First Decision by the TCA to Impose Fine to the Labour Market!

First Decision by the TCA to Impose Fine to the Labour Market!

Article by Mustafa Ayna, Özlem Başıböyük Coşkun and Arda Deniz Diler

Introduction

The Turkish Competition Authority ("**TCA**") has published its reasoned decision dated 24.02.2022 and numbered 22-10/152-62 ("**Private Hospitals Decision**" or "**Decision**") in which it examined the allegations that private health institutions and an association of undertaking (**i**) jointly determined the operating room service fees charged to freelance physicians, (**ii**) restricted competition by preventing employee transfers and jointly determining the salary scales of employees, and (**iii**) exchanged competitively sensitive information. Within the scope of the Decision, the activities of the relevant undertakings operating in Turkey's two provinces, Samsun and Bursa, were examined separately.

The Private Hospitals Decision is particularly of importance since it is the first decision in which the TCA has imposed fines on undertakings for their actions in the labour market. Although similar claims were examined by the TCA before, it had been decided not to launch an investigation for several reasons[1].

The TCA Rejected Applications for Commitment and Settlement Procedures

Remzi Avcı Özel Sağlık Hizmetleri A.Ş. ("**RETİNA**"), one of the parties to the investigation, requested a commitment meeting with the TCA. However, the TCA rejected the application submitted by RETİNA to initiate commitment procedure on the grounds that (**i**) as of the application date, other undertakings party to the investigation would not be able to apply for the commitment procedure and the procedural benefits expected by the commitment procedure would not arise and (**ii**) RETİNA was active only in the eye branch and thus it did not have a decisive role in terms of the allegations within the scope of the investigation.

The TCA also rejected the settlement application of Medicana Samsun Özel Sağlık Hizmetleri A.Ş. ("**MEDICANA SAMSUN**"), stating that the expected benefit from the settlement procedure could not be achieved since there was less than one month for the completion of investigation process[2] and no other requests from other parties to the investigation had been submitted.

The TCA's Evaluation on the Undertakings Operating in Samsun: Price-fixing and No-poaching Agreement

In the Decision, with respect to the allegation that private hospitals had determined the operating room service fees for freelance physicians jointly, the TCA found that MEDICANA SAMSUN, Samsun Medikal Grup Özel Sağlık Hizmetleri A.Ş. ("**MEDICALPARK/LIV SAMSUN**"), Derebahçe Özel Sağlık Hizmetleri San. ve Tic. A.Ş. ("**ATASAM**"), and Hospitalpark Sağlık Hizmetleri A.Ş. ("**BÜYÜK ANADOLU**") had determined the said fees jointly at a meeting held in 2020. The TCA emphasized that the fees determined at the meeting had coincided with the prices charged by the undertakings. It also underlined that it is not significant whether the price-fixing between competitors had an effect on the market since it constituted a per se violation.

In addition to determining the operating room fees for freelance physicians, the TCA also found that MEDICALPARK/LIV SAMSUN and MEDICANA SAMSUN had engaged in common pricing behaviours in terms of (**i**) practices for patients with Private Health Insurance ("**PHI**") and Complementary Health Insurance ("**CHI**"), (**ii**) excimer laser treatment prices, (**iii**) freelance physician prices, and (**iv**) angio/bypass/stent/tube baby prices. While the TCA determined a price-fixing by MEDICALPARK/LIV SAMSUN and MEDICANA SAMSUN regarding these distinct behaviours, these undertakings were given a single fine for price-fixing, not separate ones for each behaviour.

Regarding the actions of private hospitals in the labour markets, the TCA assessed that MEDICANA SAMSUN and MEDICALPARK/LIV SAMSUN had been parties to a gentleman's agreement aimed at preventing the transfer of physicians. In the Decision, it was determined that the two employees mentioned in the documents evidencing the gentleman's agreement had not been able to transfer from MEDICALPARK/LIV SAMSUN to MEDICANA SAMSUN and therefore, it was concluded that the gentleman's agreement also had been put into practice.

