Turkish Labour Markets are Headed for a New Era of Competition Law Enforcement

The Turkish Competition Authority (the "**TCA**") announced on 20 April 2021 that the Turkish Competition Board (the "**Board**") has initiated a full-fledged investigation against 32 undertakings, which are mainly active in digital markets, to determine whether they have violated article 4 of Law No. 4054 on the Protection of Competition (the "**Law No. 4054**") by way of alleged anti-competitive agreements in the labour market[1]. The announcement explains that direct or indirect anti-competitive agreements between undertakings that are competing as employers in the labour market may restrict worker mobility and deprive workers of better wages and working conditions.

This marks the first extensive enforcement action by the TCA focused exclusively on alleged anti-competitive conduct in labour markets. The TCA has previously considered anti-competitive conduct in the labour market in conjunction with other types of infringement in traditional product and services markets. For instance, on 10 November 2020, the TCA had announced the initiation of a full-fledged investigation against 8 private hospitals in order to determine whether they were in violation of article 4 of the Law No. 4054 by preventing the transfer of personnel between hospitals through gentlemen's agreements, and mutually determining the fees charged to freelance doctors for the use of the hospitals operating rooms.[2] On 10 February 2021, 21 more hospitals were included to the investigation, which is still ongoing.

Once completed, both investigations will provide valuable insight into the TCA's approach to anti-competitive conduct in labour markets.

The Board's recent precedents on the labour market

In its *Aegean Container Transporters* case[3], the Board launched an ex-officio pre-investigation to determine whether 48 undertakings active in container transportation to/from İzmir violated article 4 of the Law No. 4054 by agreeing on wages paid to their employees. In its decision, the Board explained that infringements that take place on the buy-side of the market fall within the prohibition of anti-competitive agreements and concerted practices under article 4 of Law No. 4054. The Board referred to its previous *Cherry* decision[4], where it had established that buying cartels are no different from sell-side cartels and that agreeing on the purchase price is considered as a per se violation, same as price-fixing. The decision also clarifies the Board's stance as to whether the clear exclusion of "*the labour market governed by collective bargaining principles*" from the scope of the Law No. 4054 excludes anti-competitive agreements between employers from application of the law. The Board explains that the exclusion concerns collective bargaining and the activities of labour unions and similar bodies, and that anti-competitive conduct by employers in the labour market would fall within the prohibition of article 4 of the Law No. 4054.

In addition, in its *BFit* decision[5], the Board examined a franchise agreement that contained provisions restricting the franchisee from employing a worker previously employed by BFit and/or any other BFit franchise, without the prior written approval of BFit. The Board refused to grant individual exemption to the franchise agreement and held that the provision disproportionally restricted employee mobility and had the potential to harm competition in the labour market. In its decision, the Board held that non-solicitation agreements could mean less job opportunities for workers, which would lead to lower wages, thereby favouring employers over time.

Lastly, in its *Private Schools Association* decision[6], the Board examined an agreement between members of a private schools association that contained provisions against solicitation of schoolteachers. The Board held that the provisions in question would restrict mobility of schoolteachers between private schools, thereby harming the welfare of schoolteachers. On a separate note, the Board held that information exchange between private schools in relation to wages

paid to schoolteachers consist in exchange of competitively sensitive information and may potentially harm competition.

The influence of the US model: a new enforcement trend

While scrutiny of anti-competitive practices in the labour market remained a somewhat controversial and unfamiliar topic in most jurisdictions for a long time, the US Department of Justice and the Federal Trade Commission's Antitrust Guidance for HR Professionals[7] (the "**HR Guidance**") published in 2016 accelerated compliance efforts in this area. The HR Guidance explains that agreements concerning any aspect of worker compensation would potentially be considered as wage-fixing. Naked wage-fixing and no-poaching agreements between employers would be considered as per se violations. On the other hand, the HR Guidance accepts that other types of agreements or information exchange on employment conditions between employers may be justified in some circumstances, suggesting a more effects-based approach. In addition to the HR Guidance, the agencies published an easy-reference guide titled "*Antitrust Red Flags for Employment Practices*"[8], where its is explained that competition concerns can arise if human resource professionals or company managers (i) agree on terms of employment including any type of employee compensation, (ii) exchange company-specific information on terms of employment, or (iii) agree to refuse to solicit or hire another company's employees.

Most recently, in a joint statement, the US Department of Justice and the Federal Trade Commission stated that they were closely monitoring employer coordination to disadvantage workers in the midst of the Covid-19 pandemic, especially in relation to workers employed in essential industries. The agencies stressed that anti-competitive collusion between employers such as agreements to lower wages or harm worker mobility would not be tolerated. The agencies also warned employers that unilateral anti-competitive conduct in labour markets (i.e., abuse of monopsony power) are equally illegal[9]. In January 2021, the US Department of Justice brought its first criminal no-poach action against a health care company.[10]

The US example seems to serves as an enforcement model for other jurisdictions. For example, in 2018, the Hong Kong Competition Commission issued an advisory bulletin to educate and warn employers not to engage in certain anti-competitive practices regarding the determination the terms of employment and hiring of employees. With the announcement of the TCA's most recent investigation into the labour market, the Turkish authority clearly signals that it adheres to this enforcement trend.

Next steps

In light of the global developments regarding anti-trust enforcement in the labour market, it is safe to assume that the TCA's most recent investigation in the labour market in the e-commerce sector will be trailed by further enforcement action focused on an industry-specific approach. Moreover, following the huge impact of the news of the TCA's latest investigation, the authority announced that they are mindful of the uncertainties surrounding the application of competition rules in the labour market, and signalled that a guidance will likely be issued to remedy the uncertainties faced by companies and employers. This guidance will likely follow on the footsteps of the US example and provide clear guidance as to the TCA's stance regarding anti-competitive conduct in labour markets once and for all.

Authors: Togan Turan, Gülçin Dere, Deniz Benli, Sabiha Ulusoy

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1 The announcement is available at: https://www.rekabet.gov.tr/tr/Guncel/isgucu-piyasasina-yonelik-centilmenlik-a-d8bc3379bea1eb11812e00505694b4c6.

[2] The announcement on the TCA investigation against 8 private hospitals is available at: https://www.rekabet.gov.tr/tr/Guncel/bazi-ozel-hastaneler-hakkinda-sorusturma-acildi-7cc34b0d5823eb11812200505694b4c6

[3] The Board's *Aegean Container Transporters* decision dated 02.01.2020 and numbered 20-01/3-2.

[4] The Board's *Cherry* decision dated 24.07.2007 and numbered 07-60/713-245.

[5] The Board's *BFit* decision dated 07.02.2019 and numbered 19-06/64-27.

[6] The Board's *Private Schools* decision dated 03.03.2011 and numbered 11-12/226-76.

[7] The US Department of Justice and the Federal Trade Commission's Antitrust Guidance for HR Professionals, available at: https://www.justice.gov/atr/file/903511/download.

[8] The US Department of Justice and the Federal Trade Commission's "*Antitrust Red Flags for Employment Practices*", available at: https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_red_flags.pdf.

[9] The announcement is available at : https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf

[10] The announcement is available at: https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion.