger Regulation was the lack of appropriate wording that could provide Commission and the courts with other criteria for appraisal. Since old Regulation was addressing only mergers which lead to the creation or strengthening of a dominant position. Even if assumed that this wording was related to the collective/coordinated dominant position then why it wasn’t spelled out explicitly? The old dominance test failed to reach situation of unilateral or non-coordinated effects on the competition that might result from the single firm behavior. As a result, Commission has encountered significant difficulties in proving that coordinated effects also fall under its powers to regulate mergers.In response to this deficiency of the wording of the old EC Merger Regulation, Community courts have adopted teleological approach that has better reflected Community’s aims and policies.So, the situation became different with the introduction of the “significant impediment of effective competition” test and now it is spelled out in a direct form and the Commission does need anymore to refer to the extensive interpretation of the notion of dominance in order to reach the questionable transaction.

Fortunately enough, this difference was partially eliminated with the adoption of the 2004 Merger Regulation and particularly – 2004 EU Merger Guidelines, which explicitly recognized that more concentrated market facilitates the firms in cooperating and aligning their operations, which should be amounted to the coordinated anticompetitive effects.The EU Guidelines in line with the similar US document using identical language provide that “a merger may also make coordination easier, more stable or more effective for firms…allowing them to coordinate their behavior and raise prices, even entering into an agreement or resorting to a concerted practice within the meaning of Art. 81 of the Treaty”.

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Thus, European analysis of the coordinated effects has become closer to the model applied by the US antitrust authorities. Among the cases investigated in the post-2004 Regulation period there have been several examples where Commission was unable to find dominance and used coordinated effects argumentation in order to impose divestitures on the merging parties.28 It is expected that the Commission is likely to continue to refine its unilateral effects analysis as to whether a merger significantly impedes effective competition even in the absence of a dominant position.29 One of the main contributions to the case law in this area was *Airtours*, where Commission tried to catch the transaction even though no single dominant firm could be identified on the market. So the Commission attempted to extend collective dominance argument to the oligopolistic markets. The failure of the Commission to defend its case before CFI has promoted better economic analysis and caused the marginalization of the collective dominance concept.30 In the meanwhile it is expected that Commission will resort much more often to the single firm anticompetitive effects, allowed under new Merger Regulation. This fact again cast some doubts in the true degree of the convergence in this area between the two merger control systems. So, while the US has always maintained a collective dominance standard in line with the monopolization concept, the European Commission seems to be reluctant in applying this concept, at least at this has been demonstrated in the cases where oligopolistic markets without a single dominant firm were analyzed.

Efficiencies

However, the most evident divergence between the merger control systems of EU and US is their treatment of prospective efficiencies of the proposed mergers and their role in the determination of the anticompetitive effects and ultimate approval or rejection of the concentration. It is probably the most hotly debated issue that has played one of the major roles in reforming the EU merger control system. Traditionally, two systems had cardinally different approach towards efficiencies.