New Investigation on the Competition Law Compliance of Hiring and Human Resources Practices of 32 Companies in Turkey

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On April 20, 2021, the Turkish Competition Authority ("***Authority***") announced on its website that the Turkish Competition Board ("***Board***") had launched a full-fledged investigation against thirty-two undertakings for gentlemen's agreements in labor markets across Turkey, in order to determine whether the relevant undertakings had violated Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") ("***HR Investigation***").[1]

The investigated undertakings are as follows: 1. Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik A.Ş. ("***Yemek Sepeti***"), 2. Zomato İnternet Hizmetleri Ticaret A.Ş. ("***Zomato***"), 3. Commencis Teknoloji A.Ş. ("***Commencis***"), 4. Markafoni Elektronik Pazarlama ve Ticaret A.Ş. ("***Markafoni***"), 5. Limango Dış Ticaret ve Sanal Mağazacılık Hizmetleri Ltd. Şti. ("***Limango***"), 6. Mynet Medya Yayıncılık Uluslararası Elektronik Bilgilendirme ve Haberleşme Hizmetleri A.Ş. ("***Mynet***"), 7. Grupanya İnternet Hizmetleri İletişim Organizasyon Tanıtım ve Pazarlama A.Ş. ("***Grupanya***"), 8. 41 29 Medya İnternet Eğitimi ve Danışmanlık Reklam Sanayi Dış Ticaret A.Ş. ("***Medya İnternet***"), 9. Havaş Worldwide İstanbul İletişim Hizm. A.Ş. ("***Havaş***"), 10. Noktacom Medya İnternet Hizmetleri San. ve Tic. A.Ş. ("***Noktacom***"), 11. Meal Box Yemek ve Teknoloji A.Ş. ("***Meal Box***"), 12. NTV Radyo ve Televizyon Yayıncılığı A.Ş. ("***NTV***"), 13. Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. ("***Sahibinden***"), 14. Peak Oyun Yazılım ve Pazarlama A.Ş. ("***Peak***"), 15. Veripark Yazılım A.Ş. ("***Veripark***"), 16. Koçsistem Bilgi ve İletişim Hizm. A.Ş. ("***Koçsistem***"), 17. Zeplin Yazılım Sistemleri ve Bilgi Teknolojileri A.Ş. ("***Zeplin***"), 18. DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. ("***DSM***"), 19. Etiya Bilgi Teknolojileri Yazılım Sanayi ve Ticaret A.Ş. ("***Etiya***"), 20. Logo Yazılım Sanayi ve Ticaret A.Ş. ("***Logo***"), 21. Çiçek Sepeti İnternet Hizmetleri A.Ş. ("***Çiçek Sepeti***"), 22. Doğuş Planet

[1] The Board's decisions (i) dated 15.04.2021 and numbered 21-18/213-M, (ii) dated 15.04.2021 and numbered 21-22/270-119, and (iii) numbered 21-22/270-M.

Elektronik Ticaret ve Bilişim Hizmetleri A.Ş. ("***Doğuş Planet***"), 23. Valensas Teknoloji Hizmetleri A.Ş. ("***Valensas***"), 24. Mobven Teknoloji A.Ş. ("***Mobven***"), 25. Pizza Restaurantları A.Ş. ("***Pizza Restaurantları***"), 26. Mawarid Gıda Ticaret A.Ş. ("***Mawarid***"), 27. Anadolu Restoran İşletmeleri Ltd. Şti. ("***Anadolu Restoran***"), 28. TAB Gıda Sanayi ve Ticaret A.Ş. ("***Tab Gıda***"), 29. İş Gıda A.Ş. ("***İş Gıda***"), 30. Migros Ticaret A.Ş. ("***Migros Ticaret***"), 31. Getir Perakende Lojistik A.Ş. ("***Getir***"), 32. Google Reklamcılık ve Pazarlama Ltd. Şti. ("***Google Reklamcılık***").

The announcement states that the rising opinion among scholars in recent years is that the market power of employers in the labor market leads to a decrease or repression of wages and causes working conditions to remain below competitive levels. Furthermore, it notes that, in addition to the academic discussions surrounding this issue, competition authorities have now begun to scrutinize labor markets as well.

