A Milestone For The Implementation Of The 'Ne Bis In Idem' Principle In Turkish Competition Law: High State Court Upholds The Competition Board's Non-Fining Decision

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I. Introduction

In April 2016, the Turkish Competition Board (the "***Board***") launched an investigation against Mey İçki San. ve Tic. A.Ş. ("***Mey İçki***"), a subsidiary of Diageo plc. The investigation aimed to explore the validity of the allegations regarding Mey İçki`s abuse of dominance in the Turkish markets for vodka and gin.

After eighteen months of investigation, the Board found that (i) Mey İçki holds the dominant position in vodka and gin markets, (ii) Mey İçki has violated Article 6 of Law No. 4054 on Protection of Competition ("***Law No.4054***") in the vodka and gin markets, and (iii) as Mey İçki has already received an administrative monetary fine for the consequences of the same strategy in the rakı (traditional Turkish spirit) market,[1] there is no room for another administrative monetary fine (October 25, 2017, 17-34/537-228) ("***Non-Fining Decision***").

The case handlers alleged that Mey İçki enjoyed dominance in the Turkish markets for vodka and gin, and had engaged in exclusionary practices against competitors through rebate schemes, cash payment supports and visual arrangements at sales points.

All these alleged practices of Mey İçki had already been examined and fined by the Board in its earlier 2017 Rakı Decision. The alleged practices belonged to the exact same period of time in both decisions and the only significant difference between the two investigations was the products concerned.

[1] The Board's decision dated 16.02.2017 and numbered 17-07/84-34. ("***2017 Rakı Decision***")

Throughout the investigation process, Mey İçki demonstrated that the case lacked both procedural and substantial grounds, and emphasized the "*ne bis in idem*" principle in particular. It utilized economic arguments to bolster the oral and written defenses. Specifically, Mey İçki very strongly advocated that the investigation was crippled for double-jeopardy as (i) the Turkish Competition Authority ("***Authority***") carried out a second investigation on the same allegations which pertained to the same period of time and (ii) it created the risk of a duplicate fine. Eventually, the Board found a violation through abuse of dominance but, nevertheless, it accepted Mey İçki's "*ne bis in idem*" defense and concluded that Mey İçki should be spared from another administrative monetary fine for the same alleged practices that had taken place in exactly the same time period.

Thus, the Board acknowledged once again that "*ne bis in idem*" principle should be taken into account in competition law cases. The decision was set to become a landmark precedent regarding the interpretation and application of the "*ne bis in idem*" principle under the Turkish competition law regime.

At this point, however, two competitors active in the same relevant product markets for vodka and gin initiated two separate appeals against the Board's Non-Fining Decision in the first instance administrative courts. Both lawsuits were dismissed as the courts found that the non-fining part of the decision was lawful.[2] Nevertheless, following these judgments, this time these competitors submitted their appeals to the regional administrative courts.

The 8th Administrative Chamber of the Ankara Regional Administrative Court ("***Regional Administrative Court***") accepted the appeals of the plaintiffs, overturned the judgments of the first instance courts and annulled the Board's Non-Fining Decision.[3] The Regional Administrative Court noted that the vodka and gin markets are distinct from the rakı market and then went on to state that a violation that occurred in the vodka and gin markets should also be subject to a sanction. In this respect, the Non-Fining Decision was found to be

[2] Ankara 12th Administrative Court decision dated 7.3.2019 and numbered E.2018/1145, K.2019/475 and Ankara 2nd Administrative Court decision dated 27.6.2019 and numbered E.2018/1292, K. 2019/1292.
[3] Ankara Regional Administrative Court (8th Administrative Chamber) decisions dated 04.03.2020 and numbered E:2019/2944, K:2020/424. and dated 20.02.2020 and numbered E:2019/3384, K:2020/320.

unlawful "*considering that it is possible to calculate the administrative monetary fine to be imposed, as a percentage of the annual gross revenue, set within the prescribed rate scale.*"[4]

Upon these decisions of the Regional Administrative Court, this time, it was the Authority that initiated an appeal process before the High State Court, and whereunder Mey İçki also submitted comprehensive declaration petitions as the intervening party on the appellant Authority`s side.

