Kluwer Competition Law Blog

The TCA's Stance on No-poaching Agreements: A Comparative Analysis

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The labor market has gradually increased its place on the agenda of competition law, especially in the last ten years. No-poaching agreements (agreements between competitors to not transfer employees from each other) come first among the elements that constitute the subject of competition law in the labor market. Like the other competition authorities, the Turkish Competition Authority ("**TCA**") has also examined no-poaching agreements in various decisions.

Below, the early decisions of the TCA on the subject will be given first. Subsequently, the point of the TCA's approach to no-poaching agreements will be explained in light of its current decisions and investigations. Finally, the decisions of the European competition authorities on the subject will be explained and a comparative picture of the European and Turkish approaches will be presented.

Early Decisions of the TCA

The TCA's treatment of no-poaching agreements is not fundamentally new. This issue first came before the TCA in 2005 with the *TV Series Producers* Decision[1]. However, there was more of an assessment of wage-fixing allegations rather than no-poaching agreements in the decision. However, through 2021, the TCA has reviewed, although infrequently, allegations related to no-poaching agreements. Although all of the preliminary investigations on the subject ended with the decision not to open an investigation until 2021, the approach of the TCA that sees no-poaching agreements as a violation of the Act No. 4054 On the Protection of Competition ("**Competition Law**") has become increasingly clear.

TV Series Producers Decision

In the *TV Series Producers* Decision of the TCA, the claim that some television series producers agreed not to transfer actors from each other and to keep the actor's wages at a certain level, based on the statements of one of these producers in the press, was examined. It has been stated by the TCA that if the producers determine the actor's wages through agreement, this action will mean determining the purchase prices within the scope of the Competition Law and this will clearly aim to prevent competition. In addition, it was emphasized that if the principle decisions to be taken in

this direction are implemented, competition in the market will be prevented. However, the TCA could not reach any findings supporting the statement of the relevant producer in the press and therefore decided that there was no need to open an investigation. On the other hand, it was decided to send a written opinion to the undertakings party to the preliminary inquiry regarding the need to avoid such behavior, emphasizing that the prevention of actors' transfer and the fixing of actor wages may restrict competition.

Private Schools Decision

Another decision that includes evaluations regarding the restriction of employee transfer among competitors is the *Private Schools* Decision[2]. In the decision, the determinations of the TCA regarding the provisions related to teacher employment included in the scope of the "*Principles of Private Schools*" prepared by the Turkish Private Schools Association, an association of undertakings formed by private schools, are important. Among these principles, there are provisions such as not being able to transfer a teacher of another private school together with his students, not being able to offer a transfer directly to a teacher working in another private school. It was emphasized by the TCA that these principles do not create consumer benefits and make the employment and mobility of teachers difficult.

It is also significant that the TCA assessed whether the *Principles of Private Schools*, including provisions on no-poaching, could benefit from an individual exemption. Considering that the TCA does not conduct an individual exemption review for agreements that are deemed to restrict competition by object, it can be concluded that the TCA has adopted an effect-based approach to no-poaching agreements in the decision.

Although the relevant principles were seen by the TCA as restricting competition, it was decided that there was no need to open an investigation due to (**i**) the fact that one of the associations of undertakings where the schools came together was dissolved two years before the date of the decision and no meeting was held under the relevant association of undertakings as of that date and (**ii**) the allegations that were the subject of the preliminary inquiry were time-barred. However, just like the *TV Series Producers* Decision, it was decided that a written opinion should be sent to the relevant undertakings.

Chemical Producers Decision

Another decision of the TCA, which the preliminary inquiry was concluded with the decision not to open an investigation, is the *Chemical Producers* Decision[3]. In the relevant decision, the allegation that there is a gentleman's agreement between undertakings operating in the chemical sector, regarding the employee not to be employed in another undertaking during the non-compete period agreed with his employer, was examined. In the decision, the TCA decided not to open an investigation on the grounds that the claim in question did not go beyond a hearsay and could not be proven. In addition, it was stated in the decision that the said agreements on non-compete could be exempted for certain periods between undertakings, for example by prohibiting the transfer of employees, especially in sectors where technical knowledge, skills and innovation are important.

