

LABOUR MARKET AND COMPETITION

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“Agreements made, directly or indirectly, on one undertaking not offering employment to or hiring employees of another undertaking”

Competition Board (Board) concluded the investigation that it conducted on some undertakings for the determination whether the Article 4 of Law 4054 on the Protection of Competition (Law no 4054) with the reconciliation for the 11 undertakings by making no-poaching agreement on preventing the employment of each other's employees and restricting employee mobility for the labour market for a while and it imposed a total administrative fine of 151 million 148 thousand liras on 16 undertakings which are parties to the investigation.

This decision, which had a great impact on the public, once again brought to the fore the importance of the labor market, which has frequently started to be on the radar of competition authorities around the world in recent years, in terms of competition law. We have addressed the labor market, types of violations and important decisions taken on the subject in this article. Due to the currency and importance of the subject.

Labour market and its importance regarding the competition law

Competition law is not only limited to the selling side, but also prohibits actions restricting competition on the buying side.

However, human resources and their quality are one of the most important values of undertaking, elements such as employee salaries, fringe benefits, additional payments constitute important cost item. Having qualified employees is an important power for the undertaking to make a difference and compete in the innovation, quality, production speed of its products and services, and therefore in the output market, compared to its competitors. For this reason, undertakings do not want their employees who create added value to move to other undertakings, but in order to prevent this, they may also make agreements that lead to consequences such as suppressing/reducing employee salaries and rights, as well as actions contrary to competition law.

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No-poaching employee and wage determination agreements

Undertakings may try to persuade employees of competitor undertakings to work within their organisation by offering them better wages and opportunities. This is one of the basic behaviors that create competition in the labor market.

No-poaching agreements are defined in the Dictionary of Competition Terms as "direct or indirect agreements for one undertaking not to offer employment to or hire the employees of another undertaking".

Undertakings disclaim to compete mutually in terms of transferring the employees of competitor undertakings to their own undertakings with employee no-poaching agreements.

Sometimes, undertakings may make a contract among themselves and stipulate that employees must first take permission from their current employers in order to transfer to competitor undertakings. Preventing employees from transferring to other undertakings reduces the mobility of employees. Such agreements between competing undertakings restrict the transfer of employees and appear as an anti-competitive element for labor input.

Wage determination agreements are agreements made between undertakings for the determination of the wages to be paid to employees and/or any other financial rights to be provided, directly or indirectly, at a certain level or within a certain range. Such anti-competitive agreements are also considered a violation of competition law rules. For example, explicit wage-determination agreements and explicit no-poaching agreements are considered per se competition violations in US competition law. (see. DOJ/FTC 2016, No-poaching Agreements)

Salary fixing agreements in labor markets are not much different from price fixing agreements on the sell side. Therefore, the market effects of these violations on the buying and selling sides of the market are also similar.

Here, in addition to employers determining employee wages, it is also seen as contrary to the notion of competition that they act jointly on issues related to employee benefits such as insurance payments, meal fees, housing, services and compensation rates.

Competing employers sharing sensitive information about their employees with each other may also result in a wage determination agreement in terms of competition law, as it may create a similarity for the wages and fringe benefits paid by competitors to their employees.

Articles 444 and 447 of the Turkish Code of Obligations contain regulations on non-competition. But, In order for the employer to apply these provisions to its employee, the nature of the work must comply with the conditions specified in the law, and the work can be done for a maximum of two years, except for special cases. In other words, employers must act in

accordance with the limits set by the law and must not take any liberties that would violate competition law.

Relevant decisions

The decisions taken by the US Department of Justice (DOJ) and the competition authorities in Europe for the labor market are given below.

DOJ examined the agreement between an association of undertaking formed by hospitals and care centers in Arizona, which makes bulk purchases, with the offices that provide nurses to its members, and found out that these agreements reduce competition in the market and the wages to be paid to the offices that provide nurses (and therefore the salaries to be paid to nurses) and thus the agreements violate the competition law.

