"No-poach" agreements: What can sports learn from Portuguese & Mexican football, US Major Leagues and the UFC?

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In 2020, 31 Portuguese football clubs across the first and second divisions of Portuguese football (and the Portuguese football league itself) entered into an agreement that prevented clubs from signing players who had unilaterally club terminated their contracts and left their previous club due to salary cuts and delayed payments arising from Covid-19. These types of arrangements (known as “no-poach” agreements) raise interesting competition law questions, particularly at a time when competition law agencies globally have increased their focus on labour market agreements which limit employee mobility, including in the sports sector. The agreement reached by the Portuguese football clubs has been challenged on competition law grounds and the case has now reached the Court of Justice of the European Union (**CJEU**), who has been called upon to address several questions on how EU competition law applies to the arrangement.

While the CJEU's ruling on these matters is still pending, this article offers some preliminary insights into how the agreement in question might be assessed under competition law. It does so by considering the non-binding policy brief of the European Commission (**EC**) on no-poach

agreements[1] as well as the legal framework for sporting rules coming out of the recent *European Super League* [2] and *International Skating Union*[3] cases. In the subsequent paragraphs, this article draws on an interesting range of examples from other similar cases across various sports and jurisdictions, including Major League Baseball (**MLB**), the National Football League (**NFL**), the National Collegiate Athletics Association (**NCAA**) and Mexican and European football (some of which were permitted, others of which were unlawful). It then explains the key points that leagues and sports teams need to be aware of when considering such arrangements.

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Facts of the Portuguese football league case

In 2022, the Portuguese competition authority, the Autoridade da Concorrência (**AdC**), fined 31 Portuguese football clubs for anti-competitive practices during the 2019/2020 season. The football clubs, as well as the Portuguese professional football league (*Liga Portuguesa de Futebol*

[1] Competition Directorate–General of the European Commission, 'Antitrust in Labour Markets, Competition Policy Brief No 2/2024', *European Commission*, May 2024, https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en.

[2] *Case C-333/21 – European Superleague Company* (2023) ECR (ECLI:EU:C:2023:1011).

[3] *Case C-124/21 P – International Skating Union v Commission* (2023) (ECLI:EU:C:2023:1012).

Profissional), had entered into an agreement preventing clubs from recruiting players who had unilaterally terminated their respective employment contracts with previous club(s) due to salary cuts and delayed payments arising from issues associated with the Covid-19 pandemic, including the suspension of matches, which led to the loss of revenue from ticket sales, broadcasting rights and sponsorships.

As a result of the agreement, any player who terminated his contract in the top two divisions of Portugal could not be hired by any other club in these divisions[4]. Accordingly, the agreement was viewed as a tool to keep players tied to their clubs by limiting their incentive to terminate their contracts during the pandemic. Angered at the arrangement, players called for an investigation by the ADC.

No-poach agreements

Article 101 TFEU prohibits "*agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market*".

Agreements such as the ones entered into by the Portuguese clubs may be viewed as "no-poach" agreements, in that such agreement constitutes a horizontal arrangement between “undertakings” (i.e. entities engaged in economic activity) in which they agree not to hire or make unsolicited offers to each other's employees. The EC has recently expressed its non-binding view that no-poach agreements are likely to be considered "by-object" restrictions (i.e. inherently anti-competitive) and therefore presumptively unlawful and prohibited by Article 101 TFEU[5]. However, this stance does not reflect the EC's previous decisional practice or the case law of the European courts.

The EC’s novel policy position is that no-poach agreements should generally be categorised as by-object restrictions as they restrict the autonomy of undertakings to define their own strategic commercial conditions, more specifically their employee-hiring policies. In the EC’s view, the impact of such agreements is that they can adversely affect workers by limiting their labour mobility, bargaining power and wage-earning potential. Indeed, the EC has voiced its concerns that no-poach agreements are likely to reduce labour market dynamism with resulting negative effects on employee compensation, firm productivity and innovation[6]. In the sporting context, this is primarily

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4 'AdC issues sanctioning decision for anticompetitive agreement in the labor market for the first time', *Autoridade da Concorrência*, 29 April 2022, https://www.concorrencia.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time.

5 A "by-object" restriction refers to a type of agreement or practice that is inherently anti-competitive, judged by its very nature, without needing detailed analysis of its effects.

