



Highest Administrative Court Recognized “Ne Bis in Idem” in Turkish Competition Law: The Diageo Turkey Decision

Authors: Gönenç Gürkaynak, Esq., O. Onur Özgümüş, Fırat Eğrilmez, Efe Oker, ELIG Gürkaynak Attorneys-at-Law

(1) Introduction

On February 23, 2021, the Turkish Competition Authority (“*Authority*”) has published seminal judgments of the 13th Chamber of the Council of State (“*Council of State*”).¹ These are landmark decisions that upheld the Turkish Competition Board’s (“*Board*”) analysis within the scope of its decision regarding the allegations that Mey İçki San. ve Tic. A.Ş. (“*Diageo Turkey*”) violated Article 6 of Law No. 4054 on the Protection of Competition (“*Law No. 4054*”) through exclusionary practices in the vodka and gin markets (“*Vodka and Gin Decision*”).² The decisions of the Council of State are of particular significance since they affirmed a very rare usage of the “*ne bis in idem*” principle (*i.e.*, a legal concept that restricts the possibility of a defendant being penalized repeatedly on the basis of the same offence, act or facts with the same time period) in terms of competition law.

(2) Background

The Authority initiated two separate full-fledged investigations against Diageo Turkey in 2015 and 2016, which concerned Diageo Turkey’s practices in the raki market (“*Raki Investigation*”), and its practices in the vodka and gin markets (“*Vodka and Gin Investigation*”). Both investigations were focused on Diageo Turkey’s similar practices in the respective relevant markets, which allegedly aimed to exclude its competitors by way of utilizing certain rebate schemes and investment supports to impose exclusivity upon significant sales points.

Within the scope of its decision with respect to Diageo Turkey’s practices in the raki market (“*Raki Decision*”),³ the Board has resolved that Diageo Turkey abused its dominant position through exclusionary practices and imposed an administrative monetary fine in the amount of

¹ The 13th Chamber of the Council of State’s decisions dated 02.12.2020 and numbered 2020/1939 E., 2020/3507 K.; and dated 02.12.2020 and numbered 2020/1941 E., 2020/3508 K.

² The Board’s decision dated 25.10.2017 and numbered 17-34/537-228.

³ The Board’s decision dated 16.02.2017 and numbered 17-07/84-34.

TRY 155,782,969.05. Later on, in its Vodka and Gin Decision, the Board concluded that Diageo Turkey engaged in similar exclusionary practices in the vodka and gin markets, including the rebate scheme and investment support, and therefore violated Article 6 of Law No. 4054.

One of the critical arguments that Diageo Turkey put forth within the scope of the Vodka and Gin Investigation was that the Authority's investigation contradicts the *ne bis in idem* principle. To that end, Diageo Turkey asserted that the respective principle should preclude the Board from conducting a second investigation against Diageo Turkey for the same conduct, given that the acts/behaviours that were already scrutinized under the Raki Investigation were basically the same as the ones that were scrutinized and penalized within the scope of the Vodka and Gin Investigation.

The Board put a caveat in terms of Diageo Turkey's defences based on *ne bis in idem* principle by highlighting that the determination on whether an undertaking had abused its dominant position is made based on the "relevant market" wherein the alleged violation takes place. To that end, the Board resolved that Diageo Turkey's conducts aiming to exclude its competitors from the relevant markets took place within separate product markets (*i.e.*, the raki market, vodka market and the gin market), and thereby there is no justification that would preclude the Board from scrutinizing the relevant conduct by Diageo Turkey, within separate investigations.

That being said, the Board took into account Diageo Turkey's defenses regarding the application of the *ne bis in idem* principle in its determination of the administrative monetary fine. In that context, the Board determined that Diageo Turkey's anti-competitive conducts (*i.e.*, the rebate scheme) in the vodka and gin markets on one hand, and the raki market on the other, overlapped in terms of structure and implementation. The Board further remarked that the rebate schemes applied by Diageo Turkey in the respective markets were characterized by the same elements and covered the same period. To that end, the Board resolved that the rebate schemes applied by Diageo Turkey in the raki, gin and vodka markets were the outcomes of the same business strategy and were simply identical.