B-fit Decision

The TCA's *B-fit* Decision[4] is another important decision in terms of no-poaching agreements. In the decision, B-fit's franchise agreement's provisions stating that the franchisee cannot employ any personnel employed/formerly employed by B-fit and/or another franchisee of B-fit or who have worked in competitor undertakings, without the prior written approval of B-fit, were evaluated. The possible effects of the relevant provisions on the labor market was considered by the TCA within the scope of the Competition Law. In the decision, it was emphasized that the relevant provision did not prohibit recruitment entirely and merely required the prior written consent of the franchisor, and it was stated that the relevant agreement was therefore not a typical no-poaching agreement. In addition, since the information and documents showing that the transfer of personnel between franchisees was reached, it was concluded that personnel transfer is not restricted with the provision of the agreement. In this context, it was decided that there is no need to open an investigation by the TCA, but that the relevant provision brought to the franchisee shall be limited to the term of the agreement and the reason for the written approval shall be specified.

Container Carriers Decision

The TCA's *Container Carriers* Decision[5] is also extremely important in terms of its determinations regarding the labor market. In the decision, the allegations that the container carrier undertakings agreed on the issues of fixing the wages of the drivers and not allowing the drivers to transfer between the undertakings were examined. It was stated by the TCA that the agreements made to fix the wages of the employees/not to transfer employees are not different from the cartels established on the buying side of the market. In this context, it was underlined that there is no fundamental difference between (i) no-poaching agreements and customer/market sharing agreements, (ii) wage-fixing agreements and price-fixing agreements. Moreover, the conduct of the wage-fixing agreement and the no-poaching agreement was considered by the TCA to be restrictive of competition by object. On the other hand, the TCA decided to send a written opinion to the undertakings to put an end to their infringing actions, but there is no need to open an investigation as the effect of the agreement is limited and due to procedural economy reasons.

A New Era for No-poaching Agreements Under Turkish Competition Law

As can be seen, in the previous decisions of the TCA regarding no-poaching agreements, it was decided not to open an investigation for several reasons. *Private Hospitals* Decision[6] can be shown as the first case in which this situation changed. In the decision, the allegation that private hospitals violated the Competition Law by determining the operating room service fees demanded from freelance physicians together and preventing personnel transfer between hospitals with a gentleman's agreement was examined. In this context, the TCA concluded that 18 private health institutions and 1 association of undertakings violated the Competition Law for various reasons such as fixing prices, limiting competition in labor markets and exchanging competitively sensitive information. For this reason, a total of TRY 58 million (approximately EUR 5.5 million[7]) administrative fine was imposed on undertakings. Among these, the number of undertakings that the TCA determined to limit competition in the labor markets is 16, and the total fine applied for this reason is approximately TRY 45 million (approximately EUR 4.3 million).

At this point, it should be noted that there is no reasoned decision published yet regarding this decision. The short decision published by the TCA, on the other hand, does not contain the basis of the evaluations in the decision. However, considering the case-law of the TCA that has developed over the years and especially its evaluations in the *Container Carriers* Decision, it is thought that no-poaching agreements are considered as a violation by object and labeled as a cartel. In particular, the TCA's attitude that there is no fundamental difference between (**i**) no-poaching agreements and customer/market sharing agreements, (**ii**) wage-fixing agreements and price-fixing agreements indicates that no-poaching agreements will be considered as a violation by object.

A much more comprehensive investigation into the labor market was launched by the TCA in April 2021 ("**Labor Investigation**"), shortly after the investigation on private hospitals was initiated. Although the investigation was initially launched against 32 undertakings, the scope of the investigation was expanded by the TCA in the process and this number increased to 49. Among the parties to the investigation are leading undertakings from many sectors such as e-commerce, food, communication, media and retail. The subject of the investigation is the allegation that these undertakings made a gentleman's agreement not to make job offers or job interviews with each other's employees (in other words, a no-poaching agreement).

In the statement made on the official website of the TCA regarding the Labor Investigation[8], it was emphasized that the employers competing for labor in the labor markets, preventing the transfer of employees between the undertakings through agreements between them, may deprive the employees of job opportunities that offer higher wages and better conditions. According to the TCA, the competitive structure in the labor market may be damaged by the decrease in the mobility of the labor factor between the undertakings and/or the inability to find the real value of the wages for the labor. A similar statement was made by the President of the Competition Authority on the subject[9]. According to the President of the Competition Authority, the decrease in labor mobility reduces innovation, the contribution of employees in the process of creating economic value and the welfare of employees.