6 Competition Directorate–General of the European Commission, 'Antitrust in Labour Markets, Competition Policy Brief No 2/2024', *European Commission*, May 2024, https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en.

because clubs no longer offer increased salaries to induce players of other clubs to switch teams and/or counteroffer to induce their own players to stay at the club.

The AdC's decision

Here, the AdC similarly concluded that the object of the agreement was to disincentivise players from terminating their contracts, thereby forcing them to remain with their current clubs. The clubs alleged that they had entered into the agreement to ensure that clubs could survive during a particularly testing time financially and to maintain the competitive balance within the leagues. However, the AdC did not agree with the clubs' argument that the agreement was intended to promote cooperation and sustainability objectives that could be considered essential in the context of the pandemic[7].

The clubs' appeal to the CJEU

On 16 February 2024, the Portuguese clubs sanctioned by the AdC appealed the decision in the Tribunal da Concorrência, Regulação e Supervisão (the Portuguese Competition, Regulation and Supervision Court) and asked the court to refer certain questions of EU law to the CJEU. As such, the CJEU now has to deliver a preliminary ruling on the following referred questions:

A. Does the agreement reached by the clubs constitute a rule of sporting interest that falls outside the scope of Article 101(1) TFEU altogether?
B. Does the agreement pursue proportionate and appropriate legitimate objectives, and is it thus compatible with Article 101(1) TFEU in accordance with Article 165 TFEU?
C. Is the agreement in question a restriction of competition by object contrary to Article 101(1) TFEU, and can it therefore be presumed to be unlawful on the ground that it presents a sufficient degree of harm to competition?

While the CJEU's ruling is still pending, we have outlined some thoughts below on how the agreement in question could potentially be assessed considering similar agreements in the sporting context (particularly in light of the EC's novel position).

How EU competition law applies to "rules of sporting interest"

A "rule of sporting interest", as discussed in *Meca-Medina,* refers to regulations or rules within the sports sector that are designed to ensure the proper conduct and integrity of sporting competitions.

[7] 'AdC issues sanctioning decision for anticompetitive agreement in the labor market for the first time', *Autoridade da Concorrência*, 29 April 2022, https://www.concorrencia.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time.

These rules may inherently restrict competition but can be justified if they serve legitimate objectives and are proportionate.

Historically, competition law was seen not to apply to sporting rules. However, recent cases (*European Super League* [8] and *International Skating Union* [9]) have reinforced the principle established in the landmark case of *Meca-Medina*[10] that sporting activities may be subject to competition law when they have an economic dimension.

Put differently, there is no broad sporting exception that would exclude sporting activity from the application of competition law given the economic nature of sporting rules. Nevertheless, purely sporting rules or agreements can fall outside the scope of Article 101 TFEU if they are not restrictive "by object" (i.e. inherently anti-competitive[11]) and serve a legitimate objective.

Case precedent establishes that agreements between undertakings may be justified and fall outside the scope of the Article 101 prohibition if:

- they pursue public-interest objectives that are not inherently anti-competitive;
- the methods used to achieve these objectives are genuinely necessary; and
- even if these methods restrict or distort competition, the effect does go beyond what is necessary, in particular by eliminating all competition[12].

However, this doctrine does not apply if the restraint constitutes a restriction of competition "by object"[13]. Whilst the notion of a restriction by object is to be interpreted restrictively, agreements that reveal, by their very nature, a sufficient degree of harm to competition are to be considered as having as their object the prevention, restriction or distortion of competition. As mentioned above, the EC considers that no-poach agreements generally constitute restrictions by object and are in breach of Article 101[14].

Given the economic impact on players, whose livelihoods and earning potentials could be adversely impacted by the implementation of the agreement, the practices of the clubs are unlikely

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8 *Case C-333/21 – European Superleague Company* (2023) ECR (ECLI:EU:C:2023:1011),

9 *Case C-124/21 P – International Skating Union v Commission* (2023) (ECLI:EU:C:2023:1012).

10 *Case C-519/04 P, Meca-Medina and Majcen v Commission* (2006) ECR 1-06991.

11 See Footnote 5.

12 *Case C-333/21 – European Superleague Company* (2023) (ECLI:EU:C:2023:1011) paragraph 183.

13 *Ibid*, paragraph 185.

14 Competition Directorate–General of the European Commission, 'Antitrust in Labour Markets, Competition Policy Brief No 2/2024', *European Commission*, May 2024, https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en.

to be considered exempt from Article 101 as purely sporting rules. In light of the EC's novel stance on no-poach agreements in its policy brief[15], it is in the author's view more likely that the agreement in question could *prima facie* qualify as a restriction by object under Article 101.

