TURKISH COMPETITION AUTHORITY
REKABET KURUMU

THE GUIDELINES ON COMPETITION INFRINGEMENTS IN LABOR MARKETS

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1. INTRODUCTION

(1) The Competition Authority aims to ensure a healthy competitive environment in all markets for performing the duty granted by article 167 of the Constitution of the Republic of Türkiye to prevent monopolization and cartelization. There is not any distinction between input or output markets in terms of the implementation of the Act no 4054 on the Protection of Competition (the Act). The General Preamble of the Act lists the main expectations from the market economy as efficient use of resources, maximization of consumer welfare, paving the way for innovation and technological advancement and realizing inclusive development. In order to meet those expectations, establishing competition in the markets for labor, which is an important input in production, is essential. Therefore, it is necessary to provide an environment that will allow those who supply labor and those who demand labor to take independent decisions in line with market conditions.

(2) Like in other markets, undertakings compete for keeping their employees or hiring each other's employees in labor markets. In this framework, competition for labor, which is an input, cannot be considered different from competition for other production factors; therefore, it constitutes one of the implementation fields of competition law.

(3) In competitive labor markets, it is expected that undertakings that compete for labor will offer the most attractive wage as well as other working conditions and employees will choose the most suitable job opportunity based on their qualifications and expectations. However, certain structural characteristics of labor markets may undermine an efficient competition environment. The most distinctive nature of labor markets is that the number of employees on the supply side is generally high but the number of employers on the demand side is low in the labor market whereas the number of those who demand for a product is high vis à vis the limited number of suppliers in traditional markets. In addition, employee organizations are relatively week. As a result of this weakness, employers have higher incentive to make anticompetitive agreements to the detriment of employees.

(4) Employees and undertakings come together in labor markets and wages to be paid in return for labor as well as other working conditions are determined depending on the bargaining power of the parties. Due to the characteristics of labor markets stated

above, there is a serious imbalance between employers' bargaining power and employees' bargaining bower in favor of the former. This imbalance is more apparent in sectors with high concentration.

(5) On the other hand, the reactions of employees to the changes in wages and other working conditions; in other words, the supply elasticity is considered to be low in general. Changing a job requires bearing various psychological burdens by not only the employees themselves but also for their family members because of the changes in their social environment in addition to the financial costs. As a result of this situation peculiar to labor markets, employees tolerate negative changes in wages and other working conditions up to a considerable extend, in other words, their tendency to change their jobs decreases. In addition, like in the case where employees are imposed a non-compete obligation, certain legal tools as well as rules that prevent or complicate providing services to other employers limit the mobility of employees.

(6) In addition to the problems stemming from the structure of the labor market, undertakings' conduct that is restrictive of competition regarding the mobility of employees as well as wages and other working conditions aggravate the existing imbalance. The incentive for self-improvement of the employees who are subject to lower wages than expected from a competitive market and disadvantageous working conditions and who are prevented directly or indirectly from searching for more convenient alternative job opportunities are reduced; thus the qualifications of labor are affected negatively. Moreover, employees who have lost the possibility of improving their conditions may participate less to the working life and even completely give up supplying labor and go out of work force.

(7) On the other hand, labor will be distributed inefficiently in the market because of the employees who are not employed by an undertaking that is suitable for their skills. Undertakings' inability to find appropriate labor will constitute an important barrier in front of innovative ideas and technological advancement. That means the reflection of negative effects of a competitive failure in labor markets to output markets will be inevitable. In markets where there are no innovation, technological advancement and strong competitors, consumers will buy goods and services with less variety and lower quality at higher prices.

(8) In addition, an agreement that is restrictive of competition in labor markets will decrease strategical uncertainty among undertakings whose costs are similar, which

may push undertakings to coordinate. This is much more likely in markets where labor constitute a significant amount of undertakings' costs. In case competitors coordinate, it is possible that prices will increase and other competition parameters will change to the detriment of consumers.

(9) Within this framework, the aim of the Guidelines is to set the basic principles regarding the assessment of the effects on labor markets of the practices, which result in preventing, distorting or restricting competition in a way to affect the markets for goods and services within the borders of the Republic of Türkiye, while detecting and supervising those conducts.

