HEIGHTENED ANTITRUST SCRUTINY IN LABOR MARKETS: THE TURKISH COMPETITION AUTHORITY'S PERSPECTIVE

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HEIGHTENED ANTITRUST SCRUTINY IN LABOR MARKETS: THE TURKISH COMPETITION AUTHORITY'S PERSPECTIVE

By Neyzar Ünübol

Competition law enforcement in labor markets is gaining global attention, particularly regarding no-poaching and wage-fixing agreements, which can limit competition for the labor. The Turkish Competition Authority ("TCA") has emerged as one of the pioneers in investigating and penalizing such anti-competitive practices in the labor markets. In February 2022, the TCA imposed its first fine for anti-competitive agreements concerning labor market in the Private Hospitals case, setting a precedent. Subsequent investigations targeted several undertakings highlighting the TCA's commitment to addressing anti-competitive practices in the labor markets. The TCA deems no-poaching and wage-fixing agreements as anti-competitive, akin to buyers' cartels. While the TCA's enforcement shed light on anti-competitive practices in the labor markets, further clarifications are expected to aid professionals and businesses in navigating. The TCA's enforcement has significantly influenced compliance culture, signaling that labor markets are not immune to competition law. Plans for specific guidelines addressing labor market competition concerns are underway reflecting TCA's goal to uphold competition in the labor market.

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I. INTRODUCTION

Competition law enforcement in labor markets has garnered increased attention from competition authorities, scholars, and practitioners globally. Specifically, agreements such as no-poaching and wage-fixing arrangements have come under intense scrutiny due to their potential to restrict competition within the labor market. In recent years, the Turkish Competition Authority ("TCA") has emerged as a pioneering competition authority in investigating and penalizing undertakings for engaging in anti-competitive agreements affecting the labor market. Accordingly, the TCA has developed notable experience in cases involving no-poaching and wage-fixing agreements.

In a landmark decision in February 2022, the TCA levied its first administrative fine concerning anticompetitive agreements in labor markets with the *Private Hospitals* case.[2] The investigation started in 2020 and the TCA's final decision on the case established that no-poaching agreements are akin to cartel agreements, setting a precedent for the following enforcement actions. Subsequently, in 2021 the TCA launched a comprehensive investigation targeting 32 undertakings spanning various sectors, focusing on allegations of no-poaching agreements. This investigation later expanded to encompass a total of 49 undertakings, resulting in fines imposed on 27 of the investigated undertakings. Notably, these fines amounted to a total of TRY 252 million, signaling the TCA's heightened focus on addressing no-poaching agreements. Apart from no-poaching agreements, the TCA had also investigated wage-fixing agreements in several cases, resulting in hefty fines.

These investigations and the following fines had an important impact on competition compliance culture. Prior to these decisions, labor markets were often perceived as exempt from competition law scrutiny, as evidenced by the absence of prior fines by the TCA for wage-fixing or no-poaching agreements. However, it is noteworthy that even before the landmark Private Hospitals case, the TCA investigated similar allegations and preferred to warn the investigated undertakings rather than imposing fines. For example, in a 2021 case concerning allegations that logistic companies concerted to fix freight fees for land transportation, the TCA discovered evidence showing that the investigated logistic companies were also concerting to suppress wages paid to truck drivers.[3] The TCA showed a lenient approach at that time and the investigated parties were not fined on wage-fixing ground. However, the TCA explicitly stated that concerting to suppress wages is infringing competition law. Therefore, the TCA signaled that immunity from competition law is not possible for anti-competitive behavior in labor markets.

II. THE *PRIVATE HOSPITALS* CASE

The *Private Hospitals* case marked a significant milestone as the TCA's first infringement decision and administrative fine concerning anticompetitive agreements in the labor market. In 2020, the investigation started to examine price-fixing allegations related to certain hospital services and the scope of the investigation expanded to include scrutiny of no-poaching agreements between the hospitals. The final decision on the case was made in early 2022 and the TCA identified that the hospitals entered into two different anticompetitive agreements: (i) price fixing for certain hospital services and (ii) not hiring or soliciting doctors working in another hospital and fixing increase rates for doctors' salaries. The TCA identified the no-poaching and wage-fixing agreement as a "gentlemen's agreement" among hospitals.

The hospitals' agreement pertained to refraining from recruiting or approaching doctors employed at another hospital involved in the agreement. Additionally, hospitals collaborated to determine the rate of increase for doctors' salaries. This agreement's object was to suppress doctors' salaries.

The TCA stated in the Decision that since labor is an input for firms, wage-fixing and no-poaching agreements are considered similar to a buyers' cartel. Competition regulations typically concentrate on sellers' cartels. Nevertheless, coordinated conduct by buyers can also be subject to competition law in some settings, like a buyers' cartel to decrease purchase prices. The TCA's approach is in parallel with the European Commission's interpretation as demonstrated in the Competition Policy Brief[4] published in May 2024.

