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The Turkish Competition Board finds no-poaching clauses in a gym company franchising agreements against competition law *(BFIT)*

ANTICOMPETITIVE PRACTICES, FRANCHISING, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, SPORTS, SERVICES, NON-COMPETITION CLAUSE, TURKEY

Turkish Competition Authority, BFIT, 19-06/64-27, 7 February 2019

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This case summary includes an analysis of Turkish Competition Board's (the "**Board**") BFIT preliminary investigation decision (07.02.2019, 19-06/64-27) in which the Board evaluated non-compete and no-poaching obligations imposed by Bfit Sağlık ve Spor Yatırım ve Tic. A.Ş. ("**BFIT**") to its franchisees. Accordingly, the Board concluded not to launch an investigation against BFIT and ordered BFIT to terminate the infringement under Article 9/3 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). The Board stated that BFIT has to revise non-compete and no-poaching clauses to comply with Law No. 4054 and Block Exemption Communiqué on Vertical Agreements ("**Communiqué No. 2002/2**").

Background

BFIT provides right to use its trademark to franchisees to open gyms, via franchising agreements. Under the franchising agreements, BFIT provides training for business management and gives information for marketing, public relations, accounting, etc. to gym owners. According to the complaint filed before the Turkish Competition Authority by a franchisee, BFIT's franchising agreements that include non-compete and no-poaching clauses violate Law No. 4054 and Communiqué No. 2002/2.

The Board defined the relevant product market as "gym services market" and stated that geographical market can be defined as 48 cities in which BFIT is active but also it is possible to define as Turkey, since BFIT can conclude its agreements across Turkey.

The case handlers conducted dawn raids in the premises of BFIT and collected information and documents from the relevant institutions in order to assess non-compete and no-poaching clauses in the franchising agreements. According to the agreements, BFIT imposed non-compete obligation on its franchisees and their employees for the

duration of the agreement term and after the termination of the agreement in Turkey.

The franchising agreements are classified as Type 1 and Type 2. The duration of the agreements is determined as 5 years and within this period, non-compete obligations are applied to the franchisees and their employees. In Type 1 agreements, non-compete obligations are valid for 2 years after the termination of the agreement in Turkey. For Type 2 agreements, non-compete obligations are determined as 1 year after the termination of the agreement and its scope is unclear in terms of the location.

In addition, the agreements include no-poaching clauses stating that *"the franchisee cannot employ anyone who has worked or is currently working in BFIT or as a franchisee of BFIT or another competitor without written consent of BFIT"*. BFIT asserted that these provisions are necessary since it should be notified that if personnel committed an infamous crime or if there is a lawsuit between personnel and franchisee. In addition, BFIT submitted documents showing that, although the agreements include these provisions, personnel can be transferred between the centers of BFIT and they can be employed by competitors if they provide equal or better conditions.

The Board referred to US competition law perspective on no-poaching agreements. No-poaching agreements are considered as *per se* violation, if the relevant agreements are not necessary for a legitimate collaboration. US Department of Justice stated that no-poaching agreements deprive the employees of negotiating for better job opportunities and restrict competition in labor markets, which would be no different than wage-fixing agreements. Since, no-poaching agreements indirectly result in the repression of wage increases over time by restricting employees' ability to find jobs with higher wages, while wage-fixing agreements between competitors cause this directly.

Several investigations have been launched regarding no-poaching agreements between franchisees in the US. In *Jimmy John's decision, [1]* the court concluded that relevant agreements restrict competition in labor market, however did not indicate whether the assessment should be made as *per se* violation or *rule of reason*, since the relevant no-poaching agreements restrict competition in labor market merely between the franchisees.

The Board considers that no-poaching clauses restrict competition in the market, since it results in wage fixing. Thus such clauses are considered to be in violation of Law No. 4054 in its precedents (*Actors*, 05-49/710-195, 28.07.2005; *Private schools*, 11-12/226-76, 03.03.2011). However, the Board stated that these agreements may benefit from exemption, if know-how and innovation are essential in the relevant sectors and the duration of the clauses is reasonable. In any event, the Board noted that the relevant clauses may have indirect effect in labor market and they should be evaluated under Article 4 of Law No. 4054.

According to Communiqué No. 2002/2 franchise agreements are deemed as vertical agreements. Accordingly, the Board decided that Type 1 and Type 2 franchise agreements of BFIT are subject to Communiqué No. 2002/2, since BFIT's market share is below the market share threshold (40%), the agreements would be assessed within the scope of block exemption under Communiqué No. 2002/2.

Imposing a non-compete obligation on the purchaser with regard to the period following the termination of the agreement is incompatible with the Communiqué No. 2002/2. A non-compete obligation may be imposed on the purchaser provided that it does not exceed one year as of the termination of the agreement, with the conditions that (i) the prohibition relates to goods and services in competition with the goods or services which are the subject of the agreement, (ii) it is limited to the facility or land where the purchaser operates during the agreement, and (iii) it is compulsory for protecting the know-how transferred by the provider to the purchaser.

Non-compete obligations regarding agreement term for 5 years are in line with Communiqué No. 2002/2. However, the non-compete obligations with regard to the period following the termination of agreements do not meet the conditions in Communiqué No. 2002/2, since they are not limited to the facility or land where the purchaser operates during the agreement and Type 1 agreements do not meet the conditions in terms of duration. Therefore, the Board concluded that they cannot benefit from block exemption. Besides, the Board stated that no-poaching agreements cannot benefit from the block exemption either.

As for the provisions that do not benefit from the block exemption, the Board conducted an individual exemption analysis. The Board stated that non-competition and no-poaching agreements restrict competition more than what is compulsory and did not grant individual exemption to BFIT's franchising agreements, since (i) non-compete obligation with regard to the period following the termination of the agreement does not meet the condition in terms of duration and geographic area and (ii) the scope of the consent of the franchiser is unclear.

In addition, the Board evaluated resale price maintenance ("**RPM**") allegations. It is claimed that BFIT makes price lists for gym services and under the agreements, franchisees are obliged to obtain written consent from the franchiser for the fees. The Board concluded that BFIT's RPM practices have limited effects in the market since BFIT just started these practices very recently and the market is competitive with many players. The Board concluded not to launch an investigation against RPM practices and they are required to be revised under Article 9/3 of Law No. 4054.

Conclusion

BFIT decision is one of the few decisions where the Board assessed no-poaching clauses other than merger cases as ancillary restrains. Although the Board did not launch a full-fledged investigation against BFIT, it clearly stated that no-poaching agreements may repress the wages and indirectly cause to wage-fixing and restrict competition in labor market.

[1] Butler v. Jimmy John's Franchise, LLC, No. 18-cv-0133, 2018 WL 3631577, (S.D. III. July 31, 2018), *https://casetext.com/case/butler-v-jimmy-johns-franchise-llc* ↗