The TCA also examined the physician transfer situation in respect of the two undertakings in question and emphasized the following points:

- Although it had been determined that the transfer of physicians between MEDICANA SAMSUN and MEDICALPARK/LIV SAMSUN had occurred, albeit in small numbers, physician circulation between other hospitals was more than this;
- Even though a small number of transfers had occurred between the undertakings in 2017, 2019, and 2020, this did not indicate that there had been no agreement in those years; and
- Whether the transfers have occurred is merely an indication of whether or not the agreement had been put into practice, but since no-poaching agreements are per se violations, whether or not these agreements had been put into practice had no significance on the assessment of the violation.

Further, the statement made by the officials of MEDICALPARK/LIV SAMSUN, MEDICANA SAMSUN, ATASAM, BÜYÜK ANADOLU, Özel Ana Teşhis Tedavi ve Sağlık Hizmetleri A.Ş. ("**LİMAN**"), and Medi Bafra Özel Sağlık Hizmetleri San. Tic. A.Ş. ("**MEDİBAFRA**") that they would not allow the transfer of nurses between themselves during the meetings held in June 2020 was also assessed in the Decision. However, since (**i**) the only document regarding the allegation was

an oral statement of a party to the investigation; (**ii**) the relevant statement had not indicated that any decision had been taken to prevent the transfer of nurses, but only that it had been discussed; (**iii**) no documents on the subject could be obtained; and (**iv**) as many nurses had been transferred between private hospitals between 2016 and 2020, it was assessed that no gentleman's agreement had been made to prohibit the transfer of nurses.

The TCA's Evaluation on the Undertakings Operating in Bursa: Price-Fixing, Exchange of Information, Wage Fixing and No-Poaching

Under the price-fixing allegations in the Decision, documents regarding the common behaviour of Hayat Sağlık Tesisleri A.Ş. ("**HAYAT**") and ASG Özel Sağlık Hizmetleri ve Sağlık Malz. San. ve Tic. A.Ş. ("**ARİTMİ**") on psychotechnical report approval prices were also analysed. The TCA compared the prices of the two undertakings in the relevant period with the prices stated in the documents and it emphasized that there was an overlap in the prices. Also, considering the findings that revealed the common will of ARİTMİ and HAYAT to act jointly in these prices, the TCA concluded that HAYAT and ARİTMİ had violated Law No. 4054 on the Protection of Competition ("**Competition Law**") by fixing the psychotechnical report approval prices together.

In the Decision, it was also stated that a WhatsApp group (namely, TSS Working Group) had been established for the negotiations between private healthcare institutions and insurance companies regarding the CHI process and Bursa Özel Sağlık Kuruluşları Derneği ("**BUSAD**") and authorized for these negotiations. In this context, it was concluded that C.Y.L. Turizm Gıda Sağlık Hizmetleri İnşaat San. ve Tic. A.Ş. ("**CEYLAN**"), Sina Özel Sağlık Hizmetleri A.Ş. ("**DORUK YILDIRIM**"), Atek Özel Sağlık Hizmetleri A.Ş. ("**ATEK**"), Pedmer Özel Çocuk Sağlığı Merkezi Tic. Ltd. Şti. ("**PEDMER**"), Medika-Bil Özel Sağlık Hiz. Tur. Yat. Gıda İnş. San. ve Tic. Ltd. Şti. ("**MEDİCABİL**"), ARİTMİ, and HAYAT, all members of the WhatsApp group, had shared competitively sensitive information among themselves by sharing their expectations for future.

The TCA also found that CEYLAN and HAYAT had violated the Competition Law by exchanging information regarding the price of surgery services offered to freelance physicians in Bursa. However, the exchange of information during the CHI process and the exchange of information regarding the price of surgery services offered to freelance physicians did not lead to separate fines.

In the Decision, the TCA stated that agreements to fix the salaries of employees and no-poaching agreements, which constitute the main part of competition law enforcement in labour markets, are not different from cartels. In light of this information, it was emphasized that gentleman's agreements between competitors to prevent employee transfers violate Competition Law per se. Accordingly, regarding acts restricting competition in labour markets, the TCA based on the correspondence showing that the private health institutions in Bursa had decided not to allow the transfer of each other's employees. It stated that the correspondence in question revealed that the parties had decided to prevent the transfer of physicians.

In addition to this correspondence, it was also determined that they had held meetings in this regard.

