International Development

Single Sanction for Effects of Single Strategy in Multiple Markets—'Ne Bis in Idem' Recognised by the Highest Administrative Court in Turkey

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I. Introduction

The recent judgments by Turkish administrative courts concerning the Turkish Competition Board's ('Board') decisions as a result of investigations conducted into Mey İçki San. ve Tic. A.Ş's ('Mey İçki'), a subsidiary of Diageo plc., business practices in the rakı, vodka and gin markets ('Mey İçki case') lead the discussions of the applicability of *ne bis in idem* principle in competition law. First, the Board applied the *ne bis in idem* principle based on the element of sameness of Mey İçki's conducts in the rakı market and vodka and gin markets. Then, the local courts adopted the same approach, but the Regional Administrative Court accepted that two offences based on same conduct/conducts in different markets should be subject to duplicative sanctions. Eventually, the Council of State reversed this decision by focusing on the sameness of the actions concerned and found the Board's decision to be lawful.

Key Points

- The *ne bis in idem* principle was implemented in the *Vodka and Gin* Decision concerning abuse of dominance case since the Board decided that the actions of Mey İçki in the rakı market and the vodka and gin markets are same as confirmed by the Local Courts.
- The Regional Administrative Court decided that there were multiple offences solely because there were multiple markets (*i.e.*, the rakı market and the vodka and gin markets) involved.
- The Council of State reversed the Regional Administrative Court's decision and decided that number of markets affected by the offence is not a determining factor in the assessment of whether *ne bis in idem* principle is applicable.

II. The *Ne Bis in Idem* Principle

The principle of *ne bis in idem,* which is a fundamental legal principle,[1] by definition, provides that multiple lawsuits cannot be initiated, or multiple judgments cannot be rendered against the same person due to the same conduct. Accordingly, two key elements are required in order for *ne bis in idem* principle to be applied: (i) the relevant party to the conduct, and (ii) the conduct in question, must be the same. While the sameness of the person, focusing on the 'person' identified by her civil registry records and physical characteristics in the judicial process,[2] is relatively easy to assess, the element of 'sameness of conduct' with respect to *ne bis in idem* principle is much debated in legal literature.[3]

III. The administrative phases of the Mey İçki case

On 16 February 2017, (i) the Board found that Mey İçki's practices in the rakı market constituted abuse of dominance and Mey İçki violated Article 6 of Law No. 4054

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1 Bas van Bockel, 'The European ne bis in idem Principle: Substance, Sources, and Scope' in Bas van Bockel (ed), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) UK, Ali D. Ulusoy, *İdari Yaptırımlar* (On İki Levha 2013) Turkey. This principle is considered as a '*general principle of law which is universal*'.

2 Şeyma Cebeci, 'Türk Ceza Hukuku Bağlamında Ne Bis İn İdem İlkesi' (Master thesis, İstanbul Bilgi University 2018) Turkey.

3 For different views in Turkish law, see Nurullah Kunter, Feridun Yenisey and Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku* (Beta 2008) Turkey, Erol Cihan and Feridun Yenisey, '*Ne Bis in Idem İlkesi*' (Çetin Özek Present 2004) Turkey, Yener Ünver and Hakan Hakeri, *Ceza Muhakemesi Hukuku* (Seçkin 2010) Turkey.

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on the Protection of Competition ('Law No. 4054'), and (ii) the Board imposed an administrative monetary fine on Mey İçki, which was calculated on the entire turnover of the undertaking ('*2017 Rakı Decision*').[4] Afterwards, on 25 October 2017, the same Board decided that (i) Mey İçki abused its dominant position by conducts that hindered its competitors' activities in the vodka market and gin market, but (ii) there is no need to impose another administrative monetary fine ('*Vodka and Gin Decision*').[5] More specifically, in the *Vodka and Gin Decision*, the Board defined the relevant product market as the 'vodka market' and 'gin market' and found the abuse of dominance in both markets. The *Vodka and Gin Decision* and the *2017 Rakı Decision* focused on the same conducts that transpired between 2014 and 2016, namely, (i) Mey İçki's discount system, (ii) the cash payments provided to sales points, and (iii) its interference with sales points' shelf arrangements. Thus, in the *Vodka and Gin Decision*, the Board applied the *ne bis in idem* principle and decided that there is no need to impose a new administrative monetary fine on Mey İçki, given that Mey İçki's conducts in vodka market and gin market that constituted a violation of competition law (i) had the same characteristics with Mey İçki's conducts in the rakı market that is subject to the *2017 Rakı Decision*, (ii) occurred in the same time period, and (iii) formed a part of the undertaking's general overall business strategy.[6]