Eventually, the High State Court, which is the highest plenary judicial body for administrative cases, accepted the arguments set forth by Mey İçki and the Authority on the necessity to apply the principle of *ne bis in idem*.[5] The 13th Chamber of the High State Court very recently reversed the Regional Administrative Court's decisions, and accordingly, the non-fining part of the Board's Non-Fining Decision regained its validity. All in all, the administrative procedure before the courts against the Board`s Non-Fining Decision was accurately concluded in favor of the implementation of the principle of *ne bis in idem* in competition law.

These decisions of the High State Court had immediate visible impact on the case law of the Board. In fact, just a couple of weeks following the announcement of the decisions of the High State Court, the Board rendered another non-fining decision[6] by applying the *ne bis in idem* principle, where there was again a risk of duplication of penalty due to a previous fining decision[7] rendered about the same conduct of Mey İçki carried out in the same relevant product market (*i.e.* rakı) in the same period of time.

[4] *See* Article 16(3) of the Law No. 4054: *"To those who commit behavior prohibited in Articles 4, 6 and 7 of this Law, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, generated by the end of the financial year preceding the decision, or generated by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board."*
[5] High State Court 13th Chamber`s decisions dated 02.12.2020 and numbered E:2020/1941 K:2020/3508 and dated 02.12.2020 numbered E:2020/1939 K:2020/3507.
[6] The Board's decision dated 11.03.2021 and numbered 21-13/173-74 ("***2021 Rakı Decision***").
[7] The Board's decision dated 12.06.2014 and numbered 14-21/410-178

II. The *Ne Bis In Idem* Principle

Rule of law requires that the power of the judiciary, where the sovereignty of the state manifests, must be governed by certain basic legal principles. *Ne bis in idem* is one of the general legal principles underlying this requirement.

The principle of *ne bis in idem* is universally acknowledged and discussed in various legislative and academic sources. The Charter of Fundamental Rights of the European Union sets out the right not to be tried or punished twice in criminal proceedings for the same criminal offence under Article 50. Similarly, Article 4(1) of Protocol No. 7 to the European Convention on Human Rights, which entered into force in Turkey on August 1, 1954, states that *"(n)o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

The *ne bis in idem* principle is also inextricably linked with other principles that govern the judiciary in a state of law. It is an inevitable result of the right to a fair trial, which is guaranteed under Article 36 of the Turkish Constitution and Article 6 of the European Convention on Human Rights.
This principle, by definition, provides that multiple lawsuits cannot be initiated, multiple judgments cannot be rendered, or multiple jeopardies cannot be imposed against the same person due to the same act. As a result, the *ne bis in idem* principle serves the purpose of (i) eliminating the uncertainty that a person who was subject to a penal sanction may face in expecting a new judiciary process for the same act, for the rest of their life and (ii) establishing legal security and legal reliability.

The principle of *ne bis in idem* contains two main elements. In order for it to be applied, (i) the relevant party committing the act and (ii) the act in question, must be the same. The element concerning the sameness of the person, refers to their being identified as having the

same official identity records and physical characteristics as the person who was the subject of a judicial process that has been finalized.[8]

III. *Ne Bis In Idem* Principle In Turkish Competition Law

Although the internationally accepted *ne bis in idem* principle first originated in criminal law, it is also pertinent for Turkish competition law.[9] The principle applies to administrative sanctions that have the characteristics of criminal penalties,[10] and thus, to the administrative monetary fines imposed by the Board, since they qualify as such administrative sanctions.

Pursuant to Article 15/1 of Misdemeanor Law, "*If more than one misdemeanor is committed through an act, and the imposition of an administrative monetary fine is the only sanction provided for these misdemeanors, then the heaviest administrative monetary fine will be imposed.*" According to the relevant provision, in terms of administrative sanctions, the Misdemeanor Law has accepted the *ne bis in idem* principle. Therefore, in case the legislation sets forth two separate monetary fines for a single act, only the heavier administrative monetary fine would be imposed, thereby avoiding a duplication of penalty as per *ne bis in idem* principle.