As such, it is incumbent upon the clubs to show a legitimate and proportionate objective that raises a reasonable doubt as to whether the agreement in question reveals a sufficient degree of harm to competition so as to be considered restrictive by object.

Arrangements between sports teams that have fallen foul of competition law

As mentioned above, European competition law prohibits agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition in the EU. Agreements in labour markets that restrict employee mobility or choice may be unlawful and categorised as a purchasing cartel; such issues in labour markets have increasingly become an enforcement priority for competition regulators globally, including in the EU.

The extent to which a particular agreement/practice might be considered a by-object restriction – and thus incompatible with EU competition law – will be assessed on a case-by-case basis and ultimately depend on the relevant factual and economic context.

An overview of the instances where arrangements between members of sporting competitions have been found to fall foul of competition law is set out below:

Mexican football (2021)

The Mexican competition authority, la Comisión Federal de Competencia Económica, sanctioned 17 local football teams as well as the Mexican Football Federation (**MFF**) for entering into no-poaching and wage-fixing arrangements. For over a decade, the clubs adhered to a "right of retention" agreement where each club affiliated with the MFF would register its players with the federation and could retain the right to keep the player even upon the expiration of the player's contract. If another club wanted to sign the player in question, it would be required to obtain authorisation from the original club and often pay compensation for the transfer. The authority concluded that this agreement had both the object and effect of restricting competition and limited the transfer of players as well as their salary-earning potential[16].

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15 *Ibid.*

16 Comisión Federal de Competencia Económica, 'COFECE sanciona a 17 clubes de la Liga MX, a la Federación Mexicana de Fútbol y 8 personas físicas por coludirse en el mercado de fichaje de las y los futbolistas' (2021) https://www.cofece.mx/cofece-sanciona-a-17-clubes-de-la-liga-mx-a-la-federacion-mexicana-de-futbol-y-8-personas-fisicas-por-coludirse-en-el-mercado-de-fichaje-de-las-y-los-futbolistas/.

European football (2019)

In 2019, the EC investigated several top European football clubs for allegedly agreeing not to poach each other's youth players. Such agreements, if proven, would restrict competition by limiting the opportunities for young players to move freely between clubs. The investigation highlighted the potentially anti-competitive nature of such practices, although specific sanctions or rulings were not widely publicised[17].

Major League Baseball (MLB) Scouts (2018)

In the United States, a class-action lawsuit was filed against MLB, alleging that the league and its teams had entered into no-poach agreements concerning the hiring of scouts. The lawsuit claimed that these agreements suppressed wages and restricted the mobility of scouts. The case was settled, with MLB agreeing to pay $1.75 million and to cease such practices, acknowledging the anti-competitive nature of the agreements[18].

National Collegiate Athletics Association (NCAA) coaches (2019)

In 2019, a lawsuit was filed against the NCAA and several universities, alleging that they had entered into no-poach agreements regarding assistant coaches. The lawsuit claimed that these agreements restricted the mobility of coaches and suppressed their wages. The case was settled, with the universities agreeing to cease such practices, recognising that the agreements were anti-competitive[19].

Ultimate Fighting Championship (UFC) (2024)

In September, the UFC's parent company, TKO Group, agreed to a $375 million (£281 million) settlement in response to a legal case involving about 1,200 former UFC athletes who claim that the UFC's contracts suppressed their ability to negotiate other promotional options. The lawsuits allege that the UFC attempted to maintain monopsony power in the market for elite professional mixed martial arts fighter services. The court had previously stated that the TKO Group's initial settlement was insufficient to remedy the imposition of the anticompetitive contracts[20].

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17 European Commission, 'Antitrust: Commission investigates restrictions on competition in football youth development' (2019) https://ec.europa.eu/competition/antitrust/cases/dec_docs/football_youth_development.pdf.

18 Grow, N., 'The MLB No-Poach Agreement and Its Antitrust Implications' (2018) *Harvard Journal of Sports and Entertainment Law* https://harvardjsel.com/2018/11/the-mlb-no-poach-agreement-and-its-antitrust-implications/.

