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The Undertakings Operating in the Automotive Sector under the Review of the TCA Once Again

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Introduction

In the previous days, the Turkish Competition Authority ("**TCA**") resolved under its decision dated 26.03.2020 and numbered 20-16/234-M to open an investigation against the undertaking operating in the automotive sector in order to re-evaluate its decision dated 24.06.2009 and numbered 09-30/637-150 since it was annulled by the 13th Chamber of Council of States.

Given that an administrative monetary fine in the amount of TRY 277 million in total (almost EUR 119 million[1]) was already imposed as a result of the investigation conducted regarding the same claims against 15 undertakings operating in the automotive sector in 2011, the initiation of this new investigation based on the same claims sounds interesting. Indeed, an important question comes to the mind; whether the TCA will consider the *ne bis in idem principle-double jeopardy* (prohibiting double trial or punishment due to the same action and subject) which is one of the fundamental principles of law in the current investigation.

Background of the Investigation

Within the scope of the SCT (special consumption tax) reduction introduced for the automotive sector in 2009, the TCA had initiated a preliminary inquiry with its decision dated 29.04.2009 and numbered 09-20/405-M into the complaints that new passenger car and light commercial vehicle manufacturers and distributors restricted the supply of goods and increased the prices by joint conduct after the SCT reduction. As a result of the preliminary inquiry, with the TCA's decision dated 24.06.2009 and numbered 09-30/637-150 ("**SCT-1 Decision**"), it was decided that there is no need to open an investigation against the undertakings since there is no crucial and sufficient document and finding concerning the said claims.

On the other hand, in the same meeting in which it was concluded that there is no need to open an investigation concerning the said claims, the TCA had decided to initiate a new preliminary inquiry against several undertakings operating in the automotive sector by considering the same information and documents obtained within the scope of the first preliminary inquiry in order to determine whether the undertakings which are the member of the Automotive Distributers' Association ("**ODD**") and the Automotive Manufacturers Association ("**OSD**") violated the

Competition Law via sharing some future information and estimations regarding the price, production, and sales by coming together at various meetings under the association. Following this preliminary inquiry, it was decided to open an investigation. During this investigation, the TCA obtained new evidence and findings, and accordingly resolved that 15 undertakings violated Article 4 of the Law on the Protection of Competition, No.4054 ("**Competition Law**"). As a result, an administrative monetary was imposed on those undertakings under the TCA's decision dated 18.04.2011 and numbered 11-24/464-139 ("**SCT-2 Decision**").

However, the 13th Chamber of Council of States annulled the TCA's SCT-1 Decision ten years later with its decision dated 04.12.2019 and E. 2018/3127, K. 2019/4094. Upon this annulment decision, the TCA resolved under its decision dated 26.03.2020 and numbered 20-16/234-M to open an investigation (which is currently being conducted) against several undertakings operating in the automotive sector in order to re-evaluate its SCT-1 Decision.

As it is seen, the claims regarding the behaviours examined within the scope of the preliminary inquiry concluding with the TCA's SCT-1 Decision are also the basis of this current investigation. However, as also stated above, an investigation based on the same allegations was conducted against 15 undertakings operating in the automotive sector already in 2011, and an administrative monetary fine was imposed following this investigation within the scope of the SCT-2 Decision. It should also be noted that the process of judicial remedy initiated by the undertakings against the SCT-2 decision was finalized.

At this point, since both investigations are related to the same subject, we evaluate that it would be useful to mention the application area of the ne bis in idem principle in terms of the administrative monetary fines imposed for competition violations. In this regard, the practices regarding the ne bis in idem principle under the European Union and Turkish competition law will be included below.

The Application Area of The Principle of Ne Bis In Idem in terms of the Administrative Monetary Fines Imposed for Competition Violations

Ne bis in idem principle is a criminal law principle which states that no one can be tried more than once due to a single action. In other words, it expresses that double trial or punishment due to the same action and subject is not allowed. This principle has two elements, namely (**i**) the sameness of the action and (**ii**) the sameness of the person.

Although whether this principle, which belongs to criminal law, is applicable in terms of the administrative monetary fines imposed for the competition violations is controversial in the doctrine; in the literature and the established case-law of the Court of Justice of the European Union ("**CJEU**"), it is accepted that misdemeanours and administrative fines fall into the application area of the principle of ne bis in idem. In this context, it is evaluated that ne bis in idem principle is also acceptable in terms of administrative fines imposed for competition violations which are considered as a misdemeanour.