The UK and French competition authorities also examined the agreements that indirectly mean determining the wages of the models and found a violation regarding purpose in their decisions for model agencies, where they mainly examined the price agreements.

the Dutch competition authority examined the agreement among 15 hospitals in 2010, found the article of the agreement not to make additional payments to anesthesiologists working in these hospitals to be anti-competitive as well as other provisions and the court also took the same decision.

The DOJ found that the agreement between two rival railway equipment providers not to offer jobs or hire each other's employees without the prior approval of the current employer constituted a violation of competition and it closed the case through a reconciliation in 2018.

The Board also has a decisions for the labour market.

The Board found that television series producers determine the actor's wages through agreement means determining the purchase prices and this will clearly aim to prevent competition and competition in the market will be prevented if the principle decisions taken are implemented.

The Board decided that private schools coming together to discuss and share information on issues related to school fees, scholarships and salaries is an action restricting competition.

The Board found that private health institutions operating in the provinces of Samsun and Bursa are parties to the agreement no-poaching employees, and that some undertakings in the province of Bursa violated Article 4 of Law No: 4054 in terms of purpose by determining the scale for employee raises and deciding on the minimum/maximum raise rate.

Labor market for the undertakings having high market share

Monopsony is defined in the Dictionary of Competition Terms as “a market in which there is only one buyer. It is generally accepted that buyers have monopsony power when they have influence over the price of their inputs. *But, it is defined as "Buyers' Every effect on input prices is not accepted as a monopsony power, every monopsony has an effect on input prices."*

The employer will also have monopoly power in terms of the labor market in a monopsony market where there is a single buyer of goods and services, for example, in a market where there is a single employer operating in a certain line of business in a certain region. Not only the employer's monopoly position, but also its very strong and high market share in markets with few players can cause problems in the labor market. Leading undertakings in the sector with high market shares may set employee salaries below the competitive level. This causes employees to work with less salary than the value they produce. If the employer reduces employee salaries too much, employees have the opportunity to move to other undertakings, but in such markets, employees often have to accept low salaries because they do not have other options in a multi-player and competitive market. The undertaking increases its profits as it reduces input costs despite losing a small number of employees with this practice.

However, it is stated in the International Monetary Fund's 2021 publication titled "Rising Market Power"¹ that the market power of the undertakings, which are dominant in many sectors after the pandemic, has increased due to the lack of strong competitors in the market, but, this power is not reflected in the labor market, and the undertakings pay their employees less than they deserved.

Strong undertakings can further strengthen their positions through mergers and acquisitions. It does not only reduce innovation and business dynamism by decreasing competition in the market, but also raises concerns about the labor market, as mentioned above. For this reason, competition authorities should also evaluate the effects of the transaction on the labor market in the merger/acquisition files they receive.

Practices against competition law in the labor market cause brain drain

If undertakings do not compete on the purchasing side, which includes the labor market, and engage in behaviors that will restrict employee transfers in addition to price competition, this will lead to a decrease in employee mobility and innovation in the market. Since this may cause a decrease in the quality and quantity of the products produced, it may lead to results such as a decrease in consumer welfare and ultimately damage to the country's economy. A qualified employee is the more important for the undertaking, it is the more important for the employee to be able to work under the salary and conditions he/she deserves and to have the freedom

¹ <https://www.imf.org/en/Blogs/Articles/2021/03/15/blog-rising-market-power-a-threat-to-the-recovery>

to move to another undertaking that offers his-her better working opportunities. Preventing the transfer of qualified employees to undertakings that meet their expectations affect the resulting productivity and business performance. It is revealed that employees will lose their work motivation as a result of fixed wages.

Today, knowledge-based economy has come to the fore with the increasing importance of sectors such as R&D, technology and artificial intelligence. At this point, many sectors in our country are facing the problem of experiencing a qualitative and quantitative decline in terms of final outputs, as a result of especially qualified manpower, which is suppressed in their own country, preferring to go abroad and work there.

It is very important to ensure and protect the competitive structure in the labor market and to spread the awareness of competition among undertakings in order to prevent the qualified brain drain problem, which is growing every year.