KOLCUOĞLU DEMİRKAN KOÇAKLI
HUKUK BÜROSU • ATTORNEYS AT LAW

Law Bulletin

Competition Law | Turkey | December 2024

The TCA published the Guidelines on Competition Infringements in Labor Markets.

Anti-competitive practices in labor markets, such as no-poaching and wage-fixing agreements, have been increasingly scrutinized by many competition authorities worldwide. In line with this global trend, the Turkish Competition Board (the "**Board**") conducted several investigations regarding practices in labor markets that infringe Law No. 4054 on the Protection of Competition ("**Competition Law**"). Considering the increase in investigations regarding labor markets and the need for legal certainty, the Turkish Competition Authority (the "**TCA**") published the Guidelines on Competition Infringements in Labor Markets (the "**Guidelines**") on its website on 3 December 2024.[1]

The main factors that the TCA considers when detecting and addressing potentially anti-competitive practices in labor markets, as set out by the Guidelines, are summarized below.

1. Infringements under Article 4 of the Competition Law

Firstly, the Guidelines provide that companies may be considered "competitors" in the labor markets, even if they are not competing in the same product markets. Accordingly, under the Guidelines, agreements and information exchanges between undertakings that restrict employee mobility or determine wages and working conditions are anti-competitive agreements that constitute a *by-object* restriction under Article 4 of the Competition Law.

The Guidelines address such agreements under three main categories: wage-fixing agreements, no-poaching agreements, and exchange of competitively sensitive information.

---

[1] Please visit the following link to access the relevant announcement and the Guidelines: https://www.rekabet.gov.tr/en/Guncel/guidelines-on-competition-infringements--22d3981e6ab1ef1193d70050568585c9

1.1. Wage-Fixing Agreements

The Guidelines define wage-fixing agreements as arrangements in which undertakings mutually determine the working conditions of their employees, such as wages, wage increase rates, working hours, fringe benefits, compensation, leave entitlements, and non-compete obligations. In this context, information on working conditions are interpreted broadly and include additional employee payments, rest breaks, social benefits, workplace, private health insurance, and private pension schemes.

According to the Guidelines, in line with the Board's previous decisions, wage-fixing agreements constitute a *by-object* infringement and are considered cartels. In addition, the Guidelines set out that a third party facilitating or mediating a wage-fixing agreement may also be considered a party to the infringement.

1.2. No-Poaching Agreements

The Guidelines define no-poaching agreements as direct or indirect agreements where companies agree not to solicit to or hire each other's current or former employees. In addition, the Guidelines emphasize that agreements that do not entirely prohibit companies from hiring each other's employees but require the other company's approval for employee solicitation will also be considered no-poaching agreements.

According to the Guidelines, no-poaching agreements, just as wage-fixing agreements, constitute a *by-object* infringement and are considered cartels. In addition, no-poaching agreements can also be realized through the facilitation of a third party. In this case, the third-party facilitating coordination between companies may also be considered a party to the infringement, depending on the specific circumstances of the case.

1.3. Information Exchange

The Guidelines emphasize that direct or indirect exchange of competitively sensitive information concerning labor markets violates Article 4 of the Competition Law. The Guidelines provide examples of competitively sensitive information in labor markets, which includes wages, wage increase rates, working hours, fringe benefits, compensations, leave entitlements, etc. In this context, the Guidelines state that the exchange of such competitively sensitive information may have the object or effect of restricting competition, and information exchanges with the object of restricting competition will be deemed anti-competitive regardless of their actual effects in the market.

According to the Guidelines, information exchange may occur directly between companies or indirectly through **(i)** third-party intermediaries or platforms, **(ii)** trade associations, independent market research firms, or private employment agencies, or **(iii)** channels such as websites, media outlets, or algorithms. In this regard, the Guidelines specify that third parties providing data to companies, such as market research firms, must share aggregated data.

According to the Guidelines, for information exchanges between companies not to constitute a competition law infringement, the following conditions must be cumulatively satisfied: **(i)** the exchange is conducted by an independent third party, **(ii)** source of data or the content of any individual data cannot be identified, **(iii)** the exchanged information pertains to a period of at

least three months prior, **(iv)** the data set includes aggregated information from at least ten participants, and **(v)** no single participant's data constitutes more than 25% of the aggregated data.

