The Regional Administrative Court Found the Turkish Competition Authority’s Decision concerning Mey İçki Unlawful: Abuse of the Dominance Should Be Evaluated Separately in terms of Each Product Market!

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Introduction

The Ankara Regional Administrative Court’s 8th Administrative Chamber (“**Regional Court**”) recently annulled the decision of the Ankara 2nd Administrative Court (“**Administrative Court**”)[1], in which a lawsuit against the Turkish Competition Authority’s (“**TCA**”) *Mey İçki-2* decision[2] was dismissed[3].

The Regional Court’s decision is of crucial importance in two ways: (**i**) first, as mentioned in our latest article[4], it is one of few examples in which the TCA evaluated the *ne bis in idem principle-double jeopardy* (prohibiting double trial or punishment due to the same action and subject); (**ii**) secondly, it emphasizes that violations in different product markets (although they arise from the behaviours that are part of the same strategy) should be fined separately.

Background of the Case

Back in 2017, the TCA had conducted two separate investigations against Mey İçki San. ve Tic. A.Ş. (“**Mey İçki**”) in order to determine whether it abused its dominant position through discount practices implemented in (**i**) rakı (traditional Turkish alcoholic drink) market and (**ii**) vodka and gin markets.

In *Mey İçki-1* decision[5], the TCA concluded that Mey İçki (**i**) holds the dominant position in rakı market and (**ii**) abused its dominant position through its practices aimed at complicating its competitors’ activities in this market and thereby violated Article 6 of the Law on the Protection of Competition, No.4054 (“**Competition Law**”). As a result, the TCA resolved to fine Mey İçki TRY 155,782,969 (approx. EUR 37.9 million)[6], an amount corresponding to 4.2% of its turnover achieved during the preceding financial year. It is worth noting that the fine was calculated not only on the turnover achieved by Mey İçki in rakı market but on the total turnover achieved from all of its activities.

As for *Mey İçki-2* decision, the TCA concluded that Mey İçki (**i**) holds the dominant position in vodka and gin markets and (**ii**) abused its dominant position by means of complicating its competitors’ activities in those markets and thereby violated Article 6 of the Competition Law. However, the TCA decided that it was not necessary to impose a new administrative fine considering that Mey İçki’s practices in question;

- have the same nature as its behaviour, which was considered as a violation in rakı market and imposed administrative fines according to the TCA’s *Mey İçki-1* decision,
- were conducted in the same period and
- formed a unity as a part of its general strategy.

Furthermore, while rendering this decision, the TCA took into consideration that the fine imposed in *Mey İçki-1* decision was calculated on the total turnover achieved by Mey İçki from all of its activities (without making any distinction between the turnovers achieved in rakı, gin and vodka markets).

At this point, the issue attracting attention is that the ne bis in idem principle is not at the core of the TCA’s evaluation in *Mey İçki-2* decision. Indeed, as mentioned in our latest article, Mey İçki argued in its defences that ne bis in idem principle will be violated if a second fine is imposed on Mey İçki due to the same allegations which belong to the same period of time, the defence was not accepted by the TCA. This is because the TCA stressed that the determination as to whether an undertaking (**i**) holds the dominant position and (**ii**) abuses its dominant position should be evaluated on the basis of each product market. Within this framework, it was stated that;

- in *Mey İçki-1* decision, in rakı market and
- in *Mey İçki-2* decision, in vodka and gin markets

a violation determination was made within the meaning of Article 6 of the Competition Law.

In this regard, it seems that whereas it was concluded that ne bis in idem principle cannot be applied in the case at hand, the TCA resolved not to impose a new administrative fine by using its discretion.

On the other hand, although a lawsuit was brought that requests the annulment of the TCA’s *Mey İçki-2* decision, this request for annulment was rejected by the Administrative Court by stressing that:

- it cannot be said that there is two separate facts in the case at hand due to the fact that a separate investigation was conducted in terms of the vodka and gin markets,
- the said violation subject to the administrative monetary fine is single in terms of rakı market and vodka and gin markets and therefore,
- attributing any violation to Mey İçki once more would lead to double punishment.

However, neither the TCA’s approach in *Mey İçki-2* decision nor the Administrative Court’s decision was found lawful by the Regional Court, as included below.

The Evaluation of the Regional Court

The Regional Court has shown a different approach towards to the case at hand and annulled the TCA’s *Mey İçki-2* decision. It stated that in the scenario in which the product market was defined “*alcoholic beverages market*” instead of the rakı market or vodka and gin markets, the firm would not be fined for each product included in the same product market. Nevertheless, it was pointed out that the said products were evaluated in the different product markets in the case at hand.

In this regard, it was stated that violations in different product markets (although they arise from the behaviours that are part of the same strategy) should be fined separately and thus the approach adopted in the TCA’s *Mey İçki-2* decision was found unlawful.

On the other hand, the TCA actually agrees with the Regional Court. Indeed, as explained above, ne bis in idem principle defence was not accepted by stressing that violation in (**i**) rakı market and (**ii**) vodka and gin market should be evaluated separately. But, it resolved not to impose a new administrative fine by using its discretion. At this point, it is understood that the Regional Court actually found unlawful the using of discretion by the TCA.

Concluding Remarks

The Regional Court’s decision has drawn a better-defined framework as to the application of the ne bis in idem principle. Indeed, it creates legal clarity that the TCA must separately assess the violations in different product markets and must not apply the ne bis in idem principle in this regard. Yet, although the TCA decided not to impose a new administrative fine by using its discretion, it actually agrees with the Regional Court’s opinion that ne bis in idem principle cannot be applied in the case at hand.

It might come to mind that ne bis in idem principle could be taken into consideration in view of the fact that the said behaviours in the TCA’s both decisions (**i**) have the same nature, (**ii**) were conducted in the same period and (**iii**) formed a unity as a part of its general strategy. However, it seems unlikely in the case at hand. This is because, as also stressed by the TCA in *Mey İçki-2* decision, the determination of abuse of dominant position is made based on the relevant product market. In this regard, the application of the ne bis in idem principle will not come into question for the violations arising out of the practices in different product markets.

[1] The Ankara 2nd Administrative Court’s decision dated 27.06.2019 and E.2018/1292, K.2019/1292.

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

[3] The Ankara Regional Administrative Court’s 8th Administrative Chamber’s decision dated 20.02.2020 and numbered E. 2019/3384, K.2020/320.

[4] Please see our latest article namely “The Undertakings Operating in the Automotive Sector under the Review of the TCA Once Again”, which was published at Kluwer Law Blog on 8.05.2020. http://competitionlawblog.kluwercompetitionlaw.com/2020/05/08/the-undertakings-operating-in-the-automotive-sector-under-the-review-of-the-tca-once-again/?doing_wp_cron=1589958188.2448730468750000000000 .

[5] The TCA’s decision dated 16.02.2017 and numbered 17-07/84-34.

[6] In 2017, the year-end average exchange rate was EUR 1=TRY 4,11.