In this context, the TCA underlined that the undertakings in the WhatsApp group would not have been a party to the competition violation only if the undertaking officials had reported the situation to the administrative authorities or immediately and clearly notified their competitors of their opposition to the anti-competitive issues raised in the conversations/meetings. In the absence of any document showing such action from any of the undertakings, the TCA concluded that CEYLAN, DORUK YILDIRIM, ATEK, HAYAT, PEDMER, ARİTMİ, MEDICABİL and Uludağ Özel Sağlık Hizmetleri San. ve Tic. A.Ş. ("**CİHANGİR**"), the participants of the WhatsApp group named TSS Working Group, had violated Article 4 of the Competition Law by preventing the transfer of physicians.

The TCA also found that some undertakings had held meetings to determine the salary scales and salary increases for employees jointly. In this context, the TCA concluded that ARİTMİ, MEDİCABİL, CİHANGİR, CEYLAN, Göz Nurunu Koruma Vakfı Bayrampaşa Göz Hastanesi İktisadi İşletmesi Bursa Şubesi ("**GÖZ VAKFI BURSA**"), RETİNA, MLP Sağlık Hizmetleri A.Ş. Bursa Şubesi ("**MEDICALPARK BURSA**"), Medicana Hastane İşletmeciliği A.Ş. Bursa Şubesi ("**MEDICANA BURSA**"), Pembemavi Tedavi Hiz. San. ve Tic. A.Ş. ("**PEMBEMAVİ**"), and Burfiz Özel Sağlık Hizmetleri A.Ş. ("**BURFİZ**") had violated Article 4 of the Competition Law by determining (**i**) the scale of employee salary increases and (**ii**) the minimum/maximum increase rates.

Conclusion

Consequently, the TCA imposed a total of TRY 58 million (approximately EUR 7.2 million[3]) administrative fines on undertakings, based on their 2020 turnover. In this context:

- The number of undertakings had restricted competition in the labour markets was 16, and the total fine applied for this reason was approximately TRY 43.2 million (approximately EUR 5.4 million).
- The number of undertakings had restricted competition by price-fixing was six, and the total fine applied for this reason was approximately TRY 13.4 million (approximately EUR 1.7 million).
- The number of undertakings restricted competition by exchanging competitively sensitive information was eight, and the total fine applied for this reason was approximately TRY 1.4 million (approximately EUR 0.17 million).

The *Private Hospitals* Decision is of crucial importance as the TCA assessed that the agreements made to fix the wages of the employees and no-poaching agreements are no different from the behaviour of cartels and such practices restrict competition per se. It was underlined by the TCA that there is no fundamental difference between (**i**) no-poaching agreements and customer/market sharing agreements, and (**ii**) wage-fixing agreements and price-fixing agreements.

At this point, it is also worth mentioning that the TCA is currently conducting a much more comprehensive investigation into the labour market. Although the investigation was initially

launched against 32 undertakings, it was expanded it to 49 afterwards. Leader undertakings from e-commerce, food, communication, media, and retail sectors are among the investigation's parties, and the allegation examined in the investigation is that these undertakings are parties to no-poaching agreements. The investigation is in its final stages and a decision by the TCA is expected in early 2023.

Moreover, in April 2022, the TCA launched a new investigation against 7 software/IT companies, alleging they violated the Competition Law by making gentleman's agreements in the labour market. The decisions to be rendered in these investigations are likely to provide a framework for competition law violations in labour markets. In any case, it can be said that the TCA's interest in labour markets will continue.

Published by Concurrences on December 14, 2022

---

[1] Please see the TCA's *TV Series Producers* Decision dated 28.7.2005 and numbered 05-49/710-195, *Chemical Producers* Decision dated 26.05.2011 and numbered 11-32/650-201, *B-fit* Decision dated 07.02.2019 and numbered 19-06/64-27, *Container Carriers* Decision dated 02.01.2020 and numbered 20-01/3-2.

[2] The parties may apply for the settlement procedure until the notification of the investigation report in accordance with Article 43 (5) of the Competition Law.

[3] The figures in EUR in this article are calculated at the average buying rate of exchange of the Central Bank of Turkey. For 2020, this rate was EUR 1 = TRY 8.03