Further to its assessment as to the similarities between the conducts scrutinized within the scope of the Raki Investigation and the Vodka and Gin Investigation, the Board highlighted

that if multiple misdemeanours were committed by means of a single act/behaviour, only the most severe administrative fine envisaged for the respective misdemeanours should be applied, instead of implementing separate administrative fines for each and every one of the misdemeanours committed, as per Article 15(1) of Law on Misdemeanours No. 5326 (“**Law No. 5326**”). In light of the foregoing, the Board concluded by a majority vote that there were no grounds to impose a separate administrative monetary fine against Diageo Turkey for its practices in the vodka and gin markets, considering the following: (i) Diageo Turkey’s conducts in the raki market were similar to the ones that transpired in the vodka and gin markets, (ii) these practices were conducted within the same timeframe, (iii) they are integral parts of Diageo Turkey’s general strategy as a whole, and (iv) the administrative monetary fine in the Raki Decision was determined based on the overall annual turnover of Diageo Turkey (*i.e.*, without distinguishing between the turnover generated in the relevant market).

Further to the Vodka and Gin Decision, two of Diageo Turkey’s competitors, Efe Alkollü İçecekler Ticaret A.Ş. (“**Efe**”) and Antalya Alkollü İçecek San. ve Tic. A.Ş. (“**Antalya**”), appealed against the relevant decision by filing two separate lawsuits for annulment before the Ankara administrative courts. Upon their review, Ankara 12th Administrative Court and Ankara 2nd Administrative Court (“**Administrative Courts**”) upheld the Vodka and Gin Decision.

The Administrative Courts put the case into further context by characterizing the rebate scheme implemented by Diageo Turkey in raki, vodka and gin markets as a single act/behaviour, due to the fact that it was conducted in the same period. Furthermore, the Administrative Courts held that Diageo Turkey’s conduct cannot be separated into two different acts/behaviours, merely on the basis that the Authority had conducted separate investigations in terms of “raki” market and “vodka and gin” markets. Within that context, it appears that the Administrative Courts also took into account that the Authority was compelled to assess the alleged anti-competitive conducts relating to the raki market, and the vodka and gin markets, under two different investigations because of certain procedural technicalities (*i.e.*, the Authority was not able to merge two separate investigations due to the fact that the Vodka and Gin Investigation was initiated approximately nine months after the Raki Investigation.) From this viewpoint, the Administrative Courts concluded that if the contrary were to be accepted, (meaning, if conducting two investigations indicated there were

two separate offences) this would have resulted in duplicative fines being applied to the same act/behaviour.

Lastly, by referring to Article 4(1)(a) of the Regulation on Fines to Apply In Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (“**Regulation on Fines**”), which requires calculation of separate administrative monetary fines for each behaviour violating the Articles 4 or 6 of the Law No. 4054 that are independent from each other in terms of market, quality and chronologic course, the Administrative Courts resolved that, in the particular case at hand, there were no separate behaviours in terms of market, quality and chronologic course, due to the fact that the behaviour/act was committed once, regardless of the relevant market.⁴

Further to the Administrative Courts’ decisions, Efe and Antalya appealed the relevant decisions before the Ankara Regional Administrative Court. Within the scope of its review, 8th Administrative Chamber of Ankara Regional Administrative Court (“**Regional Administrative Court**”) reflected that although Diageo Turkey’s practices which constituted a competition law violation in the vodka and gin markets were (i) conducted within the same timeframe as Diageo Turkey’s practices in the raki market, (ii) these practices were part of the same strategy and (iii) both violations were the result of identical practices, it could only be plausible to argue that Diageo Turkey could not be penalized more than once for its practices with regards to each type of alcoholic beverage in the relevant market, unless the relevant market was defined separately as the raki market, or the vodka and gin markets.

To that end, the Regional Administrative Court concluded that given that vodka and gin markets are indeed separate from the raki market, Diageo Turkey’s practices which were found to be in violation of Article 6 of Law No. 4054 should have also been subject to a separate administrative monetary fine. Based on these grounds, the Regional Administrative Court decided to overturn the Ankara Administrative Courts’ decisions.⁵

⁴ Ankara 12th Administrative Court’s decision dated 07.03.2019 and numbered 2018/1145 E., 2019/475 K., and Ankara 2nd Administrative Court’s decision dated 27.06.2019 and numbered 2018/1292 E., 2019/1292 K.