Acts that may be considered to constitute an infringement of Article 4 of the Law No. 4054 in the context of the labor market may be categorized into three distinct groups. First, competing undertakings may reach an agreement not to hire/solicit/poach each other's employees ("***no-poaching agreements***") (*see e.g., Izmir Container Transporters*,[2] *BFIT*,[3] *TV Series Producers*.)[4] Second, competing undertakings may agree to solicit a third competitor's employees in an attempt to reduce the market power of their common competitors ("***collusive poaching agreements***") (*see e.g., Pre-insulated Pipes*.)[5] Third, competing undertakings may agree to fix the parameters of workforce competition (*e.g.*, hiring and working conditions, wages, bonuses, benefits, promotions, etc.) (*see e.g., Izmir Container Transporters*,[6] *TV Series Producers*)[7], or share information about these parameters among competitors (*see e.g., Private Schools*,[8] *Cement case*[9]).[10]

[2] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[3] The Board's decision dated 07.02.2019 and numbered 19-06/64-27.
[4] The Board's decision dated 28.07.2005 and numbered 05-49/710-195.
[5] *See* COMP IV/35.691/E.4 (21 October 1998) — *Pre-insulated Pipes Cartel* OJ L 24 (30.01.1999), approved by Judgments of the Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, and C-213/02 P.
[6] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[7] The Board's decision dated 28.07.2005 and numbered 05-49/710-195.
[8] The Board's decision dated 03.03.2011 and numbered 11-12/226-76.
[9] The Board's decision dated 03.08.2011 and numbered 11-44/979-329.

In its announcement on the HR Investigation, the Authority refers only to the practice of no-poaching agreements, and declares that preventing employee transfers between undertakings through direct/indirect agreements executed by employer undertakings competing for labor in the labor market deprives the employees of job opportunities with higher wages and better working conditions.

The announcement explains and catalogues the concerns that may arise from no-poaching agreements as follows: (i) wages corresponding to the labor (*i.e.*, skill and effort) may artificially be prevented from finding their real value in the market, and (ii) the labor force may shift toward other markets (domestic or abroad) where their labor can be fairly rewarded. It also states that intervention by regulatory authorities may serve to (i) prevent employees from working for wages that are below competitive thresholds, (ii) provide and enable wider distribution of ideas/talents among firms, (iii) increase the global competitiveness of undertakings, (iv) improve the quality of the labor force and boost participation in the labor force, and (v) prevent unfair welfare transfers from employees to employers.

The investigated parties appear to range from IT & software companies to platform businesses, as well as players in the media industry and undertakings in the food and beverages sector. The Authority emphasizes in its announcement that it is well aware of the importance of the employees' contributions to the process of connecting products and services with consumers in the digital age, where creativity and innovative intelligence have become especially important.

A snapshot of the Board's case law on competition law issues in the labor market particularly regarding no-poaching agreements

There are only a few cases in which the Board analyzed no-poaching agreements in labor markets; hence, the HR Investigation will take its place in the literature as one of these rare and exceptional cases.

[10] For a detailed analysis of these three types of practices and related case law, *see* Gürkaynak, Gönenç and Güner Dönmez, Ayşe and Özkanlı, Ceren, *Competition Law Issues in the Human Resources Field* (April 16, 2013). Journal of European Competition Law & Practice, Volume 4, Issue 3, 1 June 2013, pp. 201–214, doi: 10.1093/jeclap/lpt017, available at SSRN: https://ssrn.com/abstract=3164251 (last visited April 26, 2021).