In addition, another important issue in terms of the Labor Investigation is that some of the parties to the investigation accepted the violation and settled with the TCA. At this point, the TCA's assessments are not known to the public, as the settlement decisions have not yet been published and the investigation process continues. On the other hand, considering the evaluations of TCA in the *Container Carriers* Decision and the evaluations in the investigation announcement published by the TCA, it is highly likely that the no-poaching agreements are considered as a violation by object and that the undertakings that are party to the investigation will be seen as a cartel. Further, the fact that a few of the undertakings chose the settlement procedure strengthens the possibility that fines will be requested against some of the undertakings as a result of the investigation process.

Lastly, in April 2022, the TCA launched a new investigation against 7 undertakings, most of which operate in the field of software/information technologies, with the allegations that they violated the Competition Law by making gentleman's agreements in the labor market. It can be said that the evaluations in the *Container Carriers* Decision and the *Private Hospitals* Decision that will be published will also be guiding in terms of this investigation.

The European Union's Turning Point Regarding No-poaching Agreements

As for the European Union, EU Competition Commissioner Margrethe Vestager's speech held on 22 October 2021 – at the Italian Antitrust Association's Annual Conference – marked the beginning of a change in the European Commission's behavior.

Vestager indeed stated that from now on, the EC would start investigating new types of anti-competitive conduct such as no-poaching agreements. She directly targeted the companies endorsing that anti-competitive behavior stating "[…] *when they use so-called 'no-poach agreements' as an indirect way to keep wages down, restricting talent from moving where it serves the economy best"* and "*then there are those where the key to success is finding staff who have the right skills. So in these cases, a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market"**[10]***. While the EU Commission would up until now investigate cartels on price fixing agreements or abuse of dominant position, it will now extend its field of expertise to no-poaching agreements – and therefore the labor market.

Even though the European Commission is now starting to take an interest in no-poaching agreements and investigating them, the matter had already been under the scrutiny of some national competition authorities[11] ***[12] [13]***.

In 2017, the French Competition Authority ("**FCA**") has fined EUR 302 million to three leading manufacturers of PVC and linoleum floor covering – Tarkett, Forbo and Gerflor – in a case of a cartel which includes price fixing agreements, exchange of competitively sensitive information and no-poaching agreements *(DÉCISION 17-D-20 DU 18 OCTOBRE 2017**[14]**).*

The FCA rules that – among other anti-competitive behaviors – three undertakings made a gentleman's agreement since the beginning of the year 2000, to not solicit each other's employees. The undertakings would consult each other whenever they would receive an application from their respective former employees in order not to employ any of their competitors' former workers. The FCA's decision highlights the new interest shown in no-poaching agreements as an anti-competitive behavior, therefore setting the tone of its upcoming investigations. The FCA's decision is not only historical regarding the amount of the fine given to the undertakings that formed the cartel, but it is also significant since the FCA considers the no-poaching agreements as an infringement by object.

France is not the only country following that path. In Spain, the Spanish Competition Authority ("**SCA**") has also given two major rulings in the matter of non-poaching agreements with its decisions *S/0120/08, Transitarios, 31 July 2010* and *S/0086/08 Peluquería Profesional, 2 March 2011.*

In the *S/0120/08, Transitarios* Decision the SCA stated that "*the risk that a competitor could take away your workers gives them greater negotiating capacity and the ability to demand more attractive remuneration, appropriate to the demand for that cash in the market. If it is agreed not to recruit each other's employees or not to do it without the former employer's consent, the workers lose bargaining power, which affects their remuneration*"[15].

Here the SCA's reasoning is that by having made a no-poaching agreements between them, the undertakings forming the cartel prevent their employees from having a bargaining power in case they would be looking to work elsewhere. In the *Transitarios* Decision, the SCA also views no-poaching agreements to be a competitive tactic having an influence on costs and margins, with similar effects on the market as price agreements.

Also, in the *S/0086/08 Peluquería Profesional*, the undertakings involved took part in a cartel and entered into a gentleman's agreement to not recruit their respective sales staff. The SCA considered the no-poaching agreement as an anti-competitive behavior with direct consequences on the market and the ability to alter competition.

