Kluwer Competition Law Blog

Turkish Competition Authority Sheds Lights on Labour Markets

Erdem Aktekin, Ayberk Kurt, Seda Eliri, Ece Ulusoy (ACTECON) · Saturday, December 14th, 2024

Introduction

On 03.12.2024, the Turkish Competition Authority ("**TCA**") announced that the Competition Board ("**Board**") had adopted the Guidelines on Competition Infringements in Labour Markets (**"Guidelines**") with its decision dated 21.11.2024 and numbered 24-49/1087-RM(4), following the publication of the Draft Guidelines on Competition Infringements in Labor Markets ("**Draft Guidelines**") and the receipt of public feedback.

The Guidelines were highly expected, given that the TCA had conducted four investigations over the past four years, involving more than fifty undertakings and resulting in administrative fines. Additionally, there are ongoing labour markets investigations. By publishing the Guidelines, the TCA aims to provide clarity and guidance to undertakings moving forward.

The Guidelines are closely aligned with the Federal Trade Commission's ("**FTC**") and US Department of Justice's ("**DOJ**") Antitrust Guidance for Human Resources Professionals, as well as the European Commission's ("**EC**") Competition Policy Brief dated May 2024. However, the Guidelines stand out by providing a more detailed assessment of the labour markets, distinguishing themselves from those published by the mentioned agencies. The Guidelines go beyond the scope of existing frameworks by offering in-depth analysis and addressing specific issues, such as the assessment of labour markets in mergers and acquisitions.

This article examines the key points of the Guidelines, which aim to provide clarity on potential infringements in the labor markets, as well as highlight how they are different from the Draft Guidelines. Accordingly, it also explains the types of infringements expected to fall within the scope of the Turkish Competition Law and the Board's suggested approach to those issues.

Assessments in terms of anti-competitive agreements and concerted practices

Article 4 of the Competition Law prohibits agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have their object or effect, or are likely to have the effect of preventing, distorting, or restricting competition in a specific market for goods or services. The Guidelines clarify that labour is a key input in the production of goods and services, making it an essential factor in competition among undertakings.

As such, the Guidelines explicitly state that the scope of Article 4 of the Competition Law also includes agreements between undertakings that affect labour markets.

In this context, the Guidelines explain that agreements or concerted practices between employers, as well as practices and decisions by associations of undertakings, that have the object or effect of fixing employees' wages and other working conditions, will be considered a violation of the Competition Law. The Guidelines further clarify that it is not necessary for the employers to be direct competitors in output markets; undertakings operating in different sectors may still be considered competitors in the labour markets.

The Guidelines categorize the most common types of infringements under the relevant article as follows: (i) wage-fixing agreements, (ii) no-poaching agreements, and (iii) exchange of information. Additionally, the Guidelines address circumstances under which such agreements may be considered ancillary restraints, allowing for certain exceptions when the restrictions are necessary and directly related to the objectives of the agreement.

Wage-Fixing Agreements

Wage fixing agreements are defined as agreements where undertakings jointly determine the working conditions of their employees, including wages, wage increases, working hours, side benefits, compensation, leave rights, and non-compete obligations. In the Draft Guidelines, physical working conditions were also considered as part of the working conditions, but this has been removed in the final version of the Guidelines.

In line with the Board's previous decisions on labour markets, the Guidelines state that agreements to fix wages and other working conditions constitute a violation of competition by object and would be considered as cartels.

Lastly, it is stated that wage fixing agreements can be made either directly or through a third party. In the event that a third party mediates or facilitates the agreement, the third party may be considered as a party to the infringement depending on the characteristics of the case at hand.

No-Poach Agreements

The Guidelines define no-poach agreements as agreements, directly or indirectly, in which one undertaking agrees not to offer employment to or recruit active or former employees of another undertaking. A no-poach agreement can also exist even if the parties do not completely prohibit the offers or the recruitment of each other's employees but instead make such employment conditional upon mutual consent or the consent of the employee's current employer. The Guidelines further clarify that these agreements can involve both active employees and former employees. The key issue, in any case, is whether there is an agreement between competitors to restrict employee mobility.

