VOLUME 3 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

# TURKISH NON-POACHING APPROACH- THE MOST EFFICIENT FOR CCI TO DEAL WITH MNCs

- Srajan Jain & Sakshi Kumari[1]

## INTRODUCTION

Employers are always assiduous regarding the work they assign to their employees and expect conscientious work to be done by them. In this era, every employer's morning tea must be shared with the contemplation of different reasoning towards the creation and instructions they will display for their employees. In this phase of the competitive epoch, everyone is cosseted towards their business to be in a superior position to get achievements and laurels. Currently, employers are looking for skilled labour and their skills will be remunerated lucratively. In this aeon of competitive vicinity, an adept employee can get colossal of fortuitous opportunities. Today's labour market is tyrannically active which becomes a reason for switching jobs and involvement of non-poaching agreements around the globe to keep their skilled employees and information.

People are currently well acquainted with the non-compete or non-solicitation method but must be aware of the no-poaching agreement[2]. This consensus moderates the employee's motility and remittances.[3]

Section 27 of the Contract act,1872[4] was profaned by the non-compete or non-solicitation method. Still, as per the decree of the court in Wipro limited v. Beckman International 2006,[5] Delhi high court has upheld its validation in the roof of exception. Despite this, the no-

[1] Student at Lloyd Law College, Greater Noida
[2]GonencGurkaynak, Ayse GunerDonmez,CerenOzkanlt,'Competition Law Issues in the Human Resources Field' (2013) 4(3) JECLP <https://papers.ssrn.com/abstract=3164251> accessed 21 February 2023.
[3]Mozammil Ahmad, 'Non-Poaching Clause And Its Relation With Competition'(Live Law, 1 March 2021) <https://www.livelaw.in/columns/competition-law-employer-emoloyee-non-poaching-agreements-171149> accessed 21 February 2023.
[4]Section 27 of Indian Contract Act, 1872.
[5]*Wipro Limited v. Beckman Coulter International S.A*[2006] SCC OnLine Del 74.



© 2023 International Journal of Advanced Legal Research

poaching agreement is contravened section 3 of the competition act[6] but not the provision of section 27 of the contract act.[7]

Lately, Turkish Competition Authorities in its landmark case, which is Private Hospitals Case (Private Hospitals cartel case (22-10/152-62)), announced a final judgement with respect to the investigation ofhealthcare and enterprises unions institutions under Article 49 of the act[8] and impose EUR 4.3 million penalties upon 16 members of alleged cartel, till now there is no valedictory has given over it. Despite anonymous assertions over this global interest, India's persuasion has not yet been recorded on the no-poaching agreement. This article will critically analyse the Turkish non-poaching agreement approach from an Indian perspective and helps the competition commission of India in persuading this approach.

## JURISPRUDENTIAL DEVELOPMENT OF NON-POACHING POLICY BY TURKISH COURTS

II.1. Tv series producers 'case

The Turkish non-poaching agreement policies were initiated through the TV Series producer's case(Decision No. 05- 49/710-195, Date 28.7.2005). The producers 2005 contracted with each other as per the agreement of no-poaching to fade away the door of employees by obstructing them in each other's companies. The most crucial issues raised by TCA [Turkish competition authority] may hamper the competition because they have also fixed the wages for their employees. So, by TCA's reasoning, it is incommodious under the norms of competition laws. Later TCA constricted them to escort with their concurrence.

II.2. Private school case

This precedent was followed in the Principles of Private Schools case*(Decision no.* 11-12/226-76., Date 03.03.2011), where the Turkish Private Schools Association agreed not to transfer or offer a job to teachers among them. The TCA emphasised that it will not create consumer benefits but only create complex teacher employment. By adopting the effect-based approach TCA in the decision, interestingly laid down two crucial facts, i.e. (i) the alleged

---

[6]Section 3 of The Competition Act, 2002.
[7]Shairwal SLA-S and Shloka C, 'Understanding Non-Poaching Agreements and Their Relevance In Employment Laws' (*Lexology*, 8 February 2022) <https://www.lexology.com/library/detail.aspx?g=918fd014-24e9-4a67-898e-bd4ad088593c> accessed 14 February 2023
[8]Article 49 of Law No. 4054 on the Protection of Competition.



© 2023 International Journal of Advanced Legal Research

association was dissolved two years before the decision date that attracted no meeting point and (ii) the allegation was already time-barred. Therefore, a written opinion has been sent to the relevant parties and directed them to discontinue their anti-competitive practice.

II.3. Chemical producers' case

TCA dealt with a gentlemen's agreement and non-compete period in the Chemical Producers case(Decision no. 1-32/650-201, Date 26.05.2011). It was alleged that the Chemical sector employer indulged in gentlemen's agreement practices by undertaking the employee not to be employed in another undertaking during the non-compete period agreed upon with his employer.[9] Hence, the TCA did not start an investigation due to (i) the question of law was not straightforward and (ii) it could not be established to be anti-competitive but also exempted from a non-compete agreement; for example,it is essential toprohibit the transfer of employees, where technical knowledge is required.

II.4. B-fit case

In the B-fit case(Decision no. 19-06/64-27, Date 07.02.2019) laid down a vital precedent where the allegedfranchise agreement's provision barred the franchisee from employing any personnel/formerly employed by another franchisee of B-fit or who has worked in competitor undertakings, without the prior written approval of B-fit. The TCA examined this through its lenses and concluded that the relevant provision did not prohibit employment; hence the applicable provision did not form any non-poaching agreement. Therefore, it was decided that no investigation would be needed. However, any demands made by the franchisee will only apply for the duration of the agreement, and the rationale for any written approvals must be clearly stated.