The TCA stated that anti-competitive agreements in the labor market may diminish the quality of the product or service. According to the TCA, another negative effect of these agreements aiming to suppress wages is to reduce labor supply, employee motivation and productivity which will eventually decrease quality of final outputs. By deeming no-poaching and wage-fixing agreements as tantamount

2 The TCA Decision dated 24 February 2022 and numbered 22-10/152-62.

3 The TCA Decision dated 4 March 2021 and numbered 21-11/155-64.

4 Competition Policy Brief, European Commission Issue 2, May 2024 https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en?filename=kdak24002enn_competition_policy_brief_antitrust-in-labour-markets.pdf.

to cartel conduct, the TCA applied stringent fines on the private hospitals, aligning with regulations stipulating higher penalties for cartel infringements.

III. THE TCA'S SUBSEQUENT ENFORCEMENT ACTIONS

Through subsequent enforcement actions, the TCA reaffirmed its position that no-poaching agreements merit the same level of scrutiny and penalties as cartel agreements. In 2021, the TCA launched its first dedicated investigation into labor market infringements, targeting 32 undertakings. Notably, this investigation spanned diverse industries, including FMCG retail, online food ordering platforms, and luxury retail. Moreover, the TCA emphasized that companies operating across different sectors can be considered competitors for labor, underlining the broader implications of such agreements beyond individual product markets. The investigation was completed in 2023 with a hybrid settlement decision where 11 of the 27 undertakings have been settled with the TCA, accepting the nature and scope of the infringement.

The investigation did not only address naked no-poaching agreements but also no-poaching clauses within contracts regulating a legitimate commercial relationship between undertakings were scrutinized. Therefore, the TCA opened another battlefield for competition law compliance. The TCA examined the effects of no-poaching clauses within commercial contracts such as service procurement contracts or co-operation agreements. Based on the TCA's established practice, no-poaching clauses within a merger context are considered as an ancillary restraint and do not constitute an infringement within certain limits on its scope and duration. However, when it comes to a supply contract or a cooperation agreement, no-poaching clauses may also be necessary for the proper implementation of the relevant agreements. In some cases, such clauses may not be considered anticompetitive by object. However, the TCA states that the scope and the duration of such no-poaching clauses must not exceed what is necessary to implement the main agreement. Accordingly, based on the TCA's approach, no-poaching clauses within commercial agreements may also constitute an object restriction if the scope and duration is too broad. Therefore, no-poaching clauses within larger commercial contracts are also under the radar of the TCA and the boundaries of such clauses must be drawn diligently.

Another recent notable decision is the TCA's *French Private High Schools* case.[5] The TCA imposed fines on five French Private High Schools based in Istanbul for infringing Article 4 of the Competition Law by concerting to fix teachers' salaries. In addition, the TCA recently launched a new investigation against some pharmaceutical producers concerning no-poaching allegations. Interestingly, apart from pharmaceutical producers, there is an HR consultancy firm among the investigated parties. The detail of the case is not public yet, however the involvement of an HR consultancy firm signals that such firms may play a facilitating role in formation of anticompetitive agreements in labor markets, and such firms can be held responsible for facilitating a cartel agreement.

However, the TCA's decisions lack clarity on certain issues. For example, it is not clear whether benchmarking on human resources ("HR") practices can be compliant and under what circumstances. HR professionals occasionally need to review other firms' HR practices to provide more competitive employment conditions and the boundary of such benchmarking is not clear yet. Another issue that needs clarification is the scope of no-poaching clauses within commercial agreements in a vertical or horizontal context.

The TCA also organized a symposium in early May to address competition law issues in labor markets, underlining the detrimental effects of employers' coordinated actions that diminish competition in labor markets, emphasizing the adverse impact on wages and overall working conditions. The TCA's announced next step is to develop guidelines on labor markets to clarify boundaries and shed light on acceptable practices. These guidelines are expected to serve as soft law documents, offering guidance to practitioners and companies operating in these markets. The enforcement trend together with the competition advocacy efforts of the TCA imply that the TCA's scrutiny towards the anti-competitive agreements in labor markets will continue in the near future.

IV. IS EXEMPTION POSSIBLE FOR COMPETITION RESTRICTIONS IN LABOR MARKET?

With its previous decisions, the TCA gave the strong message that naked no-poaching and wage-fixing agreements are anticompetitive by object and these agreements cannot benefit from individual exemption under any circumstances.[6] However, in some cases, restrictive clauses

5 The TCA Decision dated 24 April 2024 and numbered 24-20/466-196.

6 Individual exemption regime in Turkish competition law is similar to application of Article 101(3). Accordingly, agreements which restrict competition may be exempted from application of competition law provision which prohibits anti-competitive agreements and concerted practices. To benefit from exemption, a restrictive agreement must fulfill four cumulative conditions: (i) provide new developments and improvements in the production or distribution of goods and in the provision of services, (ii) allow the consumers benefit from this development, (iii) not eliminate competition in a significant portion of the relevant market and (iv) not limit competition more than what is necessary for achieving the goals set out in (i) and (ii).

concerning labor may be included within a legitimate commercial agreement between undertakings. The TCA's past decisions shed some light on how such restrictions will be assessed when they are part of a legitimate commercial agreement.

