Competition Board orders gym franchiser to revise non-compete and non-poaching clauses

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On 24 May 2019 the Competition Board published the results of its preliminary investigation into Bfit Sağlık ve Spor Yatırım ve Tic AŞ (BFIT). The investigation was undertaken following a complaint by a franchisee that BFIT's franchising agreements included non-compete obligations and non-poaching clauses that violated Law 4054 and the Block Exemption Communique on Vertical Agreements (Communique 2002/2).(1)

BFIT

BFIT is a gym franchise business which supplies equipment on a rental basis. It has 218 branded sports centres in Turkey. BFIT also carries out educational seminars on management and provides support for marketing, purchasing, public relations, accounting, decor and advertising.

Relevant market

In its assessment of the relevant product market, the Competition Board noted that:

- the different services that gyms provide are easy to change; and
- gyms can separate the services that they offer based on demand.

The Competition Board noted that the allegations against BFIT concerned all of the services that it provided and concluded that the relevant product market for its investigation was the gym services market.

In its analysis of the relevant geographical market, the Competition Board noted that BFIT's gyms are located in different cities and therefore it is not plausible for a consumer to use gym services in another city if they want to change gyms. Although the Competition Board noted that BFIT is active in 48 cities, BFIT can grant franchise rights anywhere in Turkey and therefore the geographical market could be defined as Turkey. However, the Competition Board refrained from reaching a conclusive geographic definition.

Franchise agreements

BFIT grants franchisees the right to use its trademark to open gyms. The Competition Board's investigation revealed that in its franchise agreements, BFIT imposed a non-compete obligation on franchisees and their employees during the agreement term (ie, five years). These agreements also included:

- a two-year non-compete obligation following the termination of a Type 1 agreement; and
- a one-year non-compete obligation following the termination of a Type 2 agreement.

In addition to non-compete agreements, franchising agreements included non-poaching clauses, which stated that "the franchisee cannot employ anyone who has worked or is currently working in BFIT or as a franchisee of BFIT or another competitor without written consent of BFIT". However, BFIT allowed personnel to be transferred between its fitness centres and to be employed by competitors if they provided equal or better conditions despite the non-poaching clause.

Non-poaching clauses

In its reasoned decision, the Competition Board referred to the US Department of Justice's approach to non-poaching agreements. From a US competition law perspective, non-poaching agreements deprive employees of the opportunity to negotiate better job opportunities and restrict competition in the labour market; therefore, they have similar effects as wage-fixing agreements. Wage-fixing agreements between competitors prevent wage increases over time by restricting employees' ability to find jobs with higher wages; non-poaching agreements indirectly have the same result.

In line with the US approach, the Competition Board found that non-poaching clauses can have an indirect effect on the labour market, as they result in wage fixing and therefore should be evaluated under Article 4 of Law 4054.(2) However, the Competition Board stated that if know-how and innovation are essential in the fitness sector and the duration of a non-poaching clause is reasonable, BFIT's franchise agreements could be exempt from Law 4054. Accordingly, the Competition Board concluded that BFIT's franchising agreements should be assessed under Communique 2002/2's block exemption, as BFIT's relevant market share was below the communique's 40% threshold.

Non-compete obligations

Under Communique 2002/2, a non-compete obligation may be imposed on purchasers for a period following the termination of an agreement provided that:

- it does not exceed one year as of the termination date;
- the prohibition concerns goods and services in competition with the goods or services which are the subject of the agreement;
- it is limited to the facility or land where the purchaser operates during the agreement; and
- it is necessary to protect the know-how that the purchaser has transferred to the provider.

The Competition Board found that BFIT's five-year non-compete obligations complied with Communique 2002/2. However, its non-compete obligations for the period following the termination of an agreement did not comply with the communique as:

- they were not limited to the facility or land where the purchaser operated during the agreement; and
- Type 1 agreements did not meet the conditions in terms of duration.

As a result, the Competition Board concluded that BFIT's non-compete obligations and non-poaching clauses could not benefit from the block exemption.

Individual exemption assessment

The Competition Board also conducted an individual exemption analysis into the non-compete and non-poaching clauses and found that BFIT's franchising agreements restricted competition more than was necessary and did not grant an individual exemption because:

- the non-compete obligation for the period following the termination of a franchise agreement did not meet Communique 2002/2's duration and geographical scope conditions; and
- the scope of BFIT's consent was unclear.

Resale price maintenance allegations

The Competition Board also examined allegations of resale price maintenance. It was claimed that:

- BFIT had determined the price of gym services; and
- franchisees had to obtain written consent from BFIT regarding fees.

The Competition Board concluded that:

- BFIT's resale price maintenance practices had had limited effects on the market, as BFIT had recently undertaken resale price maintenance practices; and
- the gym services market is competitive.

Comment

The Competition Board decided not to launch an in-depth investigation and instead ordered BFIT to cease its infringing action under Article 9/3 of Law 4054. The Competition Board stated that BFIT had to revise its non-compete and non-poaching clauses in franchising agreements to comply with Law 4054 and Communique 2002/2 in terms of duration, geographical area and written consent.

In this context, the Competition Board ordered BFIT to:

- remove the non-compete obligation for franchisee employees during an agreement term and the period following the agreement's termination; and
- revise the non-compete obligation with regard to the period following the termination of an agreement for franchisees in order to limit it to:
    - the facility or land where the franchisee operates during the agreement; and
    - goods or services which compete with the goods or services subject to the agreement.

In addition, the Competition Board indicated that:

- BFIT had to determine the scope of written consent in its non-poaching clauses and that the duration of non-poaching clauses should be limited to the agreement term; and
- non-compete obligations for the period following the termination of an agreement should be limited to one year for Type 1 agreements.

Lastly, the Competition Board stated that clauses in BFIT's franchise agreements that enable resale price maintenance should be amended.

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Endnotes

(1) The Competition Board's decision of 7 February 2019 (19-06/64-27).

(2) The Competition Board's decisions in Actors (28 July 2005 (05-49/710-195)) and Private schools (3 March 2011 (11-12/226-76).
