Kluwer Competition Law Blog

Turkish Competition Authority Reiterates: Labor Market is Subject to Competition Law Enforcement

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Anti-competitive practices in the labor markets have generally not been on the radar of the competition watchdogs. Given the increase in the number of cases dealing with the labor markets within the last five years, this appears to change. The Turkish Competition Authority ("**TCA**") contributed to that shift by publishing on May 6, 2020 another decision related with the labor markets[1].

The decision concerns an agreement about fixing the wages of the truck drivers and it took place between 47 undertakings dealing with land transportation of containers to/from ports. The TCA's decision has various interesting aspects. Firstly, it is one of its handful of decisions related with the labor markets. Secondly, the TCA relied on WhatsApp communications (third time in the last two years) taken these communications as evidence. Lastly, although the TCA established the violation, it did not impose any fine and rather instructed the concerned undertakings to stop the identified anti-competitive practices.

We will throughout this article provide a brief of this decision along with other developments taken place recently in Turkey and globally regarding the competition law enforcement in the labor markets.

Background

The TCA carried out dawn raids in the premises of the undertakings and found WhatsApp conversations about fixing the truck driver's wages. The communications indicated that the officials from the investigated undertakings settled on a wage-fixing agreement. These communications, as reported in the TCA's decision, as explicit as follows[2]:

"*… to decrease the transfers of the drivers, I believe that everybody should fix the wages/per diem allowances/special benefits, just like transportation prices. They* [drivers] *speak between each other and see other examples.*"

"*… But this kind of organization should be prevented at the cost of our life.*"

"*Dear Friends*

Please do not increase the wages of the drivers without exchanging information through this platform…"

"*… Dear friends, do we have an action regarding the driver wages and per diem allowances in the new year? I think, if we have a mutual agreement again on this topic, the driver friends will not change their companies.*"

The TCA mainly focused on three issues in assessing these communications. The first issue was whether this practice constitutes a buying cartel and if so, whether a buying cartel constitutes a violation as per the Turkish Competition Law. The second issue was whether the labor market is subject to competition law enforcement. Lastly, the TCA assessed the effect of the wage-fixing agreement between the undertakings.

Is this a buying cartel?

Anticompetitive agreements that create monopsony power in a given market with a view to abuse such power is, generally speaking, referred to as a buying cartel under the Turkish Competition Law. Indeed, in one of its previous decisions, the TCA found that undertakings operating in the demand side of the cherry market (buyers) agreed on the purchasing conditions of the cherries and emphasized that this practice constitutes a buying cartel[3]. The TCA further stated that a buying cartel carries the same nature (in terms of categorizing the violation) as a price-fixing or a customer allocation.

As such, the TCA first carried out an assessment as to the market definition. The TCA found that since the investigated arrangement was with regards to fixing the employees' wages, relevant market may be defined as a market related with the employees. However, the TCA did not define relevant market because possible alternative definitions would not affect its assessment.

TCA established that the concerned undertakings (as the employers) are comprising the demand side in the labor market whereas the truck drivers (as the employees) are comprising the supply side. The TCA categorized this wage-fixing arrangement as a buying cartel among the employers. The TCA then by referring to its previous decisions emphasized that a buying cartel is a *per se* violation under the Turkish Competition Law.

Is labor market subject to competition law enforcement?

The TCA stressed that the companies tend to poach the best employees of its competitors with a view to increase its profit by hiring the most productive employees. The TCA further stated that higher wages are of importance for the employees to consider the new offer. Fixing by the employers of the employees' wages, therefore, does away with the competition that takes place in the labor market.

The TCA then went on to assess the theory of harm regarding the lack of competition in the labor market. In this regard, the TCA emphasized that an undertaking with monopsony power in the labor market may decrease the wages without losing significant number of employees. Therefore, it was assessed that fixing the wages of the employees with a view to create and abuse the

monopsony power in the labor market negatively affects the welfare of the employees. Although the TCA also mentioned that abusing such monopsony power might also indirectly create negative effects on the consumers, it focused mostly on the reflections in the labor market.

On this point the TCA made references to its previous case law, where it established that labor market is indeed within the scope of the Turkish Competition Law. These examples include (**i**) TV Series Producers Decision (2005), where the producers' alleged agreement to fix the actors'/actress' wages were investigated; (**ii**) Henkel Decision (2011), where the alleged gentlemen's agreement to non-poach each other's employees among the competitors were investigated; (**iii**) Private Schools Decision (2011), where some of the private schools alleged agreement to fix the teachers' wages were investigation; and (**iv**) Bfit Decision (2019), where non-compete obligations of the franchisees towards the franchisor, and non-poaching agreements between franchisees/franchisor and its competitors were investigated.

The TCA also referred to international practices such as the guideline published by the US Department of Justice and Federal Trade Commission, which categorizes the wage-fixing arrangements as *per se* violation[4]. The TCA further mentioned the infamous Silicon Valley cases against the high-tech companies including Adobe, Apple, Google, Intel, Intuit, and Pixar, where these undertakings were allegedly in a non-poaching agreement to prevent employee transfers among them. Although the cases were settled, the Department of Justice prior to the settlement stated that the non-poaching agreements in question constituted a *per se* violation[5]. The TCA made further references to international examples from Europe, the US, Japan, Hong-Kong and Singapore[6], and substantiated its argument that wage-fixing is internationally accepted as a *per se* violation of the competition rules.