However, two competitors of Mey İçki, namely Efe Alkollü İçecekler Ticaret A.Ş. ('Efe') and Antalya Alkollü İçecekler San. ve Tic. A.Ş. ('Antalya') filed for the judicial review and annulment of the *Vodka and Gin Decision* before the first instance administrative courts (the 'Local Courts'). Local Courts decided to dismiss the applications, finding the third sub-paragraph of the *Vodka and Gin Decision*, *i.e.*, the decision not to issue a new administrative fine, to be lawful.[7]

Efe and Antalya appealed the Local Courts' decisions before the Regional Administrative Court. The Regional Administrative Court accepted the appellants' objections, overturned the Local Court decisions and annulled the *Vodka and Gin Decision*.[8] In its judgment the Regional Administrative Court stated that since the vodka and gin markets are separate from the rakı market, violations that occur in the vodka and gin markets should also be subject to sanction.

Following the Regional Administrative Court's decisions[9], the Turkish Competition Authority ('Authority') brought the case before the highest administrative court, the Council of State, and filed annulment petitions for appealing both decisions of the Regional Administrative Court. Mey İçki joined these cases as an intervening party on the Authority's side. In its decisions dated 2 December 2020, the Council of State reversed the Regional Administrative Court's decisions and found the *Vodka and Gin Decision* to be lawful.[10]

IV. The applicability of the *ne bis in idem* principle in the Mey İçki case

The determining factor in the Mey İçki case is the 'same conduct' element. The legal provision that was allegedly violated, and the legal grounds were the same in the *Vodka and Gin Decision* and in the *2017 Rakı Decision*. In this regard, the main issue that needed to be resolved in the Mey İçki case is to determine whether the relevant conducts, which were alleged to be violation of the law, are the 'same.'

A. The evaluation of Mey İçki case with respect to the 'same action' element

Before evaluating the 'same action' element, it would be beneficial to first assess the meaning of 'action' and 'offence' for the Mey İçki case. During the investigation processes of Mey İçki case, it was alleged that Mey İçki had violated Article 6 of Law No. 4054, which prohibits abuse of dominant position. Then, the question here is whether '*the abuse of the dominant position in a market for goods or services*' can be considered as the 'action' subject to the

4 *2017 Rakı Decision* (16 February 2017, 17-07/84-34)

5 *Vodka and Gin Decision* (25 October 2017, 17-34/537-228).

6 However, in the dissenting opinion of the *Vodka and Gin Decision*, it was argued that (i) '*there should be separate administrative monetary fines for each misdemeanor as the same misdemeanor is conducted more than once in multiple markets*' based on Article 15/2 of Misdemeanor Law No. 5326 and Article 4(a) of the Regulation on Fines and (ii) accordingly, '*Mey İçki should be subject to an administrative monetary fine for its separate practices in different markets by calculating the monetary fine separately for each behavior*'.

7 Ankara 12th Administrative Court's Efe decision (7 March 2019, E. 2018/1145, K. 2019/475), Ankara 2nd Administrative Court's Antalya decision (27 June 2019, E. 2018/1292, K. 2019/1292).

8 Ankara 8th Administrative Lawsuits Chamber of the Regional Administrative Court's Efe decision (4 March 2020, E. 2019/2944, K. 2020/424) and Ankara 8th Administrative Lawsuits Chamber of the Regional Administrative Court's Antalya decision (20 February 2020, E. 2019/3384, K. 2020/320).