Similar to wage-fixing agreements, the Guidelines treat no-poach agreements within the same framework as provider/customer sharing agreements. As such, no-poach agreements are considered an infringement by object and are classified as cartels. As a matter of fact, in the Board's Private

Hospital Decision, it is concluded that "*agreements to fix employees' salaries/agreements not to poach employees, which constitute the main part of competition law enforcement in labour markets, are not different from cartels established on the buyer side of a market.*"

Moreover, according to the Guidelines, no-poaching agreements can be made either directly between undertakings or through a third party. If a third party mediates or facilitates the agreement, that third party may also be considered a party to the infringement, depending on the specific circumstances of the case at hand.

Exchange of Information

In the Guidelines, it is stated that the exchange of information can be either unilateral, involving disclosure of individual data between undertakings, or multilateral, involving the mutual exchange of data. The exchange of information may occur directly between undertakings or through third-party channels, such as intermediary institutions, platforms, associations of undertakings, independent market research organizations or private employment agencies. It can also take place via websites, media, and algorithms.

The Guidelines state that exchanging competitively sensitive information may be considered as an agreement or concerted practice that restricts competition since they reduce uncertainty in the market, facilitate anticompetitive cooperation and provide a mechanism for detecting deviations from a possible agreement between competitors.

The Guidelines refer to *the Guidelines on Horizontal Cooperation Agreements* for the framework regarding how the Board addresses exchanges of information under Competition Law and also mention that an anticompetitive object or effect will also arise when information exchange is related to input market.

The Guidelines explain what type of information in labour markets may produce such results. Specifically, information about wages, or working conditions that affect that employees' choice of employment or labour mobility, in general, is considered competitively sensitive. The Guidelines provide further examples, listing wage increases, working hours, fringe benefits, compensations and leave entitlements, as types of competitively sensitive information. The exchange of such information may have the object or effect of the restriction of competition. In this context, the Guidelines conclude that any information exchange made with the object of restricting competition in the market will be considered as a restriction of competition, regardless of its effect.

While the Draft Guidelines included the broader phrase "all kinds of working conditions", the Guidelines narrowed the scope to "working conditions with an obvious effect on labour mobility in general". Additionally, the example of physical working conditions has been removed from the list, in line with the change made regarding wage-fixing agreements.

Furthermore, the Guidelines also provide guidance for undertakings involved in the exchange of information as third parties such as independent market survey organizations and private employment agencies. These organizations are advised to aggregate the data they collect ensuring that their reports or data do not allow for the identification of the underlying data sources. According to the Guidelines, the exchange of unaggregated data, especially when it involves current or future information that would allow the identification of the data source, or the exchange

of individual, non-public data, can create anti-competitive effects.

Unlike the Draft Guidelines, the Guidelines specify that the exchange of information generally will not be considered anti-competitive if it meets all the following conditions:

- The exchange should be managed by a third party,
- The data should be anonymized, ensuring that the source or individual data points cannot be identified,
- The information exchanged must be at least three months old,
- The data should include information from at least ten participants, and
- No single participant's data should account for more than 25% of the total dataset.

It is noteworthy that while, according to the Board's decisions, existence of at least five participant data is required for the data to be considered aggregated in output markets, the Guidelines specify that the Board will require the presence of at least 10 undertakings for data related to the labor markets to be considered aggregated.

Ancillary Restraints

The Guidelines define ancillary restraints as restrictions in an agreement that, while not aimed at preventing, distorting, or limiting competition, are essential for achieving that agreement's objectives. These restraints are necessary and directly related to the goals of the agreement but are not part of the core of the agreement.

The Guidelines state that the restrictions that are found to be ancillary restraints will not fall within the scope of Article 4 of the Competition Law while provisions on no-poaching and wage-fixing that do not qualify as ancillary restraints will be treated as infringements by object as usual. In the Draft Guidelines, it was stated that restrictions that do not qualify as ancillary restraints would fall within the scope of the Competition Law, but there was no detailed explanation on how they would be treated. It is seen that this ambiguity in the Draft Guidelines has been eliminated with a stricter approach brought by the Guidelines.

For assessing whether restrictions in an agreement are ancillary restraints, the Guidelines state that the key factors to consider are whether the restraints in question are directly related, necessary and proportional.