2. IMPLEMENTATION OF ARTICLE 4 OF THE ACT

(10) Article 4 of the Act prohibits agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services.

(11) Labor, which is an input for offering goods and services, is one of the parameters of competition among undertakings. Employees are indispensable for undertakings to compete in output markets on one hand and an important cost item on the other hand. Thus, every undertaking aims to reach the most qualified labor at the lowest cost and may tend to keep their employees or suppress wages.

(12) Undertakings competing for labor may make agreements that are restrictive of competition about limiting the mobility of labor and determining wages and other working conditions. Like in other anticompetitive agreements on the purchase side of the market, the aim of anticompetitive agreements in labor markets is to interfere in purchasing conditions.

(13) Agreements or concerted practices between employers as well as practices and decisions of associations of undertakings which have their object or effect fixing employees' wages and other working conditions are considered a violation of article 4 of the Act. Employers' duty to pay wages in return for employees' duty of service is one of the most important working conditions. In addition, working place and time, working hours at the workplace, annual leave periods, supplements to the wage, breaks, social benefits such as wedding, maternity, education, food, disability and death benefits are among working conditions. Factors such as benefiting from private health insurance

and individual retirement system on condition that the premiums are paid by the employer are also covered by working conditions[1]. Similarly, agreements or concerted practices as well as practices and decisions of associations of undertakings which have their object or effect avoiding hiring each other's current or former employees will be considered as a violation of article 4 of the Act. It is not necessary that employers be competitors in output markets in such assessment. Undertakings that are competitors in labor market are regarded as competitors irrespective of their activities in the output market.

(14) Although it is possible to indicate different types of agreements between undertakings that are restrictive of competition in labor markets, the most frequent violation types in those markets are wage-fixing agreements, as a result of which undertakings act jointly in determining employees' wages and other working conditions, and no-poaching agreements where undertakings agree not to hire each other's employees.

2.1. Wage Fixing Agreements

(15) Contracts of service and labor contracts made between employees and undertakings are governed by the Turkish Code of Obligations no 6098 and Labor Act no 4857 (the Act no 4857). The first paragraph of article 8 of the Act no 4857 includes the following provision: *"Employment contract is an agreement where one party (the employee) undertakes to work in subordination and the other party (the employer) undertakes to pay remuneration. The employment contract is not subject to any special form unless the contrary is stipulated by the Act.*" Concerning wage, which is stated in the mentioned article, Article 55 of the Constitution includes the following expression: *"Wages shall be paid in return for work. The state shall take the necessary measures to ensure that workers earn a fair wage commensurate with the work they perform and that they enjoy other social benefits."* On the other hand, not only wage but also other working conditions with an obvious effect on employees' choice of employment or labor mobility in general make up the remuneration of employees' labor. Working conditions that create rights or debts for employees are also covered. Thus, it is possible to define wage fixing agreements as agreements where undertakings jointly determine working conditions such as wages, wage increases, work periods, fringe benefits,

[1] The Decision of the 7th Civil Chamber of the Court of Cassation dated 16.03.2016 and numbered 2015/43401 E., 2016/6392 K.

compensation, leave entitlements, non-compete obligations. Those agreements intend to determine working conditions especially at a certain level or range.

(16) Article 4(1)(a) of the Act prohibits directly or indirectly fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any condition of purchase or sale by means of agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings. Accordingly, wage and other working conditions provided by undertakings in return for employees' labor under employment contract are considered as costs that form the price and/or condition of purchase. Therefore, agreements to fix wage or other working conditions are deemed illegal and prohibited according to the same provision of the Act. Those agreements constitute an infringement of competition by object due to their nature[2].

(17) The Competition Board (the Board) addresses this type of agreements, which can be classified basically as fixing the purchasing price, in the same framework with price fixing agreements made on the output side of the market[3]. In this sense, wage fixing agreements that constitute an infringement by object are regarded as cartel[4].

(18) Wage fixing agreements can be made either directly or through a third party. In case a third party mediates for the agreement or facilitate it, the third party may be accepted as a party to the infringement depending on the characteristics of the concrete case.