19 McCann, M., 'NCAA Faces Antitrust Lawsuit Over No-Poach Agreements for Assistant Coaches', *Sports Illustrated* (4 April 2019) https://www.si.com/college/2019/04/04/ncaa-antitrust-lawsuit-no-poach-agreements-assistant-coaches

20 BBC, 'UFC agrees new £281m payment to former fighters' (2024) https://www.bbc.co.uk/sport/mixed-martial-arts/articles/cly7z4knr02o.amp.

Proportionate arrangements that have been permitted

However, in other instances, where an agreement can be deemed a proportionate mechanism to ensure the sustainability of clubs, or an entire league, and ultimately promote competitive balance and financial stability within the sport, it may withstand scrutiny:

Union of European Football Association (UEFA) homegrown player rule

UEFA's regulations requiring clubs to include a certain number of homegrown players in their squads have been scrutinised under EU competition law. While these rules impose certain restrictions on player movement and, *prima facie*, constitute a restriction of competition under Article 101 TFEU, the court also recognised that these regulations could be justified if they are proportionate and necessary to achieve legitimate objectives, such as promoting the development of local talent and maintaining the competitive balance within European football[21].

Major League Baseball (MLB) reserve clause

Historically, MLB operated under a reserve clause system, which effectively bound players to their teams indefinitely. While this system was eventually challenged and modified, certain aspects of player movement restrictions have been upheld as part of collective bargaining agreements. These agreements, negotiated between the league and the players' union, have been deemed lawful as they are part of a broader labour negotiation process[22].

National Football League (NFL) free agency rules

The NFL has various rules governing free agency and player movement, including franchise tags and restricted free agency. These rules have been challenged under antitrust laws but have generally been upheld as they are part of the collective bargaining agreement between the NFL and the NFL Players Association. The courts have recognised that these agreements are negotiated in good faith and aim to balance the interests of both players and teams[23].

National Basketball Association (NBA) salary cap and free agency

The NBA's salary cap and free agency rules, which include restrictions on player movement and compensation, have also faced legal scrutiny. However, these rules have been upheld as they are part of the collective bargaining agreement between the NBA and the National Basketball Players

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[21] *Case C-680/21 - Royal Antwerp Football Club (2023) (ECLI:EU:C:2023:1010)*.

[22] Korr, C. P., The End of Baseball As We Knew It: The Players Union, 1960-81 (University of Illinois Press, 2002).

[23] Smith, M., NFL Free Agency and Antitrust Laws: Balancing Player and Team Interests (2019) *Journal of Sports Law*, vol. 12, no. 3, pp. 45-67.

Association. The courts have recognised that these agreements promote competitive balance and financial stability within the league[24].

Lessons for clubs and associations

Players are at the centre of the sport and intrinsically linked to the economic activity of the clubs. Therefore, entering into an agreement tantamount to a "no-poach" arrangement is likely to receive close scrutiny from the CJEU. In light of the recent landmark case in Mexico, and the general increased scrutiny on labour market agreements which restrict employee mobility and supress wages[25], the CJEU will consider the clubs' arguments on the sustainability of the league carefully before making a determination of the law.

Players, clubs, other competition authorities/courts and the football community at large will undoubtedly be following the proceedings with interest. While it is by no means clear that the EC's novel approach would withstand scrutiny from the European courts, clubs and sporting associations in particular should remember the following key points when it comes to “no-poach” or similar agreements that restrict player/coach movement between teams:

- **Proportionate Legitimate Objectives**: Clearly define the purpose of the agreement and ensure that it can be evidenced that the agreement has a legitimate objective such as promoting the competitive balance and financial stability within the league.
- **Duration and Geographic Scope**: Limit the duration and geographic scope of any agreement to what is strictly necessary for the legitimate purpose. Overly broad or indefinite agreements are more likely to fall foul of competition law.
- **Non-Exclusive Clauses**: Consider including non-exclusive clauses that allow for at least some level of player/ coach mobility, such as permitting negotiations with other clubs under certain conditions.
- **Employee Consent**: Ensure that employees are aware of and consent to any restrictions on their mobility. This can help mitigate claims of unfair labour practices.
- **Alternative Arrangements**: Explore alternative arrangements that achieve the same objectives without restricting competition, such as collaborative agreements that do not include no-poach clauses.

[24] National Basketball Players Association, 'NBA Collective Bargaining Agreement' (2017) https://nbpa.com/cba.

[25] See, for example, Competition Directorate–General of the European Commission, 'Antitrust in Labour Markets, Competition Policy Brief No 2/2024', *European Commission*, May 2024, https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en.

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