

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Competition Issues in Labour Markets – Note by Turkey

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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Turkey

1. Introduction

1. The OECD Roundtable on “Competition issues in labour markets” offers a valuable opportunity for the Turkish Competition Authority (TCA) to present its past and recent experience in relation to competition law enforcement in labour markets.
2. Just as many authorities, TCA’s experience in labour markets is limited compared to product markets. The reason behind the global inattention to the topic of this roundtable lies in the fact that modern competition law literature and enforcement have focused on production markets and the effects of monopolies on production. Therefore monopolization of input markets and the effect of monopsonies received less attention. Consequently, labour monopsony power and related labour market issues have been mostly disregarded.
3. However, in recent years, several academic studies have proven that the traditional approach needs to change. In addition, decisions and guidelines have been providing a basis for the applicability of competition law on labour markets.
4. In Turkey, one of the sectors in which the studies has shown to entail monopsony power is the retail sector¹. After the merger and acquisition activities in this sector, concentration rates increased, which led to the exclusion of many small firms from this market. Some studies argued that concentration in the retail market decreases job opportunities and on the other hand reduces employee wages². The disappearance of local and small-scale employment opportunities can also adversely affect social capital, which is crucial for economic growth.
5. Although there is limited number of academic studies on labour monopsony power in Turkey, TCA has shown its intention to follow the trends with its recent *Bfit decision* (Decision No. 19-06/64-27, Date 07.02.2019). The decision involves assessments of both no-poaching agreements and non-compete covenants. However, there is no case, which conducts a detailed assessment of labour monopsony.
6. How TCA approaches to the all related issues will be explained below.

2. Exemptions and Limits

7. Like most of the jurisdictions worldwide, Turkish competition law has also granted an exemption for collective bargaining agreements. According to the preamble of Article 3 of The Act on the Protection of Competition (Law No.4054), definition of services does “not extend to the labour market, where the principle of collective bargaining is recognized”. This approach has not exempted labour market from the application of

¹ KOÇ. Ali, KOVACI. Süreyya, BÖLÜK. Gülden, “The Effects of Concentration in Retail Sector: An Evaluation At The Viewpoint of Competition and Labour Market” Akdeniz İ.İ.B.F. Journal (18) 2009, p.66-99.

² DUBE, A. and JACOBS, K., (2004), “Hidden Cost of Wal-Mart Jobs, Use of Safety Net Programs by Wal-Mart Workers in California”, A Study of The UC Berkeley Labor Center.

competition law as a whole but clearly kept collective bargaining agreements out of the scope.

8. In theory, it is possible that collective bargainings and related union actions may be detrimental to competition. However, the shield provided to collective bargaining due to social policy concerns seems to make competition authorities refrain from implementing traditional tools of competition enforcement.

3. No-poaching Agreements

9. Despite of the fact that there are many possible aspects of competition law enforcement in labour markets and thus many debates on the table, several competition authorities ruled that naked no-poaching agreements are clearly detrimental to competition. Therefore, discussions on this issue are mainly focused on different matters such as what other types of collusions can be detrimental to competition, what is the role of competition in product market when investigating collusions between employers, whether effect-based approach to no-poaching agreements is necessary and how to deal with franchisor-franchisee agreements including no-poaching agreements.

10. The first ever decision on no-poaching and wage fixing agreements issued by the TCA was about an alleged collusions between TV series producers (Decision No. 05-49/710-195, Date 28.7.2005). One of the main producers in this sector claimed that there was an understanding between producers to not to poach each other's actors/actresses and to fix their wages. As a result of the preliminary inquiry, the Turkish Competition Board (The Board) stated that this type of agreements would reduce competition due to their effect on input price. However, during the inquiry no evidence was found to show that TV series producers actually colluded. Therefore, only an official warning was sent to parties under Article 9(3) of Law No. 4054, which warned the TV series producers that an agreement on no-poaching and wage fixing would be a violation.

11. Another decision, where the Board decided that no-poaching and wage fixing agreements are a violation of competition law, was regarding private schools and school associations (Decision No. 11-12/226-76, Date 03.03.2011). Allegedly, private schools fixed their fees and coordinated their personnel policy with the help of school association. Findings for 2001-2002 period have shown that private schools set meetings in order to exchange information about school fees and teacher wages. Participants to these meetings stated their intention to determine fees and wages in coordination. The Board decided that even if contacts between competitors did not amount to an agreement, information exchange on competitive parameters was an infringement of the law. However, since the limitation period for the investigation had expired the Board did not initiate an investigation on its findings for 2001-2002 period. Moreover, decision also involved assessments on the association's "Ethics Policy" which included an obligation to refrain from soliciting, hiring or recruiting one another's teachers. It was underlined in the reasoned decision that the "Ethics Policy" also contained a provision which required the private schools to follow the rules in order to be able to join the association. The Board ruled that "Ethics Policy" was considered as a decision of an association of undertakings hindering hindered competition. The decision of the association was seen as a violation of law because it was preventing teachers' job mobility". Remarkably the Board reviewed allegations of price fixing in the context of traditional consumer welfare standards and its effects on product market. However, effects of no-poaching agreements only explained in the context of job mobility. As a result, under Article 9(3) of Law No. 4054 an official warning was sent to parties, which stated that an agreement on no-poaching and wage fixing would be a violation.