[2]Board decision dated 24.02.2022 and no 22-10/152-62 and the decision dated 24.04.2024 and no 24-20/466-196
[3] Board decision dated 02.01.2020 and numbered 20-01/3-2, para. 32, Board decision dated 07.02.2019 and numbered 19-06/64-27, Board decision dated 24.02.2022 and no 22-10/152-62.
[4]Board decision dated 24.02.2022 and numbered 22-10/152-62.

2.2. No-poaching Agreements

(19) No-poaching agreements are those that are made directly or indirectly, where one undertaking will not to offer a job to or hire the employees of another undertaking[5]. It is possible to say that a no-poach agreement exists in cases where undertakings do not prohibit completely undertakings from offering jobs or hiring each other's employees but make employment conditional upon the approval of each other or of the current employer of the employee. Moreover, those agreements may concern both active employees and former employees of undertakings. In this sense, while the scope and subject of no-poaching agreements may differ, what is important is whether there is an agreement between competitors to limit employees' mobility.

(20) Article 4(1)(b) of the Act prohibits allocation of markets for goods or services, and sharing or controlling all kinds of market resources or elements with agreements, concerted practices between undertakings or decisions and practices of associations of undertakings. No-poaching agreements have the object of artificially allocating the labor supplied among undertakings. Accordingly, no-poaching agreements are examined under the scope of the principles stated in Article 4(1)(b) of the Act[6]. In line with this, no-poaching agreements are assessed within the same framework as supplier/customer allocation agreements. Therefore no-poaching agreements that constitute an infringement by object are regarded as cartel [7].

(21) Moreover, no-poaching agreements can be made either directly or through a third party. In case a third party mediates for the agreement or facilitate it, the third party may be accepted as a party to the infringement depending on the concrete case.

[5] Rekabet Terimleri Sözlüğü (Competition Terms Dictionary), (2019), Revised Sixth Edition, p. 51.
[6] Board decisions dated 07.02.2019 and numbered 19-06/64-27, dated 02.01.2020 and numbered 20-01/3-2, dated 24.02.2022 and numbered 22-10/152-62.
[7]Board decision dated 19.01.2023 and no 23-05/59-19 and the decision dated 13.04.2023 and no 23-18/326-111

2.3. Exchange of Information

(22) For the purposes of these Guidelines, information means all kinds of data which are related directly or indirectly to labor; exchange of information means exchange of the said types of data among undertakings. Exchange of information may be unilateral in the form of disclosing individual data or multilateral in the form of exchanging data. Undertakings may exchange information directly. Besides, they may exchange information through a third party channel such as an intermediary or a platform; through associations of undertakings, market survey organizations or private employment agencies[8]; via channels such as websites, media and algorithms.

(23) Exchange of information may lead to benefits such as eliminating information asymmetry among undertakings or increasing efficiencies by making comparisons with competitors. On the other hand, exchanging competitively sensitive information may be considered as an agreement that is restrictive of competition or concerted practice under article 4 of the Act as it reduces uncertainty in the market, facilitate anticompetitive cooperation and detection of whether there is a deviation from the agreement between competitors.

(24) The framework concerning how the Board deals with the exchange of information under competition law is given in the Guidelines on Horizontal Cooperation Agreements. It is also likely that an anticompetitive object or effect will arise when the subjects of information exchange are not related to output market but to input market. Competitively sensitive information in labor markets that may produce such results are information on wages, or information on other working conditions with an obvious effect on employees' choice of employment or labor mobility in general. For instance, information about working conditions with an obvious effect on labor mobility in general such as wage increases, working hours, fringe benefits, compensations and leave entitlements, may be regarded as competitively sensitive information and exchange of such information may have the object or effect the restriction of competition. 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.

[8]Article 3(1)(j) of the Directive on Private Employment Agencies, which was put into effect after it was published in the Official Gazette dated 11.10.2016 and numbered 29854 defines a private employment agency as "*The agencies which are founded by real or legal persons authorized by the Authority to mediate for the employment of jobseekers at suitable occupations and finding suitable workers for various jobs and/or establishing temporary business relations.*"

(25) Exchange of information can be considered as a part of the agreement when it facilitates the functioning of anticompetitive agreements. In case undertakings exchange competitively sensitive information to maintain a no-poaching or wage fixing agreement, exchange of information may be regarded as a part of the relevant agreement.