1.4. Ancillary Restraints

Ancillary restraints are defined as restrictions that do not have the object or effect of preventing, distorting, or restricting competition and that do not constitute the primary purpose of the main agreement; however, are necessary for the implementation of and directly related to the objectives intended to be achieved by the main agreement. Restrictions that constitute ancillary restraints are not considered agreements restricting competition under Article 4 of the Competition Law. On the contrary, no-poaching agreements and wage-fixing restrictions that are not considered ancillary restraints fall within the framework of the Guidelines and will be considered *by-object* infringements.

According to the Guidelines, for restrictions in the labor market to be considered ancillary restraints, they must be **(i)** directly related to the agreement, **(ii)** necessary for the implementation of the agreement, and **(iii)** proportionate to the agreement.

Direct Relation: According to the Guidelines, for a restriction to constitute an ancillary restraint, it must be an integral part of the main agreement. In other words, the restriction must not exist independently from the main agreement, and its aim must be to support and facilitate the objectives of the main agreement.

Necessity: According to the Guidelines, for a restriction to be considered an ancillary restraint, it must be indispensable for the implementation or continuation of the main agreement. In this regard, depending on the nature of the main agreement and the market characteristics, the relevant restriction may be deemed necessary if companies in similar situations would not have entered into the main agreement without this restriction. However, the Guidelines provide that justifications such as the agreement becoming less profitable or more difficult to implement in the absence of this restriction are insufficient to satisfy the necessity requirement.

Proportionality: To satisfy the proportionality requirement, the intended objective of the ancillary restraint must not be achievable through less restrictive means. The Guidelines state that the proportionality of an ancillary restraint will be assessed based on the specific circumstances of each case. Nevertheless, the Guidelines provide examples of situations where a restriction fails to meet the proportionality requirement. Accordingly, the following limitations would not meet the proportionality requirement: **(i)** limitations that do not explicitly specify any duration or the duration of which exceeds the period necessary to achieve the intended objective of the main agreement; **(ii)** limitations that cover employees other than the key employees which are critical for the implementation of the main agreement or fail to specify the employees covered; **(iii)** limitations that exceed the geographical scope of the main agreement; and **(iv)** limitations that apply to all parties of the main agreement or a broader group of parties even though it would suffice to cover only one party or a limited number of parties.

In this regard, the Guidelines provide a specific framework for ancillary restraints which will be deemed reasonable within the scope of proportionality requirement, thereby ensuring legal certainty.

2. Application of Other Provisions of Competition Law

The Guidelines also state that the principles established in the Competition Law will also apply (to the extent applicable) to Articles 5, 6, and 7 of the Competition Law, which respectively concern exemption, abuse of dominant position, and mergers and acquisitions.

Exemption: According to the Guidelines, the exemption conditions outlined in Article 5 of the Competition Law will also apply to potentially anti-competitive agreements in labor markets. Furthermore, the Guidelines state that wage-fixing agreements, no-poaching agreements, and competitively sensitive information exchanges that have the object of restricting competition in labor markets are in principle excluded from the scope of the exemption regime, due to their disproportionate nature in terms of restricting competition and the low likelihood of achieving new economic/technical advancements or providing benefits to consumers.

Abuse of Dominant Position: The Guidelines state that, for assessments under Article 6 of the Competition Law, it will be examined whether the investigated company holds a dominant position in both the relevant product and labor markets. Accordingly, abuse of dominant position in labor markets may arise in various forms and these kinds of infringements will be assessed on a case-by-case basis.

Mergers and Acquisitions: Article 7 of the Competition Law prohibits mergers and acquisitions that may significantly impede effective competition. The Guidelines provide examples of variables to be considered when assessing whether a transaction significantly impedes competition in the labor market. These include the parties' market shares in the labor market, level of market concentration, similarity between the parties' employees' qualifications, barriers to entry in the market, organization of labor suppliers in the relevant market, costs of switching between jobs, whether the transaction increases the opportunity for coordination between competitors in the labor market, and whether the transaction constitutes a killer acquisition.

CONTACT

Neyzar Ünübol
nunubol@kolcuoglu.av.tr

Ali Tunçsav
atuncsav@kolcuoglu.av.tr