9 The Board (i) rendered its new decision on 11 June 2020 as per Article 28(1) of Law No. 2577 on Administrative Jurisdiction Procedures Law and (ii) decided that Mey İçki is in a dominant position in vodka and gin markets, which it has abused and thus violated Article 6 of the Law No 4054, and (iii) imposed an administrative monetary fine for each violation in the vodka and gin markets separately; a total of TRY 41,542,125.08 (11 June 2020, 20-28/349-163).

10 13th Chamber of the Council of State's Efe decision (2 December 2020, E. 2020/1941, K. 2020/3508), 13th Chamber of Council of State's Antalya decision (2 December 2020, E. 2020/1939, K. 2020/3507).

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investigation. The answer to this question would be negative, since '*the abuse of their dominant position in a market for goods or services*' does not constitute an attitude or behaviour that can be directly carried out in the physical world; it is in fact a conclusion reached through the assessment of several actions or behaviours. In other words, the abuse of dominant position in a market for goods or services is an 'offence', which can only be presented by the legal characterisation of those actions realised in physical domain. It would not be possible to consider the abuse of dominant position in a market for goods or services, as an action or behaviour in and of itself. Moreover, Article 6 of Law No. 4054 (i) provides that the violation shall need to have been committed through 'agreement' and 'concerted practices,' and therefore, is aware that '*the abuse of their dominant position in a market for goods or services*' cannot be considered as an action, and (ii) gives examples of the particular situations that can be considered as an abuse of the dominant position.

The actions that were considered as an abuse of the dominant position in the investigations and consequent decisions of Mey İçki are the specific attitudes and behaviours realised in the physical domain, such as product purchase agreements, discount activities, display, and availability practices in sale points. In such circumstances, '*the abuse of their dominant position in a market for goods or services*' constitutes an 'offence' that stems from the legal classification of certain actions; while the 'action' requiring the administrative monetary fine includes attitudes, transactions, and behaviours such as practices and agreements which are qualified as the 'abuse of dominant position.'

In this regard, in the assessment of the 'same action' element of the *ne bis in idem* principle, the determining factor is whether the action or actions which causes the offence are same; rather than the sameness of 'offence'. Thus, pointing to the existence of the alleged violations, *i.e.*, the abuse of dominant position in the rakı market, and the abuse of dominant position in the vodka and gin markets, is not important. The material issue for the *ne bis in idem* principle is whether the actions which gave rise to the two offences are same. Indeed, the Board noted that since Mey İçki had abused its dominant position in both markets through the same action(s), this satisfied the 'same action' element of the *ne bis in idem* principle.

That said, the Regional Administrative Court decided that since the Board had found that the prohibition of abuse of dominance was violated for the vodka market and gin market in *Vodka and Gin Decision* as well as the (separate) rakı market in the *2017 Rakı Decision*, this (separate) offence should be subject to a new sanction based on the fact that '*the rakı market is separate from the vodka and gin market*'. The Regional Administrative Court further decided that '*it can only be possible to conclude that there is no reason to impose a repetitive fine on the undertaking for every single beverage included in the same market*', only if the legal classification related to the offence had been determined as the alcoholic beverages market rather than rakı market and vodka and gin markets. This finding focused on the 'product' rather than 'action' as a result of the Regional Administrative Court's '*sanction for beverage*' formula which is not easy to understand. The Regional Administrative Court's approach that allows for imposing as many sanctions as number of relevant markets determined, without considering whether the offence is based on the same conducts, would risk undermining the *ne bis in idem* principle.

Another topic that needs to be addressed when evaluating the Mey İçki case in light of the 'same action' element, is related to the principles to be applied in determining whether the actions subject to both investigations are the same. At this point, it would be necessary to take into account the criteria that the European Court of Human Rights ('ECtHR') and Turkish courts use to determine whether multiple behaviours are part of and form the same action as a whole, since the actions suitable for the qualification as 'abuse of the dominant position' appear as 'a totality of behaviours' formed by the combination of a large number of practices, attitudes and behaviours.