(26) On the other hand, whether the exchange of information between competitors in the labor market creates effects that restrict competition can also be examined on the basis of the concrete case. In the assessment of competition restricting effects of exchange of information, the characteristics of the relevant market, the nature of the information shared and the method of information exchange are taken into account. Although the basic approach to the characteristics of the relevant market, the nature of the information shared and the method of information exchange is explained in the Guidelines on Horizontal Cooperation Agreements, the Board may consider different variables peculiar to labor markets and the conditions of the concrete case.

(27) Not only competitors in the labor market but also undertakings conducting the exchange of information in the capacity of a third party such as independent market survey organizations and private employment agencies should pay attention to the risk that information exchange will create anticompetitive effects. Independent organizations that report data about working conditions, especially information about wages should aggregate the data they collect and should not allow the prediction of the source of those data[9] since collecting information about employees and working conditions from a few number of undertakings will increase the risk of anticompetitive effects. As a result, exchange of information, which is not aggregated and which is current or future, allowing identification of the data source or data content individually and non-public, can create anticompetitive effects.

(28) It is accepted that the exchange of information, which fulfills all of the conditions below, will not create anticompetitive effects as a rule:

- should be managed by a third party,
- does not permit the identification of the data source or individual data content,

[9] Board decision dated 19.11.2020 and numbered 20-50/687-301.

- the information which is the subject of the exchange should be at least three months old,
- information should include at least the data of ten participants,
- no single participant's data should have a share more than 25% of the total data.

2.4. Ancillary Restraints

(29) Ancillary restraints are those which are necessary to the implementation of and directly related to the agreement's objectives and which are imposed to the party of an agreement, which does not prevent, distort or restrict competition by object or effect, although they do not constitute the substance of the agreement[10].

(30) Such restrictions may be imposed as a provision of the agreement or as an agreement which is different from but subject to the main agreement in a manner that is directly related, necessary and proportional for the implementation of a more comprehensive and legitimate main agreement. In other words, restrictions that are not the primary objective of the main agreement but directly related, necessary and proportional for the implementation and sustainability of the agreement are ancillary restraints[11].

(31) While the restrictions that are found to be ancillary restraints will not be addressed under the scope of article 4 of the Act, those that are not considered ancillary restraints about no-poaching and wage fixing will be addressed under the framework explained under titles 2.1 and 2.2 and they will be regarded as an infringement by object[12].

(32) For the assessment whether restrictions on labor in the main agreements that are not anticompetitive by object or effect are ancillary restraints, whether the restraints in question are directly related, necessary and proportional in terms of the main agreement is considered.

[10] Rekabet Terimleri Sözlüğü (Competition Terms Dictionary), (2019), Revised Sixth Edition, p. 51.
[11]Board decision dated 23.02.2006 and no 06-14/173-45 and the decision dated 26.05.2022 and no 22-24/390-161.
[12]Board decision dated 26.07.2023 and no 23-34/649-218 and the decision dated 27.02.2024 and no 24-10/170-66.

2.4.1. Direct Relation

(33) Direct relation means the restraint is an indispensable part of the main agreement and subject to the implementation of that agreement. That means in the absence of the main agreement, the relevant restraint would not exist.

(34) In order to meet the direct relation requirement, first, it is necessary to clearly show the main agreement to which the restraint is related to. Restraints imposed without being linked to a certain main agreement between undertakings will not meet the direct relation requirement because of their ambiguity.

(35) The ancillary restraint should be directly related to the main agreement's objective. In this sense, the restraint should be aimed at supporting or facilitating the objective of the more comprehensive main agreement and serve for achieving the objective of the main agreement at the same time.

(36) It is not sufficient for the restraint to be implemented within the same time period as the main agreement to be considered an ancillary restraint. However, in case the ancillary restraint meets other requirements, it may be considered directly related even if it is not implemented at the same time as the main agreement.