In light of above, the TCA established that labor market is subject to competition law enforcement, and that the case at hand is a buying cartel that took place in the labor market, which is a *per se* violation. Considering these, the TCA should have been expected to the fine the undertakings or at least to initiate a full-fledged investigation. The TCA, however, followed a different route and went on to assess the effect of the wage-fixing at hand in the preliminary investigation phase.

The effect of the wage-fixing in the case at hand

As known, when an agreement remains within certain market share thresholds, the European Commission does not initiate an investigation, or if initiated, may not impose fines as per the De Minimis Notice of the European Commission[7]. Unlike the European practice, the Turkish practice does not have a *de minimis* rule to provide safe harbour for the agreements that do not have an appreciable effect on the competition. The TCA, however, established by case law that where the effect of an anti-competitive agreement is minor, the TCA may not initiate a full-fledged investigation and rather send a notice to the undertakings to cease their identified anti-competitive practices[8].

As such, the TCA with a view to assess the effect of the wage-fixing in the case at hand, analysed the following:

- The last three years' average of net and gross wages paid by each undertaking to the drivers.
- The number of undertakings operating in the land transportation of the containers to/from ports in the nearby locations (Izmir and neighbouring cities).

- The transfers of the drivers among the investigated undertakings.

The TCA found that the last three years' average of net and gross wages paid by each undertaking is generally very close to the minimum wage allowed the Turkish legislation. The TCA established that, regardless of whether there exists a wage-fixing arrangement, the wages for the truck drivers would be close to minimum wage. However, the TCA does not substantiate this finding and seemingly disregarded the possibility that the wages could have been higher than the minimum wage, had there not been a wage-fixing arrangement. The TCA also found that larger undertakings pay a little bit higher than the smaller ones and established a correlation thereof.

The TCA then stated that although there are around 200 undertakings operating in the land transportation of the containers to/from ports in the nearby locations (Izmir and neighbouring cities), only 47 of them is a part of the wage-fixing agreement. Therefore, it was found that the wage-fixing agreement is not likely to create a significant buyer power in the labor market.

Lastly, the TCA found a significant number of drivers transfers between the undertakings, which demonstrated that the wage-fixing agreement did not prevent the drivers to change the undertakings that they worked for.

In light of these assessments, the TCA established that the wage-fixing in question did not create an appreciable affect in the labor market and decided not to initiate a full-fledged investigation against the undertakings, and to send a notice instead to cease their identified anti-competitive practices.

The TCA Relied on WhatsApp Communications

In the Orthodontic Products Decision[9] published in mid-2018, the TCA indicated that its case-handlers during the dawn raids inspected WhatsApp conversations. Within the scope of the decision, the TCA conducted raids on the premises of nine undertakings allegedly involved in price fixing practices. The findings of the raids revealed that the TCA has inspected the employees' WhatsApp conversations in the company computers linked to the company GSM lines. The TCA has found no violation as a result of its preliminary investigation.

A couple months after this decision, the TCA published its Mosa? Decision[10], where we saw another example of where the TCA relied on WhatsApp communications in an inspection. In this case, during the dawn raid conducted by the TCA at Mosa?'s premises, one of the case-handlers realized that the employees have been communicating during the dawn raid through a "WhatsApp group chat" named "Mosa?". The TCA accessed to the WhatAapp group chat and came across to texts revealing that the employees intentionally cut the electricity, disconnected the internet and deleted e-mails, which led to an administrative fine for hindering the on-the-spot inspection.

The decision subject to this article is the last example, where the TCA relied on WhatsApp communications and taken them evidence to substantiate the wage-fixing agreement. This proves that the TCA will continue to inspect and rely on WhatsApp communications realized between the undertakings.

Conclusion

With this decision, the TCA reiterated that labor market is indeed subject to competition law enforcement and wage-fixing agreements are not different than a customer allocation or a price-fixing, all of which is considered a *per se* violation. Additionally, the decision demonstrates that the TCA decisively continues its practice to inspect the WhatsApp communications of the investigated undertakings and use them as evidence.

Given the increasing attention to the labor market by the competition watchdogs, direct and indirect negative effects of anti-competitive agreements in the labor law market are likely to be assessed in a more detailed manner in the near future.

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[1] The Turkish Competition Authority's 02.01.2020 dated and 20-01/3-2 numbered decision.

[2] The Turkish Competition Authority's 02.01.2020 dated and 20-01/3-2 numbered decision, page 5 – 9.

[3] The TCA's 24.07.2007 dated and 07-60/713-245 numbered decision.

[4] DOJ-FTC Antitrust Guidance For Human Resource Professionals, 2016.

[5] Competitive Impact Statement at 7–8, United States v. Adobe Sys., Inc. (No. 10-CV-01629) (D.D.C. 2010)

[6] Décision n° 16-D-20 du 29.09.2016 French Competition Council; Competition and Markets Authority, Case CE/9859-14, "Conduct in the modelling sector" (16.12.2016); Case S/DC/0612/17 Montaje y Mantenimiento Industrial; Singapore v. Employment Agencies, The Competition Commission of Singapore, CCS 500/001/1; https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf; https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html

[7] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52014XC0830%2801%29).

[8] The TCA's 06.05.2009 dated and 09-21/438-106 numbered; 25.06.2014 dated and 14-22/428-192 numbered; 30.12.2008 dated and 08-76/1227-465 numbered; 22.05.2018 dated and 18-15/282-140 numbered; 03.04.2014 dated and 14-13/238-104 numbered decisions.

[9] The TCA's 29.03.2018 dated and 18-09/157-77 numbered decision.

[10] The TCA's 21.06.2018 dated and 18-20/356-176 numbered decision.

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