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HR is on the Radar of the Turkish Competition Authority

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Turkish Competition Board (the "Board") has announced on 10.11.2020 that it initiated an investigation concerning eight hospitals in private sector who, according to allegations, collectively determined surgery operating room service fees to be requested from the freelance doctors and concluded gentlemen's agreement to prevent personnel transfers in between. The Board further announced on 10.02.2021 that 21 other hospitals were included in this investigation. According to its very recent announcement of 20.04.2021, the Board initiated another investigation against 32 commercial enterprises across the country who allegedly concluded a gentlemen's agreement relating to labour markets. A vast majority of these enterprises were innovative technology companies who have digital platforms. We learn from the announcement[1] that the Board is going to investigate the labour market with respect to how the wages are set. As a result of the preliminary inquiries conducted, the Board has reached certain clues, in light of which the concerned enterprises are suspected to be in unfair competition practices such as committing not to transfer employees from the counterparts and setting an upper limit for the wages to be offered.

The said investigation is interesting for a number of reasons. Foremost, the labour market, which is believed to be out of scope of competition law according to the classical theory of competition, is being scrutinised by the Board for the first time to such a degree.[2] Especially the investigation announced on 20.04.2021 has a special character given that it exclusively focuses on the labour market.

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1 The announcement is available at: https://www.rekabet.gov.tr/tr/Guncel/isgucu-piyasasina-yonelik-centilmenlik-a-d8bc3379bea1eb11812e00505694b4c6 (Last access on 22.04.2021).

2 The Boards earlier conduct in this respect was relating to investigations to a very limited scope which resulted in merely expressing an opinion, rather than issuing a sanction. Please see for example, the Board's decision of 11-12/226-76 dated 03.03.2011, and decision of 19-06/64-27 dated 07.02.2019, and decision of 20.01/3-2 dated 02.01.2020.

The Board's scrutiny over the labour market poses the following questions at the first sight:

- Is, or to what extent is, the Board authorised to examine the labour market?
- How would the gentlemen's agreement mentioned in the Board's announcement be conceived by the Board and what would be the criterion?
- Would the employees of the enterprises under the Board's investigation including the ones whose job applications were dismissed as per the alleged gentlemen's agreement be entitled to file lawsuits for cartel compensation or other compensation claims?

The objective of this paper is to present concise and preliminary remarks addressing the questions of whether (or to what extent) the labour market can be examined within the scope of the Act no. 4054 on the Protection of Competition ("APC"), what should be understood by the term "gentlemen's agreement" and whether the concerned employees can pursue cartel compensation.

Can Labour Market be examined under the APC? If Yes, to what Extent?

Market is defined as the place where the prices are set up at the point supply equals to demand and the factors that can be replaced with each other based on these prices and in exchange of money. Each market has two sides: suppliers and those in demand.

According to this definition labour has a market as well. The employees supply their labour and the employers demand this labour. The equilibrium of supply and demand in this market would result in employee wages which is the price of the labour. As a supplier of labour, if you are in a profession where there is no sufficient demand or supply surplus, your wage demand would be suppressed. If your profession is highly demanded and there is supply shortage, then you don't have to worry about your wage.

Yet, labour market considerably differs from the other markets where the supply would decrease parallel to the decrease in demand. For instance, in a market where ten typewriter manufactures produce a total of 100 typewriter per year and yet the demand for typewriters decreases gradually each year, the manufacturer who do not

reach the desired level of profitability is expected to leave the market and enter new markets with increasing trend of demand. In this new market, it would be easier to reach the targeted profit levels depending on the available production factors. This is, however, not the case with the labour market. A qualified worker who is not satisfied with the earned income has no chance to enter a new profession down to lack of demand for its current profession. It would be highly unexpected for a lawyer who suffers from supply surplus after having studied law for 4 years to begin studding medical sciences and become a doctor after 7 years. Even this happens, the conditions in the respective labour market would also be shifted after 7 years of studying medical sciences. This is why labour market is regarded as an anomalistic market.

Labour market is competitive, too. The employers compete with each other for the qualified work force, whereas the employees compete for better working conditions. That being said, the competition among the employees yielded fierce result in history which can be defined as anything but humane. The history witnessed factories, called as "warm beds" by the British, where one hundred employees worked in two shifts of 12 hours and share 50 beds. These practices resulted in legislative activities regulating the labour market. This is why, the labour market in the countries, especially those from continental custom, are today is highly regulated through individual and collective labour law and social security law.

Given the competition in the labour market, it is possible to think at the first sight that this market can also be subjected to the APC. However, the classical theory in the competition law is in the opposite direction. The competition law has unwritten exceptions. For example, we all acknowledge that the technological progress would be hampered in case a patent owner is not vested with exclusive rights for 20 years. This, despite the fact that there is no provision preventing the APC to be applied to such patent rights.