In its recent *Izmir Container Transporters* decision, the Board analyzed the wage-fixing agreements among container transporters, as well as the no-poaching practices that were carried out as part of the wage-fixing agreement. In that decision, the Board summarized the theory of harm in relation to competition law violations in the labor market by stating that "*just as competition law aims to maintain the free-market conditions applied between purchasers and sellers of goods, it also aims to maintain the application of these conditions between purchasers and providers of labor.*"[11]

In the same decision, the Board provided a detailed analysis of both wage-fixing agreements and no-poaching clauses. It first explained its views regarding competition law violations on the buyer-side with reference to its earlier *Cherry*[12] and *Tobacco Leaf*[13] decisions, by emphasizing that wage-fixing/no-poaching agreements are essentially no different than the creation of buying cartels. The Board noted that, in its *Cherry* decision, the agreement on fixing the purchasing price had been considered and treated as a *per se* violation. Regarding its *Tobacco Leaf* decision, the Board underlined that, although some sort of effects-based analysis had been conducted in the relevant decision—which may shed light on the impact of the monopsony power of the undertakings—the agreements and concerted practices on the buyer side may well constitute a "restriction by object."[14] In this respect, in its *Izmir Container Transporters* decision, the Board mentioned that there had been decisions in which the Board had assessed no-poaching clauses included in M&A agreements under the "ancillary restraints" doctrine by considering whether they were directly related to the transaction and necessary for the implementation of the agreements.[15] Moreover, by citing the relevant US case law and literature,[16] it also observed that no-poaching agreements are not fundamentally different from customer or market allocation agreements. The only difference

[11] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[12] The Board's decision dated 24.07.2007 and numbered 07-06/713-245.
[13] The Board's decision dated 19.09.2002 and numbered 02-56/699-283.
[14] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[15] *See e.g.*, the Board's decision dated 09.05.2012 and numbered 12-25/717-203; the Board's decision dated 20.05.2008 and numbered 08-34/455-160; the Board's decision dated 18.06.2009 and numbered 09-29/602-143.
[16] *In re: Railway Industry Employee No-Poach Antitrust Litigation*, Civil No. 2:18-MC-00798-JFC, MDL No. 2850, available at https://www.justice.gov/atr/case-document/file/1131056/download (last visited April 26, 2021); *United States v. eBay, Inc.*, 968 F.Supp.2d 1030 (N.D. Cal. 2013); TALADAY, J. M & MEHTA, V. (2017), "*Criminalization of wage-fixing and no-poaching agreements*", CPI's North America Column, p. 1-2; Phillip E. Areeda and Herbert Hovenkamp (2019), Antitrust Law - An Analysis of Antitrust Principles and Their Application, Wolters Kluwer.

between the two is that, while the former is made on the seller side, the latter is made on the buyer side.[17] Therefore, in *Izmir Container Transporters*, the Board emphasized that no-poaching agreements may constitute restrictions of competition by effect or by object. [18]

The Board also noted that undertakings may have legitimate grounds for cooperation in the labor market and that restrictions (such as wage-fixing/no-poaching agreements) may be reasonably necessary for such cooperation. If this is not the case in a given investigation, then the finding of a violation becomes more straightforward. Accordingly, the Board rejected the undertakings' claim that they had concluded the relevant agreements in order to avoid the problems related to hiring employees (given the supply shortage concerning the employees in question), by considering that most undertakings had sufficient numbers of employees and that some undertakings even employed more than the sufficient number of employees.[19]

As for the no-poaching practices, the Board ultimately found that: (i) no-poaching may be considered as one of the outcomes that undertakings would like to achieve through their wage-fixing agreement, (ii) the agreement between the investigated undertakings is considered to restrict competition by object, (iii) given the changing numbers of employees of the investigated undertakings, it is not possible to conclude that labor mobility in the market was restricted, and (iv) the investigated undertakings did not comprise a substantial part of the market in terms of exercising buyer power. Hence, the Board decided that the agreement in question did not have an appreciable impact on the market.[20]

As a result of its analysis on both wage-fixing agreements and no-poaching practices, the Board decided not to initiate a full-fledged investigation. Nevertheless, three Board members rendered a dissenting opinion, asserting that there existed a wage-fixing agreement between the undertakings, which constitutes an object restriction of competition, and that the

