Kluwer Competition Law Blog

A Brief Analysis of Competition Law Enforcement in Labor Markets and the Approach of the Turkish Competition Authority

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Introduction

When competition law is considered, first issues that come to mind are anticompetitive agreements between competitors, abusive unilateral practices of dominant undertakings and mergers that restrict competition in relevant product or service markets. The foregoing practices are condemned as they lead to an increase in the end-user prices in the short or the long run due to their negative impacts on the competitive process. Moreover, the general understanding is that competition law exists for the protection of consumers and the maximization of their welfare. Thus, there is an inherent link between low end-user prices and consumer welfare, whereby the former is by far the most significant precondition for the promotion of the latter. This is because; the concept of "*consumer*", which is referred to in the much acclaimed "*consumer welfare standard*" in competition law -established by the neoliberal Chicago School of thought- is a one-dimensional being who solely engages in market transactions as a buyer and has no other role in these markets.

However, this assumption disregards the fact that in real life, an overwhelming majority of these "*consumers*" are not only buyers but they are also laborers who work for the firms that are at the supply side. As laborers, the welfare of these "*consumer/laborers*" are also greatly affected by the competition between the firms for the acquisition of workers through parameters such as higher wages, better working conditions and greater side benefits. Therefore, the existence of fierce competition between firms in labor markets are also extremely important for the welfare maximization of real-life consumer/laborers. Accordingly, in theory, the protection of competition in labor markets should also be a major concern for the competition watchdogs.

Despite this fact, competition law enforcement has been so far limited in labor markets. Yet, currently there seems to be a shift in this approach as enforcement towards certain anti-competitive practices in labor markets are increasing. Competition watchdogs are becoming more active particularly in addressing anticompetitive agreements that create monopsony power and abuses of monopsony power leading to increased buyer power on the labor demand side[1].

Competition Law in Labor Markets

From a competition law perspective, same rules should apply for competition for the procurement of goods and services and the acquisition of labor. Firms that compete for hiring or retaining the same laborers are competitors in the labor markets, regardless of whether these firms also offer goods and services that are in competition with each other. In this regard, agreements between competitors that aim to restrict competition within labor markets should also be deemed illegal. As per the "*Antitrust Guidance for Human Resource Professionals*" ("**Guidance**") which was published in 2016 by the United States Department of Justice ("**DOJ**"), it is stated that "*agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal*". These agreements are considered as *per se violations* of competition rules the violation of which may lead to criminal liability in the United States. In a speech delivered on January 23, 2018, DOJ's Principal Deputy Assistant Attorney General Andrew Finch stressed that "*the DOJ expects to pursue criminal charges for agreements that began after October 2016, as well as for agreements that began before but continued after that date*".

The first investigations in the labor markets indicate that the most common anticompetitive behavior in such markets is "*no-poaching agreements*". The Guidance defines no-poaching agreements as "*agreements by which a company agrees with another company to refuse to solicit or hire other company's employees"*. Those agreements between direct competitors are considered as *per se* violation of competition law unless these are necessary for a larger legitimate collaboration in certain jurisdictions.

DOJ is not the only competition watchdog that has the enforcement of competition rules in the labor markets in its agenda. In February 2018, the Japan Fair Trade Commission published a report entitled "*Report of Study Group on Human Resources and Competition Policy*", which aimed to sort out the views on application of competition rules to ensure competition for human resources to facilitate a pleasant environment for individual workers. In addition, the Hong Kong Competition Commission has also published an Advisory Bulletin for the prevention of anticompetitive behaviors in labor markets. Interestingly, in Europe, neither the European Commission nor the national competition authorities published any policy guidelines with regards to potential violations of competition rules in labor markets for now.

The Approach of the Competition Authority

Even though the Turkish Competition Authority's ("**TCA**") did not publish any guidelines regarding the enforcement of competition law in labor markets, there are few cases where certain potentially anti-competitive agreements in labor markets were dealt with. The first evaluation of no-poaching and wage-fixing agreements by the TCA was made in its TV Series Producers Decision[2]. In this regard, as per the complaint made to the TCA, it was alleged that five top-tier TV series producers agreed not to poach each other's actors/actresses and to set fixed prices in case of doing so. Nevertheless, as a result of the preliminary investigation conducted no evidence was found to prove that the relevant TV series producers engaged in an anti-competitive agreement. The TCA concluded the relevant preliminary investigation by stating that the TV series producers should avoid no-poaching and wage fixing agreements as these would constitute violations of competition rules.