Labour law had also been considered to be out of the APC's scope for a number of reasons.[3] Foremost, the anomalistic nature of the labour market would not allow the APC's application. Besides, a wide conception revealed that labour market which is not restricted and regulated can have downsides more than its benefits. In any case, labour market is already subject to comprehensive regulations stemming from labour law which yield satisfactory results. Needless to say, this approach reflects the view of Continental Europe's classical conception. Under the influence of the US law, this approach has been softened over the time and it is recently advocated that labour market can also be subjected to a competition test.[4] In the US, it is widely accepted that the competition regulations were involved in the relationship between employees and employers and there is a number of cases supporting this.[5] Yet, it should be born in mind that the employment relations in the US has characteristics of private law more than public law, in contrast with the Continental Europe.

To conclude, it can be said that our continental law system, from a classical point of view, does not recognise labour market as a customary object within the ambit of competition authority's play field. Yet, this approach is recently changing and the current question rather is to what extent the competition authorities can exercise their scrutiny power over the labour market. This is why the progress and outcome of the said investigations are of a nature that would arouse interest and establish precedent for the other continental law systems.

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3 Please see Roger Zäch, Schweizerisches Kartellrecht, Bern 2005, N. 257 et seq for more details of classical theory of competition law.

4 Please see https://www.noerr.com/en/newsroom/News/war-for-talents-in-the-crosshairs-of-competition-authorities and https://www.steptoeantitrustblog.com/2019/01/new-year-resolution-eu-antitrust-compliance-teams-putting-hr-practices-radar-screen/ (Last access on 22.04.2021).

5 https://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf (Last access on 22.04.2021).

What is Gentlemen's Agreement?

The Board makes use of the term "gentlemen's agreement" in its announcements mentioned above.[6] The fact that these investigations may pave the way for introducing a definition for this term is also appealing for the lawyers

Adam Smith declared in *the Wealth of Nations* (on page 34) as follows:

> *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. "*

Whenever one tries to define the concept of gentlemen's agreement in terms of competition law, it is the above quotation to be referred. This is especially because that gentlemen's agreement is one of the most lightweight agreement types. A gentlemen's agreement does not contain a common intention between the parties in terms of the law of obligations or even any corresponding wills. As also exemplified by Adam Smith, two merchants who met at a wedding ceremony just complain about the current market conditions as a matter of daily conversation. Indeed, such "agreements" in German Law, can also be named "breakfast cartel" (*Frühstückskartelle*). The fundamental condition for a competition authority to sanction such "conversations" is the existence of an impression that each and every attendant took what was said during these conversations seriously to be put into practice. This mental reservation should be proven by the authority. So, in case the Board is using the term "gentlemen's agreement" in its announcements in the way described above, the issue of proving the allegations of such an extraordinary nature in the course of the said investigations, would be in the core of legal debates.

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6 For more details, please see Roland von Büren/Eugen Marbach, Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Bern 2002, p. 251.

Employees: Aggrieved by Cartel?

According to the LPC Art 58/1;

> *"Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited. […]"*

The second paragraph goes on to say:

> *"If the damage arises from an agreement or decision or gross negligence of the parties, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.*

In practice, the "compensation by three fold" serves the purposes of sanctioning the parties who caused damage by using their dominant power apart from compensation for the real damage. This punitive damages requires as a precondition the fault on the part of the damaging party and existence of a pecuniary loss. The second paragraph of the provision requires the take the real loss or the profit gained or to be gained by the damaging parties into account when calculating the three-fold compensation.

Art 58 the APC entitles those who suffer from cartel arrangements to file compensation claims. The legislator does not restrict the term sufferer to the "enterprises in competition" and prefers to keep the subjects of this right rather broad. Indeed, Turkish courts confirmed in several occasions the fact that consumers who suffer from cartels are entitled to compensation.[7] However, no claim from the employees has been tested before the courts so far. In such a case, there is certainly

[7] See the decisions ruling that such claims should be resolved according the outcome of the Board's investigations; Istanbul 12th Consumer Court, numbered 2016/152 E., 2017/192 K., dated 09.05.2017; Court of Cassation, 13th Civil Division, 2019/1422 E., 2019/8836 K., 25.09.2019; see also Court of Cassation, 19th Civil Division, 2016/10649 E., 2017/5244 K. 20.06.2017 ruling that a lawsuit brought before the consumer shall be filed before the consumer courts.

a room for debate about a number of issues, in particular, which court would be vested with competence over such a dispute, how the calculation will be made and how the prescription periods will be applied.

Another question posed is whether a request as to wages that the employee has been deprived of can be claimed in addition to the cartel compensation from enterprises under the Board's investigation. Further, it should be also evaluated whether the employee whose job application was dismissed because of a gentlemen's agreement can claim compensation for discrimination. Similarly, the courts may encounter various unprecedented disputes such as whether the employee who content itself with a wage lower than what it deserved because of a gentlemen's agreement can terminate the employment agreement based on just cause as per Art 24 Labour Law. The problem can also manifest itself when an employee of a subcontractor claims its deprived rights and wages after a gentlemen's agreement prevents it to be hired by the main contractor.

Overall, a series of complex questions and hurdles that fall within a wide intersection area of labour law and competition law is waiting at the doorstep of Turkish law and practice.