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COMPETITION LAW RISKS RELATED TO NO-POACH AGREEMENTS

Recently, the Turkish Competition Authority ("**TCA**"), alongside its international counterparts in the United States and the European Union, has increased scrutiny over no-poach agreements and other employment related competition law infringements. During the past few years, the Competition Board (the "**Board**") conducted several investigations and imposed fines on undertakings that entered into anti-competitive no-poach agreements in a wide range of sectors. Notably, the Board imposed in total a fine of TRY 58 million (approximately USD 4.6 million) on 19 private hospitals[1] and TRY 151 million (approximately USD 5.6 million) on 16 undertakings[2] on the grounds of restricting employee mobility through no-poach agreements.

From a competition law perspective, firms are competing in the employment market to recruit employees, regardless of whether they provide the same goods or services. In this regard, firms entering into agreements (i) to fix salaries, compensations or fringe employee benefits or exchange sensitive information concerning these issues or (ii) not to hire or solicit other firm's employees may violate Law No. 4054 on the Protection of Competition (the "**Competition Law**").

As the TCA's scrutiny over no-poach agreements is gaining momentum, the need for human resource professionals to be informed on this issue became more important. Accordingly, we summarize below the key issues to consider concerning no-poach agreements and other employment related competition law infringements.

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[1] The Board's decision dated 24 February 2022 and numbered 22-10/152-62
[2] The Board's decision dated 26 July 2023 and numbered 23-34/649-218

1. Naked No-Poach Agreements and Information Exchange on Salaries

Agreements in which companies openly agree not to hire or approach each other's employees (i.e., gentlemen's agreements) are considered anti-competitive by object. In the Board's recent decisions, naked no-poach agreements are considered as hardcore restrictions and the Board imposed heavy fines on companies in various sectors for being involved in such agreements. According to the TCA's approach, companies entering in such agreements do not have to be competitors operating in the same market to determine a competition law infringement since companies from different markets may in fact compete for the same employees.

According to the TCA's approach, information exchange regarding employment conditions (e.g., salary, fringe benefits etc.) is also deemed anti-competitive. For instance, an information exchange on planned salary increase rates may create a significant competition law risk. Nevertheless, not all information exchange relating to the labor market constitutes a competition law infringement. Sharing certain types of information, such as consolidated and anonymized data collected by independent third parties or information on past practices may not entail any risk. Therefore, companies should carefully draw the line between the information that can be shared and that should be kept confidential.

2. No-Poach Clauses in Commercial Cooperation Agreements

No-poach clauses may be part of a broader and legitimate commercial cooperation agreement. These agreements may be between direct competitors, as well as firms operating at different levels of the supply chain. In this regard, obligations preventing the parties to a cooperation agreement to poach each other's employees may be required for safeguarding their know-how and intellectual property. However, no-poach clauses that are too broad in terms of scope and duration may not be compliant with competition law. For this reason, parties must assess whether the no-poach clause is genuinely necessary for the implementation of the cooperation agreement and the scope is well designed. To avoid any competition law risks, no-poach clauses in commercial cooperation agreements require meticulous drafting and a thorough assessment from a competition law perspective.

3. No-Poach Clauses in the Context of Mergers and Acquisitions

In the context of M&A, no-poach clauses may be generally included in share purchase agreements to prevent the seller from poaching the target company's employees. Such clauses may be considered as permissible ancillary restraints, provided that they comply with certain conditions mainly explained in the TCA's Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions. These conditions generally relate to the no-poach clause's duration, geographic scope and subject. The TCA's decisional practice also demonstrates the TCA's approach to such clauses. Therefore, if companies wish to include a no-poach clause in their share purchase agreements, it is of utmost importance to carefully determine the clause's limits in terms of duration, scope and subject to avoid any competition law related risks.

4. Non-Compete Agreements in Employment Contracts

Article 4 of the Competition Law only applies to agreements between companies. Thus, non-compete provisions under employment contracts between employees and employers that prevent employees from working for a competitor following the end of an employment relationship are not considered within the

scope of Competition Law. That said, there are certain limitations, such as restrictions relating to the duration, geographic scope and the subject matter, to secure a valid non-compete obligation from an employment law perspective. These limitations must be diligently designed in a reasonable manner so that they are not deemed too broad to hinder the employee's financial liberty. Otherwise, the enforceability of the non-compete agreement would be jeopardized.

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