2.4.2. Necessity

(37) The necessity requirement means that the restraint is obligatory to implement or maintain the main agreement between the parties. In cases where it would not be possible to implement or maintain the main agreement in the absence of the restraint, the restraint will be considered necessary. The necessity requirement will be addressed according to objective criteria, independently of the parties' subjective assessments. Accordingly, when the nature of the agreement and the characteristics of the market are taken into account, if undertakings with similar conditions would not be able to be party to the main agreement without the restraint in question, the restraint can be regarded necessary.

(38) In case the undertakings can implement and maintain the main agreement without the restraint or with restraints that are less restrictive of competition, it will be concluded that the restraint is not necessary. If the implementation of the agreement would be more difficult or less profitable in the absence of the restraint, the relevant restraint is not deemed necessary.

2.4.3. Proportionality

(39) The third requirement to consider a restraint ancillary is proportionality. In order to deem a restraint proportional, it is necessary that it should not be possible to attain the objective in question with the restraint with a tool that is less restrictive of competition and the scope of the restraint should be limited to the objective, geographic scope, duration and parties to the main agreement.

(40) The Board will consider whether a restraint is proportional depending on the conditions of the concrete case. However, especially, in the following cases where

- 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 have key importance for implementing the main agreement or it is not clear which employees the restriction is imposed to,
- The restraint exceeds the geographic region where the main agreement is implemented,
- The restraint cover all of the parties to the agreement or more parties than necessary, in cases where it is sufficient to impose the restriction to only one party or a few parties to the main agreement,

it will be concluded that the restraint does not meet the proportionality condition.

(41) Restraints which do not meet direct relation, necessity and proportionality requirements simultaneously will not be considered ancillary restraints. The burden of proof is on the parties regarding the fulfillment of the criteria for ancillary restraint assessment. Imposing the restraint in question in written form will increase certainty about the requirements explained above.

3. IMPLEMENTATION OF OTHER ARTICLES OF THE ACT

(42) The principles set in these guidelines are applicable to the inquiries made under Articles 5, 6 and 7 of the Act insofar as it is appropriate.

(43) Agreements and concerted practices between undertakings and decisions of associations of undertakings are exempt from the application of Article 4 provisions, provided they fulfill all of the following requirements: They must ensure new developments and improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services; the consumer must benefit from those; they must not eliminate competition in a significant part of the relevant market and they must not restrict competition more than necessary to achieve the goals set out in the first two requirements.

(44) The assessment of agreements, concerted practices between employers and decisions of associations of undertakings in terms of the requirements listed in the provision of Article 5 of the Act will be based on the principles set in the Guidelines on the General Principles of Exemption in general.

(45) As a rule, any kind of agreement, decision and practice that is restrictive of competition, which meet all of the requirements listed in article 5 of the Act can be exempt from the implementation of Article 4 of the same Act. However, it is presumed that an agreement that disproportionately restricts competition because of its legal and economic characteristics and is unlikely to create economic benefits to outweigh its negative effects on competition will probably fail to meet the conditions for exemption. In fact, wage fixing and no-poaching agreements as well as exchanging information to restrict competition are such kind of restrictions and cannot benefit from exemption as a rule.

(46) According to Article 6 of the Act, abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others is illegal.

(47) Assessments under Article 6 of the Act will examine whether the undertaking under examination holds dominant position in the relevant product or service market as well as in the relevant labor market. In the labor markets, abuses of dominant position may be realized in different ways. Thus, competition infringements involving abuses of dominant position will be assessed in light of all of the specific circumstances and characteristics of the individual case under examination.

(48) Article 7 of the Act no 4054 of the Act prohibits merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking, except by way of inheritance, of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country.

(49) For determining whether the transaction results in significant lessening of competition in the labor market, although not limited to those, variables such as the market shares of the parties in the labor market and the concentration level of the market, the similarity of the qualifications of the employees employed by the parties to the transaction, barriers to entry to the relevant market, organization of labor suppliers in the relevant market, costs of changing jobs, the ability of the competitors of the parties to the transaction to increase capacity or make new investments, potential competitive pressure, whether the transaction increases the opportunities for competitors operating in the market to cooperate, whether the transaction is a killer acquisition will be taken into account.