Moreover, Article 4(1)a of Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decision Limiting Competition and Abuse of Dominance ("***Regulation on Fines***") also echoes the *ne bis in idem* principle as follows: "*The base fine shall be calculated within the framework of Article 5 of this Regulation. In case more than one independent conduct – in terms of the market, nature, and chronological period – prohibited under Articles 4 and 6 of the Act is detected, the base fine shall be calculated separately for each conduct.*" The Regulation on Fines, therefore, recognizes that separate base fines should only

[8] Cebeci, Şeyma. Ceza Hukuku Bağlamında Ne Bis İn İdem İlkesi *(Ne Bis In Idem Principle In the Context of Criminal Law)*, İstanbul 2018, pg: 24 and continued
[9] Karabel, Gözde. Rekabet Hukukunda Ne Bis In Idem İlkesi *(Ne Bis In Idem Principle in Competition Law)*, 2015, Ankara s. 4. *See:* https://www.rekabet.gov.tr/Dosya/uzmanlik-tezleri/142-pdf#:~:text=Ne%20bis%20in%20idem%20ilkesi%2C%20ayn%C4%B1%20fiilden%20dolay%C4%B1%20ayn%C4%B1%20ki%C5%9Fi,veya%20ceza%20verilmemesini%20ifade%20etmektedir.(last accessed: March 8, 2021)
[10] *Ibid*.

be applied in respect of independent conduct, and independent conduct should only be deemed to exist where three cumulative conditions are satisfied: namely that the examined behaviors take place in different markets, have different natures (*i.e.*, they constitute different types of violations) and take place in independent chronological periods. In this way, the Regulation on Fines implicitly respects the principle of *ne bis in idem* by precluding the application of multiple base fines, in cases where acts are materially identical.

Furthermore, several Board precedents[11] also show that (i) *ne bis in idem* principle is recognized within the scope of Turkish competition law, (ii) the Board actively avoids the issuance of duplicate sanctions, and (iii) the Board renders its decisions pursuant to the *ne bis in idem* principle. Yet, the Board's Non-Fining Decision casts a unique but also very significant and solid approach for the implementation of the principle of *ne bis in idem,* even against the challenges that could arise due to the susceptibility of the case to misinterpretations because of the different relevant product market definitions at hand, as had been the case in the judgement of the Regional Administrative Court.

IV. The Assessment of the High State Court

Throughout the appeal process against the Regional Administrative Court's decisions, Mey İçki argued that, by annulling the Board's Non-Fining Decision that accurately assessed the *ne bis in idem* principle, the Regional Administrative Court had ignored that the actual circumstances that called for applying the principle, misinterpreted the essence of *ne bis in idem*, and therefore, rendered a decision in breach of this fundamental law principle. Mey İçki explained that the allegations in the 2017 Rakı Decision and Non-Fining Decision had (i) concerned the same undertaking, and (ii) based on the same conduct by that undertaking, that

[11] The Board's (i) Bereket Energy decision dated 01.10.2018 and numbered 18-36/583-284, para 552, (ii) Enerjisa decision dated 08.08.2018 and numbered 18-27/461-224, para 663, (iii) Pınar Milk Products and Dimes Food Industry decision dated 22.4.2004 and numbered 04-27/339-81, (iv) SEK Milk Industry Institution decision dated 22.4.2004 and numbered 04-27/340-82, (v) İzocam decision dated 8.2.2010 and numbered 10-14/175-66, (vi) Frito-Lay decision dated 29.08.2013 and numbered 13-49/711-300, (vii) Turkcell decision dated 06.06.2011 and numbered 11-34/742-230, (viii) Samsun Driving Schools decision dated 15.05.2013 and numbered 13-28/387-175, (ix) Cargo decision dated 3.9.2010 and numbered 10-58/1193-449, (x) Booking decision dated 05.01.2017 and numbered 17-01/12-4, para. 271, (xi) Mars decision dated 18.01.2018 and numbered 18-03/35-22, para. 39.

took place in the same time period, *i.e.,* 2014-2016. The Authority also emphasized these points in its own appeal submissions.

Taking into account the arguments of Mey İçki and the Authority in its assessment, the High State Court has now clearly confirmed that the *ne bis in idem* principle should apply in this case. The High State Court (i) decided that the annulment of the Board's Non-Fining Decision that implements the principle of *ne bis in idem,* had been unlawful and (ii) rightfully reversed the decisions of the Regional Administrative Court.