In an analysis document provided by Spain to contribute OECD for competition issues in labor markets[16], it is highlighted that no-poaching agreements have been liken by the SCA to price-fixing agreements. Indeed, the SCA considers that the no-poaching agreements have a direct effect on the wages by reducing them and limiting their negotiating by employees. Even though no-poaching agreements are not traditionally perceived as price fixing, the SCA based its position in the decision *S/0086/08 Peluqueria Profesional*, stating that:

*"In the second element of the definition of cartel, price-fixing, fixing production or sales quotas, dividing up markets, including fraudulent bidding, or the restriction of imports or exports, from which it is obvious that the legislator did not wish to include only the most obvious types of the practices listed, as price-fixing can be undertaken in very different ways and effective regulations in defence of competition must be able to encompass not only the clearest types of price-fixing (such as plain and simple setting of retail prices), but also more or less subtle agreements and practices which are intended to limit competition in prices. Therefore, the CNC Council considers that the substantiated practices can be classified as a cartel in the sense of AP 4 of the LDC, given that their aim was to restrict price competition, quantities and other competitive variables equivalent to price-fixing."**[17]***

Conclusions

As a result of early preliminary inquiries of the TCA regarding no-poaching agreements, it was decided not to initiate an investigation against the undertakings for various reasons and only to send a written opinion. However, the *Container Carriers* Decision can be seen as the TCA's final warning to no-poaching agreements in the labor market. Because the *Private Hospitals* Investigation, which was initiated after this, was concluded with a decision to fine the undertakings, and several undertakings settled with the TCA within the scope of the *Labor* Investigation.

In addition, the TCA's case-law has gradually evolved into the approach that no-poaching agreements restrict competition by object and that the parties of these agreements form a cartel. However, the TCA's evaluation in the *Chemical Producers* Decision, that exemptions may be granted to agreements that restrict the transfer of employees for a certain period of time in sectors where technical knowledge and skills or innovation are important, should not be forgotten. In this regard, the question of whether the TCA will set out certain exceptions where no-poaching agreements will not be considered as a violation will be answered by the reasoned judgment of the *Private Hospitals* Decision and the decisions to be taken as a result of the other two on-going investigations.

With her speech held on 22 October 2021, EU Competition Commissioner Margrethe Vestager emphasized the fact that no-poaching agreements will be considered as anti-competitive behaviors and sanctioned as such. Even though some decisions have been given by courts and competition authorities within the European Union and Turkey, it clearly is a novelty. One can state that both

Turkey and the European Commission are following the steps of what has been done globally in terms of ruling on no-poaching agreements cases.

While some European Competition Authorities such as the French one and the Spanish one have ruled on the matter, it seems that the TCA is both starting to initiate more and more investigations in the labor market and rule on no-poaching agreements cases, therefore extending its area of expertise and giving a new impulse to its national competition law.

Now that the European Commission openly asserted its will to put scrutiny into the no-poaching agreements in its investigations, it seems interesting to wonder how it will affect the field of competition law post COVID-19. Indeed, the latter took a toll on the labor market that suffered a lot of breaches relating to employees' rights and employment matters. For Turkey, it can be said that the TCA has developed a case-law over time and will guide future investigations in the light of this case-law.

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[1] The TCA's decision dated 28.7.2005 and numbered 05-49/710-195.

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

[3] The TCA's decision dated 26.05.2011 and numbered 11-32/650-201.

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

[5] The TCA's decision dated 02.01.2020 and numbered 20-01/3-2.

[6] The TCA's decision dated 24.02.2022 and numbered 22-10/152-62.

[7] The figures in EUR in this article are calculated at the average buying rate of exchange of the Central Bank of Turkey. For 2021, this rate was EUR 1 = TRY 10.47

[8] Available in Turkish on: https://www.rekabet.gov.tr/tr/Guncel/isgucu-piyasasina-yonelik-centilmenlik-a-d8bc3379bea1eb11812e00505694b4c6

[9] Available in Turkish on: https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-isgucu-704d8ab983adeb11812e00505694b4c6

[10] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-2021-competition-law-conference-organised-association-finnish-lawyers_en

[11] Available in Spanish on: https://www.cnmc.es/sites/default/files/104188_244.pdf

[12] Available in French on: https://www.legifrance.gouv.fr/juri/id/JURITEXT000023671169

[13] Available in Spanish on: https://www.cnmc.es/sites/default/files/223889_1.pdf

[14] Available in French on : https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/17d20.pdf

[15] *Competition Issues in Labour Markets – Note by Spain*, 5 June 2019, p. 4.

Available in English on: https://one.oecd.org/document/DAF/COMP/WD(2019)48/en/pdf

[16] ibid.

[17] ibid., p. 4.

This entry was posted on Friday, June 3rd, 2022 at 10:00 am and is filed under Labour market, No-

poach-agreement, Turkey

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