[17] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[18] *Ibid.*
[19] *Ibid.*
[20] For the wage-fixing agreement, the Board decided in *Izmir Container Transporters* that: (i) it was clear that there was an agreement on fixing wages, (ii) the agreement was deemed to be an object violation, (iii) although the salaries paid by the investigated undertakings were similar and commensurate to some extent, the salary levels were determined on the basis of minimum wages, (iv) the differences among salaries indicated that the agreement did not have a considerable impact, and (v) the investigated undertakings did not comprise a substantial part of the market. For more details, *see* the Board's decision dated 02.01.2020 and numbered 20-01/3-2.

preliminary investigation should have been incorporated into the investigation numbered 2018-4-036, in which the Board investigated the price-fixing agreement between the same undertakings.[21]

Moreover, in its *BFIT* decision, the Board analyzed certain clauses included in the franchise agreements requiring the franchisees to obtain the franchisor's approval for hiring the employees of other franchisees. The Board first determined that the relevant clauses were not typical no-poaching clauses, given that the employees could be hired as long as prior approval was obtained from the franchisor. It also observed that the documents demonstrated that there were indeed employee transfers between the parties to the agreement. Nevertheless, the Board decided that the agreement could not benefit from an individual exemption, since the no-poaching clause restricted competition beyond what was necessary. Hence, it concluded that the period of the no-poaching clauses must be limited to the agreement period, and that the franchisor must provide a clear reasoning as to why its written approval must be required for hiring the employees of other franchisees.

In the *Private Schools* case, the Board analyzed an agreement among private schools prohibiting the transfer of teachers from one school to another. The Board decided not to initiate a full-fledged investigation, but chose to send a letter to schools warning them not to engage in anti-competitive practices.[22]

In *Henkel*, the Board assessed the allegation that there was an unwritten "gentlemen's agreement" among chemical manufacturers with respect to not hiring each other's employees during the non-compete period provided in their employment contracts. The Board determined that the no-poaching gentlemen's agreement did not violate competition law since: (i) undertakings had legitimate grounds for requiring non-compete agreements, which is protecting their know-how from competitors, and (ii) the employees are compensated during the non-compete period.[23]

As to the consumer harm that may arise as a result of the monopsony power obtained in the labor market through no-poaching agreements, in *BFIT*, the Board stated that, although there

[21] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[22] The Board's decision dated 03.03.2011 and numbered 11-12/226-76.
[23] The Board's decision dated 26.05.2011 and numbered 11-32/650-201.

is the possibility that the reductions in the cost of labor stemming from anti-competitive conducts may be passed on to consumers, the focus of the analysis should be on the direct restrictions in the input market, (*i.e.*, labor market), as opposed to the indirect potential effects in the output market (*i.e.*, on the consumers), since these conducts have significant direct impact on the welfare of the employees.[24] In *Izmir Container Transporters*, the Board stated that wage suppression may reduce the number of workers, which may cause a decrease in the output level and ultimately lead to a price increase and loss of consumer welfare.[25] Finally, in *Private Schools*, the Board remarked that the agreements among private schools preventing solicitation of each other's teachers were harmful to both consumers and employees.[26]

As a final note, in addition to the no-poaching agreements, the Board analyzed exchanges of information about the parameters of workforce competition. In *Private Schools*, the Board decided that information on teachers' wages constituted competitively sensitive information and determined that the exchange of information on wages could be considered as a violation of competition law.[27] In the *Cement case*, the Board found that the undertakings' HR representatives had organized a meeting to discuss, among other issues, salary raises. Having noted that the exchange of information about employees' wages could lead to coordination in the relevant market, the Board ultimately concluded that there was no indication that the parties had reached an anti-competitive agreement.[28]

All in all, the Board's past few decisions indicate that no-poaching agreements may be deemed to constitute a restriction of competition, either by effect or by object. These decisions also clearly demonstrate that the Board considers whether the investigated undertakings have legitimate grounds for restricting transfers of employees when analyzing the no-poaching agreements in question. The new HR Investigation will hopefully shed more light on the Board's approach.

[24] The Board's decision dated 07.02.2019 and numbered 19-06/64-27.
[25] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[26] The Board's decision dated 03.03.2011 and numbered 11-12/226-76.
[27] *Ibid*.
[28] The Board's decision dated 03.08.2011 and numbered 11-44/979-329.

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(First published by Mondaq on April 29, 2021)