The Case-law of the Court of Justice of the European Union's Approach

As per the established case-law of the CJEU, it is seen that ne bis in idem principle is acceptable in the European Union competition law practices. The most important case that shows the principle of ne bis in idem is acceptable in terms of competition violations in the European Union law is the CJEU's *Aalborg Portland Decision*[2].

In this decision, the CJEU stated that the application of that principle is subject to the threefold condition of (**i**) *identity of the facts*, (**ii**) *unity of offender*, and (**iii**) *unity of the legal interest protected*[3]. According to the CJEU's assessment in that decision; the same undertaking cannot be investigated and sanctioned more than once for a single unlawful course of conduct requiring the same sanction.

It is possible to say that these conditions set forth in the CJEU's *Aalborg Portland Decision* constitute the basis for the evaluation of the claims regarding the double investigation and punishment within the scope of competition law. As a matter of fact, these conditions were taken into consideration in the CJEU's *Telekomunikacja Polska Decision*[4] and *Toshiba Decision****[5]*** , and an examination was carried out as to whether the principle of ne bis in idem is violated.

Furthermore, the evaluations in the CJEU's *Limburgse Vinyl Decision* are remarkable since those shows that the principle of ne bis in idem is applicable in European Union competition law practice***[6]***:

"*In that regard, it should be observed that, as is apparent from the grounds of the contested judgment,* ***the principle of non bis in idem****, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR,* ***precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.***"

The Approach Adopted in the Turkish Competition Law

In Turkish law, it is accepted that the principles regarding criminal law are applicable in terms of misdemeanours and administrative monetary fines. Indeed, as per the established case-law of the Constitutional Court of Turkey, it is understood that the fundamental criminal law guarantees stipulated in Article 38 of the Constitution of Turkey must also be applicable for administrative fines[7]:

"Administrative fines are also subject to the principles set forth in this article since there is no distinction between administrative and judicial penalties in Article 38 of the Constitution of Turkey."

Therefore, it is considered that ne bis in idem principle, which is one of the guarantees of fundamental criminal law, is also acceptable in terms of administrative monetary fines imposed under the Competition Law.

Indeed, in the literature, it is stated that administrative monetary fines imposed by the TCA are considered as criminal and those fall into the application area of the principle of ne bis in idem. Furthermore, it is seen that ne bis in idem principle has been evaluated in the TCA's several decisions. The investigations conducted by the TCA against *Mey ?çki****[8]*** and *Bereket Energy*

*Group**[9]*** shows that the principle of ne bis in idem is acceptable in terms of administrative sanctions to be imposed under the Competition Law. Although the defenses made by undertakings based on the ne bis in idem principle were not accepted under the said investigations due to the evaluations specific to related cases, the fact that the TCA evaluated the principle of ne bis in idem in these two decisions is of importance since it demonstrates that ne bis in idem principle is acceptable in terms of competition law.

Concluding Remarks

In the light of the foregoing case law and evaluations, ne bis in idem principle is indeed acceptable in terms of administrative monetary fines imposed under the Competition Law. In this regard, considering that the underlying facts and violation claims are the same in terms of both the SCT-2 Decision (concluding with a fine) and this current investigation, ne bis in idem principle will be discussed in the investigation which is currently conducted.

In conclusion, the result of this investigation is of particular importance since it will probably draw a well-defined framework as to how the ne bis in idem principle shall be applied in competition law investigations.

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[1] In 2011, the year-end average exchange rate was EUR 1=TRY 2,32.

[2] *Aalborg Portland A/S v. the Commission*, The joined cases C- 204, 205, 211, 213, 217 and 219/00 P, [2004] ECR 1-123.

[3] *Aalborg Portland Decision*, para 338.

[4] COMP/39525, *Telekomunikacja Polska Decision* dated 22.06.2011, para 136.

[5] *Toshiba Corporations and Others v. Ú?ad Pro Ochranu Hospodá?ské Sout?že Decision* dated 14.02.2012, C-17/10, para 97.

[6] Limburgse Vinyl Maatschappij and Others v. the Commission, The joined cases C-238, 244, 245, 247, 250, 252 and 254/99 P [2002] ECR I-8375, para 59.

[7] The Constitutional Court of Turkey’s decision dated 10.01.2013 and numbered 2012/93 E., 2013/8 K. Please also see the Constitutional Court of Turkey’s decision dated 29.11 2012 and numbered 2012/106 E., 2012/190 K.

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

[9] The TCA’s decision dated 01.10.2018 and numbered 18-36/583-284.

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