12. It is worth underlining that this case included firms competing with each other in both product and labour market. The decision has shown us that there was a collusion on both markets. Therefore, a question arises whether firms, which are in a collusive practice on product market, also have an extra desire to agree on labour market or vice versa. Since parties have already settled on one competitive parameter, collusion on the other one may not be far away from the table.

13. The most recent decision of the TCA about no-poaching agreements is the *Bfit decision*³. Bfit (a chain of sports centers) has brought a comprehensive “*Non-Compete Clause*” in its franchise agreements throughout Turkey. These agreements include non-compete clauses for both franchisor and its employees. The clauses about employees cover that “*franchisee cannot recruit an employee formerly worked for another franchisee or rival firms and an employee currently works for another franchisee without the written consent of franchisor*”. The Board stated that although concerned agreement is not a classical no-poach agreement as it is not completely prohibiting the employee transfer but requires the consent of franchisor, provisions of the agreement could still restrain employee transfers between Bfit’s different branches or from a rival company to a Bfit branch. Bfit defended that the purpose of the clause was not to reduce the mobility of workers but to inform franchisees on whether an employee committed an infamous crime or there is a legal dispute arose with that employee.

14. As a result of the review, no-poaching clauses were considered to be a violation of Article 4 of Law No.4054. In addition, it has been evaluated that these provisions will not benefit from individual exemption within the scope of Article 5 of Law No.4054, as they were found to be eliminating competition in a significant part of the relevant market.

15. However, it was also observed that in practice the transfer of employees between Bfit’s different branches or from a rival company to a Bfit branch was not prevented by Bfit. Besides, due to the low market share of Bfit and a large number of competitors in the market, it was concluded that the possible effects of the violation will remain limited and therefore there is no need to initiate an investigation for the case.

4. Labour Concerns in Merger Cases

16. Several transactions were cleared by the TCA where the non-solicitation (no-poaching) clauses were a part of the agreement. The Board evaluated these clauses as an ancillary restraint. Therefore, these clauses were reviewed to see whether they are directly related and necessary to the implementation of the transaction. Cases have shown that acquiring parties have an urge to set non-solicitation clauses in order to guarantee their investments. Particularly in transactions where employees have know-how, non-solicitation clauses are found more often. Cases also have shown that high level employees are more often subject to non-solicitation clauses in merger transactions.

17. Notably, the Board has focused on the duration of non-solicitation clauses in merger cases and argued that if the transaction has no substantial know-how transfer, the duration of clauses must be limited for a maximum of two years (Decision No. 07-56/632-214, Date 4.7.2007). To sum up, TCA has so far reviewed only non-solicitation clauses in merger cases and has not examined any employer monopsony power via merger notifications.

³ Reasoned decision was not published by the time this contribution was prepared.

5. Non-compete Agreements

18. Non-compete agreements, which are concluded between an employer and an employee, are regulated by the Turkish Code of Obligations No. 6098. They are enforceable only if employment provides crucial information to employee and there is probable harm to employer. Moreover, courts are authorized to review the covenants to see if they are reasonably limited as regards their duration, geographic scope and variety of restricted occupations.

19. The first case where the Board discussed non-compete agreements' and their anticompetitive effects was in 2011. In this case the Board rejected claims and stated that the issue was outside the scope of Law No. 4054 (Decision No. 11-32/650-201, Date 26.05.2011).

20. However, TCA's current approach to non-competes represents the opposite. In *Bfit Decision*, which was explained above, shows that there were non-compete clauses in franchise agreements, which are placed to prevent franchisee's employees (personal trainers) from competing for two years following the expiry of the agreement in Turkey. The Board decided that the non-compete clauses for employees are worth to examine and fall within the scope of competition law. Further, it is stated that an agreement, which creates know-how transfer, such as a franchising agreement, may generally justify a non-competition obligation for the duration of the agreement, however an obligation which continues after the expiry of the agreement may restrict the competition. Therefore, the Board examined whether the concerned clauses can qualify for an individual exemption. As a result, the Board ruled that even the agreement enabled a substantial know-how transfer from franchiser to franchisee, it did not entail a know-how transfer to employees. Therefore, it was decided that setting a non-compete clause for employees was not necessary to protect the know-how and the agreements could not benefit from article 5 of Law No.4054 as they were limiting competition more than what was compulsory for achieving the know-how protection. Eventually, a full-fledged investigation has not been initiated. Instead of an official warning has been sent to parties in order to make them remove the non-compete clauses for employees from the agreements.

6. Conclusions

21. In the light of the latest trends in competition law and policy, ignoring labour monopsony power concerns seems not like an option for competition authorities any more. However, the applicability of competition law, especially on unilateral conduct cases in labor markets, requires further study and discussion from many aspects. No doubt, unprecedented cases around the world will shed light on enforcement practice in the future.

22. In Turkey, earlier and recent cases show that underdeveloped legal doctrine and economic theory on this matter did not prevent the TCA from enforcing competition rules regarding labour market concerns like no-poaching agreements. However, decisions have not focused on the theory of labor market power yet. Since imperfect competition in labour market is in question more than ever, the number of the relevant cases in Turkey is expected to increase.