⁵ 8th Administrative Judicial Chamber of Ankara Regional Administrative Court’s decisions dated 04.03.2020 and numbered 2019/2944 E., 2020/424 K; and dated 20.02.2020 and numbered 2019/3384 E., 2020/320 K.

(3) Assessment of the Council of State

Upon the decisions of the Regional Administrative Court, the Authority (and Diageo Turkey as the intervening party) appealed the case before the Council of State, which is Turkey's highest court in the administrative branch. In these landmark decisions, the Council of State's analysis of case is heavily grounded in the discussion and interpretation of various criminal law concepts.

The Council of State explained that both Law No. 5326 as well as Turkish Criminal Code No. 5237 ("**Law No. 5237**") found it sufficient that a person who commits multiple offenses (or misdemeanours) with a single act shall only be sentenced to the most severe penalty among those that are stipulated for the relevant offenses, instead of facing multiple penalties for each offense (*i.e.*, the ideal concurrence of offences). Based on this, the Council of State put forward the conditions for ideal concurrence as the following: (i) there should be a single conduct, (ii) multiple offenses should arise through a single conduct and (iii) the application of rules regarding ideal concurrence should not be expressly prohibited by the relevant legislation.

The Council of State continued by construing the term "single conduct" under Article 15 of Law No. 5326 and Article 44 of Law No. 5237. In this regard, the Council of State concluded that the "conduct" should be construed as the "act," regardless of whether there are several outcomes/results of such an act. Accordingly, the Council of State further clarified that the outcome/result is not a sub-element of the conduct and the fact that there are several outcomes/results of a conduct should not preclude the application of the rules of ideal concurrence. In other words, the Council of State highlighted that even if a conduct brings forth several outcomes/results, this does not justify implementing multiple administrative sanctions for this conduct, which actually comprises a single act.

To that end, the Council of State deemed that the manifestations of Diageo Turkey's commercial strategy, including its rebate scheme and other exclusionary conducts in the raki market on one hand and the vodka and gin markets on the other, were separate outcomes/results arising from a single conduct/act. Accordingly, the Council of State also considered that the two separate misdemeanours (which were the mere outcomes/results of the single conduct of Diageo Turkey) identified under the Raki Decision and the Vodka and

Gin Decision should be regarded as a single conduct, which does not differ in terms of market, quality/element and chronologic course. To that end, the Council of State did not consider the case at hand, where two misdemeanours are committed by means of a single conduct/act, to fall within Article 4(1)(a) of the Regulation on Fines, which requires the application of separate administrative monetary fines for each behaviour violating the Articles 4 or 6 of the Law No. 4054 that stand independent from each other in terms of market, quality and chronological course. In light of this analysis, the Council of State overturned the decision of the Regional Administrative Court.

It is worth mentioning that although both the dissenting opinion in the Vodka and Gin Decision, as well as the decision of the Council of State refer to Article 4(1)(a) of Regulation on Fines, they employ it to support opposing arguments. In the dissenting opinion, the President and the Vice President of the Board argued that pursuant to the relevant provision, separate administrative monetary fines should have been imposed for each independent conduct which was realized in different markets and therefore the administrative monetary fine in the Raki Decision could not be deemed as a justification for not imposing an administrative monetary fines against Diageo Turkey's conducts in vodka and gin markets. On the other hand, as also discussed above, the Council of State interpreted the relevant provision in a way to deduce that the relevant practices were conducted regardless of the markets, and also, they were not independent in terms of their characteristics and chronological processes.

(4) Conclusion

The Council of State's decision might pave the way for a more frequent implementation of the *ne bis in idem* principle in competition law cases. It is a seminal decision not just for affirming an assessment rarely brought by the Board, but also for providing a framework for implementation of the relevant criminal law principles within the context of competition law cases and interpretation of the rules regarding independent conducts under Regulation on Fines.

Additionally, one of the reasons as to why the Board did not impose a separate administrative monetary fine against Diageo Turkey in its Vodka and Gin Decision was that the administrative monetary fine in the Raki Decision had already been determined based on the



overall annual turnover of Diageo Turkey, instead of just the turnover it generated in the raki market. It may be the case that going forward, the decision of the Council of State could steer the Board to impose administrative monetary fines based on an undertaking's turnover generated in the relevant market, in similar cases.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on March 19, 2021)