The High State Court (i) referred to Article 2 of the Law on Misdemeanors, which defines misdemeanor as a wrongdoing for which an administrative sanction is to be imposed by the law and (ii) indicated that the conduct, in other words, the misdemeanor that is prohibited under Article 6 of Law No. 4054 and fined as per the Article 16 of Law No. 4054 is "*the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country, on their own or through agreements with others or through concerted practices.*"

Accordingly, the High State Court concluded that (i) in accordance with this legal definition, one of the elements of misdemeanor is the "*market for goods or services*" where the behavior takes place and therefore (ii) in the event that the anti-competitive action is committed in more than one product market and creates more than one effect, there will be as many violations as the number of markets. However, the High State Court underlined that in order to resolve the dispute, it is necessary to clarify how many fines can be given, in the event that more than one misdemeanor is committed with a single act. Therefore, the High State Court reached the conclusion that committing more than one misdemeanor with a single act does not always mean that more than one fine should be imposed.

The High State Court stated that since the violations committed by undertakings with the same conduct within the scope of the execution of a single commercial policy, regardless of the markets involved, are not independent in terms of "the *market, nature* ***and*** *chronological period*" (emphasis added), they should be evaluated as a single action and should not be penalized more than once.

Accordingly, the High State Court pointed out that the conducts that were found to constitute a violation in the vodka and gin markets (i) were the same as the conducts that were considered to constitute a violation in the 2017 Rakı Decision and subjected to administrative fines, (ii) took place in the same period and (iii) were part of the whole general strategy of the undertaking. It therefore decided that (i) the Board`s Non-Fining Decision had been lawful and (ii) the Regional Administrative Court decisions were devoid of legal accuracy.

V. Why This Case Matters

Had they been allowed to stand, the Regional Administrative Court's decisions to annul the Board's Non-Fining Decision would have caused legally conflicting results in terms of evaluating the applicability of *ne bis in idem* principle in Turkish competition law. There is no doubt that the decisions of the Regional Administrative Court were clearly in breach of the generally accepted legal principle of *ne bis in idem*, which sets forth that a single act cannot be sanctioned twice. As explained above, the Regional Administrative Court had concluded that a new administrative monetary fine should be issued, solely based on the fact that the Authority conducted two different investigations covering different markets. Thus, these decisions of the Regional Administrative Court would have had a crucial and adverse impact on the way that *ne bis in idem* principle is assessed in Turkish competition law.

By reversing the decisions of the Regional Administrative Courts, the High State Court once again ensured that *ne bis in idem* principle would be consistently applied in Turkish competition law and emphasized that the Board should not render duplicate sanctions against the same undertakings for the same alleged behaviors taking place at the same time period. Therefore, the decision of the Board still sets a landmark precedent in terms of better understanding the significance and the implementation of the "*ne bis in idem*" principle under the Turkish competition law regime.

These new decisions of the High State Court also strengthened the High State Court's earlier approaches, where the *ne bis in idem* principle was applied to the administrative sanctions,

e.g., disciplinary sanctions.[12] Indeed, before these new decisions, the High State Court had stated that "*The global 'ne bis in idem' principle is a principle that should also be applied to disciplinary law*."[13] With these new decisions, the High State Court did not only adopt a consistent approach for the implementation of the principle of *ne bis in idem* in cases concerning administrative sanctions, but also confirmed and paved the way for the implementation of this generally accepted legal principle in the competition law cases.

As a result, the High State Court's new decisions that uphold the Board's Non-Fining Decision are especially remarkable as they open a new chapter for recognizing the necessity of considering the *ne bis in idem* principle in competition law cases. Indeed, these new decisions of the High State Court already produced effects on the case law of the Board, as mentioned above.

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[12] *See* For example, the High State Court (5th Chamber) decision dated 4.1.2018 and numbered E. 2016/20351 K. 2018/619.
[13] *Ibid*. For a parallel approach, *see* the High State Court (12th Chamber) decision dated 12.10.2017 and numbered E. 2017/599 K. 2017/4803.