II.5. Containers carriers' case

In the Container Carriers case*(Decision no.* 20-01/3-2,*Date 24.02.2022)* alleged that the container carrier indulged in anti-competitive activity by restricting drivers' mobility. Therefore, it was observed that wage-fixing agreements and not transferring employees would be directly proportional to cartel formation by capturing and raising barriers in the

[9]'The TCA's Stance on No-Poaching Agreements: A Comparative Analysis' (*Kluwer Competition Law Blog*, 3 June 2022) <https://competitionlawblog.kluwercompetitionlaw.com/2022/06/03/the-tcas-stance-on-no-poaching-agreements-a-comparative-analysis/> accessed 14 February 2023



© 2023 International Journal of Advanced Legal Research

market. Hence, the wage-fixing agreement and the TCA considered the non-poaching agreement anti-competitive. However, the TCA decided to send ceased and deeded orders for procedural economic reasons. This is one of the most critical decisions regarding the labour market.

The jurisprudence developed over time was reflected in the era-changing Private Hospitals Decision. It was alleged that private hospitals raised market barriers by restricting personnel transfer between them and fixing operational room service fees demanded from freelance physicians. Hence, it formed a prima-facie violation of section 4[10] of the Competition act by alleged cartel members indulging in fixing prices, limiting competition in labour markets and exchanging competitively sensitive information. In this case, TCA laid down that non-poaching agreement are directly proportional to market sharing agreement, and the presence of either wage-fixing agreements or price-fixing agreements reflect the reality of non-poaching agreement that make it de-facto violation of the competition act by its objects. Therefore, any gentlemen or non-poaching agreement will presume to be anti-competitive under either the horizontal or vertical agreement.

## WHAT SHOULD BE THE INDIAN APPROACH TO THE RECIPROCITY OF TCA?

At present, multinational countries are acknowledging the principles of the no-poaching policy. Still, till now, this is the only opinion that has been shared by India through which corporate sectors such as technology, healthcare, aerospace, government contractors and professional services etc., would be entitled to enter into such policies. It will be suitable to consider the Turkish non-poaching policy as it will be based on all current labour market conditions like individual harm through a non-poaching agreement does not attract potential damage. Merely taking prior permission from the owner does not draw any restriction on the mobility of employees. Restricting the movement of employees, particularly in industries that require technical expertise, skills, and innovation, should not impede the employee's rights, as long as a reasonable time frame is observed, wages fixed through agreement will be directly proportional to fixing purchase prices that aim to prevent competition and presence of any market sharing agreement, wage-fixing agreements and price-fixing agreements will reflect the present of non-poaching agreement. They will presume to be anti-competitive in nature.

[10] THE PROTECTION OF COMPETITION 1994 , S 4



© 2023 International Journal of Advanced Legal Research

This was similar to the 'Antitrust Guidance for Human Resource Professionals'[11] guidelines issued by the Federal Trade Commission (FTC) and the DOJ of the USA jointly.

These guidelines observed that any wage-fixing or gentleman agreements among employers, whether entered directly or indirectly, are per se illegal under competition law and will empower the DOJ to initiate criminal proceedings against the individual, the company, or both. This will lead to the first time the DOJ had provoked the criminal no-poach case in USA v. Surgical Care Affiliates[12], where it was alleged that SCA formed a secret agreement to not solicit senior-level employees from its competitors would violate section 1 of the Sherman Act, which prohibits agreements that cause restraint of trade.

The FCA on 18 October 2017 was recently admitted by the alleged parties that they indulged in a no-poaching agreement from 1996 to 2011, not to hire from each other's company and impose a fine of EUR 302 million on the parties. These conditions will help determine whether non-poaching agreements cause anti-competitive harm and also guide Indian regulators for different policies formation on non-poaching in India.

## CONCLUSION

After inspecting the Turkish no-poaching policy, we have concluded by swapping traditional bid-rigging and price-fixing policies with the recent cartel activity called the no-poaching agreement. Till, Somethings yet to be traced over the no-poaching policy by CCI [Competition Commission of India].

To form an agreement under the norms of the no-poaching policy, parties will interrogate each other concerning rational inspection to compose a valid contract per judicial standards. In Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd[13], the supreme court has held that "a non-compete agreement would be valid as long as it is reasonable in scope."[14]

The current configuration of a no-poaching agreement is a Market sharing agreement, Wage-fixing agreement, Price-fixing agreement etc. as per the consonance of the competition

[11] 'To Poach Or Not To Poach – Potential Risks From A Competition Law Standpoint - Antitrust, EU Competition - India' <https://www.mondaq.com/india/antitrust-eu-competition-/1252978/to-poach-or-not-to-poach--potential-risks-from-a-competition-law-standpoint> accessed 14 February 2023

[12] United States v. Surgical Care Affiliates, LLC and SCAI Holdings, LLC *[2021],* Case No. 3:21-CR-00011

[13] Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd[1967] AIR 1098.

[14] Supra 12



© 2023 International Journal of Advanced Legal Research

commission of India, and the no-poaching agreement will dilate sections 3 and 4[15] of the competition act. Let's see the stand of the Indian legislature on solving new difficulties of anti-competitive activities by the 21st-century cartels through a no-poaching agreement.

[15] Competition Act 2002, s 3 & 4.



© 2023 International Journal of Advanced Legal Research