The ECtHR and the Turkish judicial bodies reach the conclusion that there is a single action when there is integrity of purpose, time, and place between multiple behaviours; in other words, when these behaviours form parts of the whole. In this regard, even if the behaviours that form parts of the whole are not exactly same in the multiple punishment processes, it does not always mean that the actions are not same. From this aspect, the 'same action' element is satisfied when the fundamental behavioural elements of the actions subject to multiple sanctions are the same.

In *Vodka and Gin Decision,* where the Board applied the *ne bis in idem* principle, the Board took this approach and (i) assessed whether the investigated practices, attitude and behaviours are parts of a single action to determine whether the conducts subject to each investigation are the same, and (ii) took into account the similarities and overlaps in terms of the fundamental elements. The Board pointed out the unity of timeline by stating that the practices were carried out at the same period and also found the unity of purpose with its determination that these practices '*constitute a part of Mey İçki's general strategy*'.

In the judicial review for annulment filed against *Vodka and Gin Decision*, the Local Courts also focused

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on whether the investigated practices, attitude and behaviours constituted a single action. The Local Courts *'accepted that the violating conduct of the said undertaking is single.'* and further stated that *'There are no different conducts in terms of the nature, market and chronological process that would necessitate the imposition of separate administrative fines'*. This demonstrates that the Local Courts established the unity of time by determining that the conducts pertained to the same time period and emphasised that the behaviour subject to each investigation constitutes a part of the whole. Consequently, the approach adopted by the Board and the Local Courts in determining whether imposing a fine in the investigation in vodka and gin markets is in accordance with the case law of the ECtHR and Turkish judicial bodies.

B. The Council of State decision

The Council of State rendered a very recent and landmark decision on the application of the *ne bis in idem principle* in competition law issues concerning Mey İçki case. With this decision, the Council of State (i) reversed the Regional Administrative Court' decisions, and (ii) found the *Vodka and Gin Decision*, which implements the principle of *ne bis in idem,* to be lawful. As the plenary administrative court, the Council of State has now clearly confirmed that the *ne bis in idem* principle should apply in the case of Mey İçki on its violations of Article 6 of Law No. 4054. This decision could also shed light on the European competition law practice especially on the abuse of dominance cases.

The decision of the Council of State primarily intends to clarify how many sanctions should be imposed if multiple misdemeanours are committed with a single conduct. The Council of State refers to (i) Article 15/1 of the Misdemeanour Law which provides that if multiple misdemeanours are committed with a single act and if these misdemeanours only require administrative monetary fines, then only the highest administrative monetary fine should be imposed, and (ii) the preamble of the draft law which includes that '*Paragraph 1 of the article includes a provision that is akin to the rule of ideal concurrence of the same kind of offences, regulated under the Turkish Criminal Code*' in order to show how to construe Article 44 of the Turkish Criminal Code No. 5237, which sets out the rule for *ideal concurrence* of offences of the same kind, as follows: '*A person who commits more than one offence through a single act shall only be sentenced for the offence with the heaviest penalty*'. The Council of State further states that in order for this rule to be applicable, more than one crime (misdemeanour) must be committed through a single act and pursuant to the principle of 'a single sanction for a single act (prohibition of double jeopardy)' by which the lawmakers aim to prevent multiple sanctioning of a person for a single act in terms of both criminal law and misdemeanour law. Pursuant to these explanations, the Council of State decided that conditions for ideal concurrence for offences of different kinds would be as follows: (i) relevant act or conduct must be singular, (ii) multiple crimes must be committed with a single act, and (iii) relevant law regulating the committed crime must not prevent application of the rules of ideal concurrence of different kind of offences.

The Council of State then explains the concept of 'single act' as referred in Article 15 of Law No. 5236 and Article 44 of Law No. 5237. The Council of State provides that the term 'act' would refer to the 'action' instead of the 'result', pursuant to Article 44 of the Turkish Criminal Code No. 5237. The Council of State further explained that '*If one deed creates more than one result, then this would not preclude the application of ideal concurrence provisions. As a result, the approach of the new Turkish Criminal Code does not classify "result" as a sub-element of the act. Accordingly, "act" should only be perceived as the deed*'.