The TCA's past decisions demonstrate that, no-poaching clauses, which are part of horizontal or vertical agreements between firms, may benefit from exemption depending on the economic and legal context of the case. The TCA has assessed such no-poaching clauses from an individual exemption perspective in several recent decisions.

The first decision7 concerned assessing competitive effects of a no-poaching clause within a franchise agreement, obliging franchisors not to hire other franchisors' employees without prior consent. The TCA decided that no-poaching clause in the franchise agreement is necessary for the implementation of the specific franchising model. This is because the employees' (who were personal trainers in this case) personal know-how was an important asset for the franchisors. The TCA stated that the no-poaching clause can benefit from individual exemption provided that its duration does not exceed the duration of the franchise agreement. This case demonstrates that in a vertical relationship, no-poaching clauses may benefit from exemption depending on the economic and legal context of the agreement and the relevant business. However, it is important to note that the TCA limited no-poaching obligation's duration, signaling that overreaching no-poaching obligations will be scrutinized.

Another individual exemption decision assessed competitive effects of a cooperation agreement between two insurance companies which govern the cooperation for provision of post-sale health insurance operations.[8] The cooperation agreement involved a reciprocal no-poaching obligation covering the employees responsible for the provision of the relevant insurance operations. The TCA assessed the necessity of this no-poaching obligation for the effective implementation of the agreement. The TCA questioned whether non-disclosure obligations on the relevant employees were enough to protect the know-how and clientele information. The TCA concluded that, non-disclosure obligation imposed on the employees would not be enough to reach the object of the no-poaching clause. In addition, the TCA assessed that the no-poaching clause covered only the employees who are critical to the provision of the relevant insurance operation and the duration of the obligation was not longer than is necessary. The TCA also stated that the relevant employees can work in many different insurance companies except for the agreed parties, therefore the agreement did not affect an important portion of the labor market. Accordingly, the TCA's granted an individual exemption to the relevant cooperation agreement. Therefore, it is possible to benefit from individual exemption for no-poaching clauses within a legitimate commercial agreement even within a horizontal cooperation setting, provided that the scope and duration of the no-poaching clause is limited to what is necessary for the implementation of the agreement.

Finally, the TCA assessed a vertical restriction related to wages offered to workers in a dealer agreement context.[9] In this case, a leading automotive distributor recommended to its independent dealers the minimum wages to be paid to employees working in sales and after-sales departments. Interestingly, the TCA assessed whether the rules set out in the Block Exemption Communiqué on Vertical Agreements[10] and Guidelines on Vertical Agreements can be applied to labor market restrictions by analogy. These applicable vertical block exemption rules have been designed to cover recommendations on resale price but not recommendations on wages. However, the TCA stated that recommendation on wages is akin to recommending a purchasing price and although it is not explicitly covered within the applicable law, a supplier's wage recommendation to its dealers may benefit from the block exemption. Accordingly, similar to the rules on resale price maintenance, it is possible to recommend wages in vertical agreements, but the recommendation must not turn into a fixed wage.

In summary, the TCA hasn't ruled out the potential for exemptions regarding contractual restrictions concerning labor markets. Nonetheless, defining the limits of these restrictions requires careful consideration, and the illustrative cases available don't provide sufficient guidance on the matter.

V. CONCLUSION

The TCA has been the one of the first movers to scrutinize the anticompetitive agreements within labor markets, developing notable experience on a rather unexplored area. The increasing frequency of the TCA investigations in this area and the imposition of high fines indicate the TCA's scrutiny of anticompetitive practices in labor markets will continue. An important aspect of these investigations is the TCA's definition of the market as the "labor market," rather than segmenting the market by product markets. Consequently, companies involved in such agreements need

7 The TCA Decision dated 7 February 2019 and numbered 19-06/64-27.

8 The TCA Decision dated 3 July 2021 and numbered 21-29/368-184.

9 The TCA Decision dated 7 September 2023 and numbered 23-41/796-280.

10 The Block Exemption Communiqué on Vertical Agreements sets out the rules applicable to vertical agreements for benefiting from the block exemption.

not be direct competitors operating in the same sector to breach competition law, as they may compete for the same employees in the broader labor market, irrespective of the specific goods or services they provide.

According to the TCA's enforcement practice, both no-poaching and wage-fixing agreements are anti-competitive by object, and they must be treated like buyers' cartels. These practices can indirectly impede employee mobility, potentially leading to wage stagnation within the labor market and decreasing productivity. Additionally, the TCA has announced its intent to release specific guidelines addressing competition law concerns within labor markets. The TCA remains steadfast in its commitment to employing competition law tools to safeguard the competitive dynamics of labor markets.

The TCA's enforcement practices have shed light to several questions on what conduct in labor markets will be considered anti-competitive and have been very helpful in providing direction to professionals and businesses engaged in these markets. However, there are still many issues that need clarification. The subsequent move by the TCA involves formulating labor market guidelines to define limits and provide insight into permissible behaviors. These guidelines are anticipated to function as informal regulatory documents.

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