In the sequel, in its Private Schools Decision[3], the TCA evaluated whether major private schools made no-poaching and wage fixing agreements through their association of undertakings (the

Private Schools Association). In this regard, as per the preliminary investigation, the TCA determined that private schools conducted meetings to discuss school fees, scholarships and wages. Accordingly, the TCA stressed that such meetings and discussions were in violation of the competition rules as the schools exchanged competitively sensitive information. However, as the limitation period had expired, the TCA did not initiate an investigation. The TCA further evaluated whether certain clauses of "*Private Schools Ethics Policy*" adopted by the Private Schools Association were in violation of the competition rules. In this regard, it was held that the related policy shall be considered as a decision of an association of undertaking that restricts competition, as it imposed obligations such as refraining from soliciting, hiring or recruiting competitor's teachers and prevents teachers to switch jobs. As a result, similar to the TV Series Producers Decision, the TCA concluded the preliminary investigation by reminding that the private schools should avoid no-poaching and wage fixing agreements as they violate competition rules.

Most recently, in its Bfit Decision[4], the TCA evaluated Bfit's (a fitness center chain) franchise agreements which included, among others, certain non-compete clauses for both franchisers and its employees. As per this clause; "*franchisee shall not recruit an employee who formerly worked for another franchisee or for a competitor or an employee who currently works for another franchisee without the written consent of the franchisor*". The TCA determined that the relevant agreement is a special type of no-poaching agreement that was also applicable for the transfer of laborers between Bfit's various fitness centers.

It is without doubt that an agreement among competing fast-food franchisees, which prevents them from hiring each other's' employees would break the competition rules. However, inter-franchise poaching restrictions are different from a competition law perspective. Accordingly, the TCA analyzed the relevant clauses in accordance with the case law in the United States. The TCA concluded that pursuant to the case law of the United States (and in particular the Jimmy John's Decision[5]), transfer restrictions between other franchises of a brand also reduces mobility of workers and therefore violates competition rules. However, in its Bfit Decision, the TCA stressed that the relevant no-poaching clause did not constitute an absolute ban of employee transfers but imposed a requirement of getting a written consent from the franchisor.

Nonetheless, the TCA determined that the relevant clause is anti-competitive, and it could not benefit from individual exemption as it leads to elimination of competition in a significant part of the relevant labor market. However, as a result of its review, it found that (**i**) employee transfers between Bfit's various fitness centers or competitors were not completely prohibited and (**ii**) the effects of the agreement were limited due to the relatively low market share of Bfit. In this regard, similar to its previous decisions concerning no-poaching agreements, the TCA concluded the relevant preliminary investigation by holding that current franchise agreements of Bfit violate competition rules and shall be revised in accordance with the competition law.

Conclusion

To recap, it is without doubt that the enforcement of competition rules in labor markets is of crucial importance as anti-competitive practices in such markets have negative effects on the welfare of consumer/laborers, who are much better representatives of real people when compared to one-dimensional consumers envisaged in the Chicago School's "*consumer welfare standard*". It should be reminded that although the competition law related cases regarding labor markets has been so

far confined to anti-competitive agreements, it would not be surprising to encounter similar developments in abuse of dominance and even merger cases.

As a final note, considering the latest trends in competition law enforcement, number of relevant cases is expected to increase. Therefore, companies and especially human resources departments shall be aware and therefore take all necessary measures to ensure compliance.

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[1] OECD – Competition Concerns in Labour Markets – Background Note, June 5, 2019.

[2] TCA's decision dated 28.02.2005 and numbered 49/710-195.

[3] TCA's decision dated 03.03.2011 and numbered 11-12/226-76.

[4] TCA's decision dated 07.02.2019 and numbered 19-06/64-27.

[5] United States District Court for the Southern District of Illinois, *Butler v. Jimmy John's Franchise, LLC,* dated 31.07.2018.

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