The Council of State indicates that Article 4/1(a) of the Regulation on Fines which regulates calculation of the base fine adopted a similar approach by including that when there are multiple independent acts which were prohibited by Articles 4 and 6 of Law No. 4054, which are independent in terms of market, characteristics and chronological process, the base fine should be calculated separately for each act. Accordingly, the Council of State considers it is necessary to ascertain whether there are multiple independent 'acts' in order to calculate and implement the administrative monetary fine. The Council of State explains that this approach '*eliminates any possible repetitive sanctioning that may occur when there are not any multiple acts, in other words when the same act results in multiple competition law violations. Therefore, the law complied with the principle of "single sanction for single act"*.' In other words, the Council of State decided that when the same act results in multiple competition law violations, the application of the *ne bis in idem principle* will ensure multiple sanctions will not be imposed, in line with the principle of 'single sanction for single act'.

When two misdemeanours, which were prohibited by the Law No. 4054, are committed but the act itself is singular, the Council of State decided that (i) '*the applicable sanction is also singular pursuant to the rules of ideal concurrence of offences of different kinds*', (ii) when undertakings commit violations through the same act without

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distinguishing any specific market as part of executing a commercial strategy, '*these acts would not be independent in terms of market, characteristics or chronological process*', and (iii) '*accordingly, such acts need to be treated as singular and should not be imposed multiple sanctions*'.

As a result of above reasoning, the Council of State decided that '*the Board considered the same conduct as a violation in the rakı market as well, which occurred during the same period and imposed an administrative monetary fine*' and concluded that (i) *'the relevant conduct constituted a unity as part of the undertaking's general strategy*', and (ii) *'there was no need to impose a new administrative monetary fine*'.

Although accepting in its decision that if the anticompetitive 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, the Council of State decided that committing more than one misdemeanour with a single act does not always mean that more than one fine should be imposed.

In light of foregoing, the Council of State's decision eliminates the uncertainty of the application of the general principles of the *ne bis in idem principle* in Turkish competition law that the abovementioned Regional Administrative Court's decisions created. The Council of State (i) rejects the approach that a new administrative monetary fine should be issued, solely based on the fact that the Authority conducted two different investigations covering different markets, and (ii) focuses on whether the acts would be independent in terms of market, characteristics or chronological process when an undertaking commits violations through the same act as part of executing a commercial policy.

Upon this decision, Efe requested the Regional Administrative Court to insist on its decision against the Council of State's decision. The Regional Administrative Court did not persist on its previous decision and complied with the reversal decision of the Council of State by rejecting Efe's appeal.[11]

V. Conclusion

In terms of application of the *ne bis in idem* principle in competition law, and especially the abuse of dominance cases, '*the abuse of their dominant position in a market for goods or services*' cannot be held to mean the attitude and behaviour that took place directly in the physical domain, but would constitute a conclusion reached through the assessment of several actions or behaviours. The abuse of dominant position in a market for goods or services cannot possibly be considered as an action or behaviour in itself. In the Mey İçki case, the essential element for the application of the *ne bis in idem* principle would be whether the actions, which allegedly gave rise to the two offences, were the same.

After the Regional Administrative Court's assessment, which created a conflicting approach to the implication of *ne bis in idem* principle, the Council of State successfully eliminated the conflict by reversing the decisions of the Regional Administrative Court, on the ground that the number of markets affected by the offence is not a determining factor in the assessment of whether *ne bis in idem* principle is applicable. The Council of State, by focusing on the sameness of the actions concerned, strengthened the approach of 'single sanction for single act' for the implementation of *ne bis in idem* principle in competition law cases.

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11 Ankara 8th Administrative Lawsuits Chamber of the Regional Administrative Court's Efe decision (18 March 2021, E. 2021/295, K. 2021/600).

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