The Guidelines define being directly related as a restraint being an indispensable part of the main agreement and necessary for its implementation. To fulfil the condition of being directly related, (i) it must be clearly demonstrated which main agreement the restraint is linked to and then (ii) the ancillary restraint must also be directly related to the objective of that agreement, meaning it serves a necessary function in achieving the agreement's primary goals.

The Guidelines also clarify that it is not sufficient for a restraint to be implemented within the same time period as the main agreement for it to be considered an ancillary restraint. However, if the ancillary restraint meets other requirements, it may still be considered directly related even if it is not implemented at the same time.

The necessity requirement is defined in the Guidelines as the restraint being essential to implement

or maintain the main agreement between the parties. According to the Guidelines, a restraint will be deemed necessary if it is not possible to achieve or sustain the original agreement in the absence of the restraint. Considering the nature of the original agreement and the characteristics of the market, if undertakings in a similar situation would not be party to the original agreement without the restraint in question, then the restraint can be regarded as necessary.

According to the Guidelines, for a restraint to be considered proportionate, it must not be possible to achieve the same objective using a less restrictive alternative that has a lesser impact on competition. Additionally, the scope of the restraint must be limited to the purpose, geographical scope, duration and parties of the agreement that it is part of. In particular, the Board may deem the restraint not fulfilling the proportionality requirement in the following cases:

- The duration of the restraint is not clearly defined, or the duration of the restraint is longer than necessary to attain the objectives with the restraint.
- Restraints are imposed on employees other than those who are key for implementing the main agreement or it is not clear which employees the restriction covers.
- The restraint exceeds the geographic region where the main agreement is implemented.
- The restraint covers all of the parties to the agreement or more parties than necessary, in cases where it is sufficient to impose the restriction on only certain parties.

In the Draft Guidelines, an ancillary restraint exceeding the duration of the agreement is listed as one of the situations where the restraint will not be treated as an ancillary restraint. However, in the Guidelines this part is omitted. Therefore, it is understood that the Board may consider restrictions whose duration exceed the duration of the agreement as proportionate depending on the circumstance of the case.

Analysis under other articles of the Turkish Competition Law

Regarding individual exemption, the Guidelines state that agreements on wage-fixing and no-poaching as well as exchanges of information that will negatively affect the effective competition in a market are unlikely to create economic benefits to outweigh their negative effects on competition because of their legal and economic characteristics and therefore these infringements cannot benefit from an exemption as a general rule.

In relation to the assessments to be made under abuse of dominance, the Guidelines limit itself to make generic remarks and state that labour market related competition infringements involving abuses of dominant position will be assessed in light of all of the specific circumstances and characteristics of individual cases. On the other hand, in the Draft Guidelines, a more detailed approach was taken and it was stated that exclusionary or market-closure abusive acts in terms of labour markets can take place on two axes: (i) the acts of the undertaking in a dominant position in the relevant labour market that limit labour mobility against the will of the employees and (ii) the negative effects of the exclusionary acts of the undertaking in a dominant position on to the labour market. However, it is seen that this section is completely removed from the Guidelines.

The Guidelines state that merger and acquisition analyses should consider factors such as the transaction parties' market shares, market concentration, employee qualification similarities, barriers to entry, labour supplier organization, workplace switching costs, competitors' capacity utilization or investment opportunities, potential competitive pressures, the possibility of increased

cooperation between competitors, and the risk of a killer acquisition.

Conclusion

The adoption of the Guidelines is a significant step towards enhancing clarity regarding the TCA's enforcement priorities in labour markets. The Guidelines provide valuable insight into the Board's future assessments and partially clarify the conditions under which ancillary restraints, frequently encountered in practice, may be excluded from the scope of Article 4 of the Competition Law. Furthermore, the Guidelines resolve the uncertainty around how to handle cases where the criteria for an ancillary restraint are not fully met, stating that such agreements will be considered infringements by object.

They also clarify the conditions under which the exchange of information does not lead to anti-competitive effects and outline key points companies must consider when engaging third parties for labour market analysis. Overall, the Guidelines set a clear standard for the evaluation of labour market practices and help businesses navigate potential compliance challenges.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Saturday, December 14th, 2024 at 9:00 am and is filed under Labour market, Türkiye
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.