Non-employment agreements: The performance of the Portuguese Competition Authority

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On April 13, 2021, the Portuguese Competition Authority (PCA) took on a pioneering role in adopting an Illicit Notice (indictment) on an agreement not to hire workers (no-poach agreement)[1], considering it was a materialization of a restrictive practice of competition in the labour market[2], involving the Portuguese Professional Football League (PPFL)[3] and 31 companies (sports societies) from the First and Second Leagues in the 2019/2020 edition.

Thus, according to the anti-competitive practice resulting in a horizontal agreement, the undertakings could not hire workers (male footballers) subordinated to other companies, particularly when they had unilaterally terminated the employment contract for reasons relating to the pandemic situation. In this regard, it is worth noting that the process was opened in May 2020 by the PCA, which, contiguously, imposed a precautionary measure on the PPFL, which stipulated the immediate suspension of the deliberations arising from this agreement, as it considered them a manifestation of concerted practice capable of causing a potentially serious and irreparable impact on the relevant competitive market.

However, before outlining the guidelines on this topic, it is important to point out that the adoption of an Illicit Notice does not call for the final determination of the investigation since the undertakings mentioned above have at their disposal the exercise of the right to be heard and to defence. They can certify that the respective practice is not seen as restrictive of competition, that it does not restrict it in a sensible way, or that it is even justified in the light of the canons of competition law.

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[1] This practice consists of the fact of companies mutually undertaking not to make job offers or hire workers from each other.

[2] This is the first accusation on this matter in Portugal. In fact, as of the date of this text, in terms of the scope of action of the European Commission, under Article 101 of the Treaty on the Functioning of the European Union (TFEU), there are no decisions on restrictive practices of competition in the labour market regarding the non-procurement or wage-setting agreements. However, this reality has already been a subject of discussion and decisions in the North American context, with the Department of Justice and the Federal Trade Commission having adopted the Antitrust Guidance for Human Resource Professionals in 2016. Furthermore, in other Member States, competition authorities have already determined national decisions on this subject—e.g., Spain (2010); France (2017); Holland (2010). For a more detailed analysis of the North American and European experiences, see PAIS, Sofia, "A aplicação do direito da concorrência nos mercados laborais: participação de trabalhadores das plataformas digitais em convenções coletivas e acordos de não contratação", *Questões Laborais*, 2021, n.º 58, pp. 64-69.

[3] It should be noted that the PCA considered that the situation in question involved an agreement between undertakings and not a decision to form an association of undertakings, so it appears that under that agreement, the PPFL will have had autonomous participation.

Therefore, proceeding with the legal framework in the national and European Union orderings, we recall that under the Labour Code, as stipulated in Article 138, non-contracting agreements are null and void; moreover, so are agreements between companies that restrict competition (cf. article 101, no. 2, of the TFEU and article 9, no. 2, of Law 19/2012). After the adoption of final PCA decisions or their *res judicata*, there is also the possibility of workers injured in the circumstances in question asking for compensation – the so-called follow-on actions (cf. Law no. 23/2018, of 5 June).

In view of the scenario described, the PCA considered that the present no-poach agreements could have potential anti-competitive effects on the labour market[4]. There would be a strengthening of the purchasing power of employers since, by renouncing competition by reducing the number of potential alternatives in demand for each worker, they would also be reducing their bargaining power. In fact, the worker would have to sell their services to a reduced number of potential employers or even exclusively to their current one. Such a situation would lead to a monopsony[5] or an oligopsony[6] market structure, which could raise competition concerns, particularly in the context of a significant number of employers adhering to the relevant agreement and the existence of barriers to entry. Notwithstanding, such a reality could still influence the remuneration of workers (their value could deviate from their marginal productivity), as well as hinder labour mobility and reduce the quality of the allocation of workers to the company—to resolve certain football gaps, they could not hire players belonging to national competitions. In addition, the PCA also warned that the implementation of this horizontal agreement does not constitute a proportional mechanism that employers can carry out to safeguard investment in training their workers, and that there are other less restrictive measures (e.g., attribution of bonuses).

Regarding the analysis of the product market, the PCA considered that this agreement could have negative effects and harm consumers since it could compromise the quality of the product (*in casu*, of the football games), which would reduce the competitive environment between clubs, and eventually players could even be lost in the context of national competitions[7].

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[4] According to the *Commission Communication on the definition of the relevant market for the purposes of Community competition law*, the relevant market is considered to be the market for specific products or services that are substitutable by the consumer in terms of the prices, characteristics, and use of the goods. Thus, mutatis mutandis, the labour market would be what brings together the jobs considered replaceable from the perspective of workers.

[5] There is only one employer in the market.

[6] There are some great employers in the market.

[7] In other dimensions of potential effects of non-procurement agreements in the downstream market, in a general perspective and not applied to the specific case, they can also lead to: (i) reduction of the quantity of the product;

After a brief analysis of the sketched factuality[8], we believe it to be very positive that the PCA has started its journey of applying the rules for the defence of competition in the labour market[9]. Since, as we have analysed, for the most part, there are high discrepancies in market power between both sides[10], which can lead to the imposition of precarious working conditions, unfair wages, and even a situation of economic stagnation. As such, we claim that competition law is an adequate instrument to solve situations of this nature and that it could not be unapplied in the labour market, thus reinforcing the protectionist vein (either of consumers or, in this case, of workers) that has been strengthened by the European Commission and the National Competition Authorities.

(ii) price increase; (iii) hampering the circulation of knowledge between companies, which may harm their ability to innovate; (iv) reinforcing market conditions for the coordination of behaviours.

[8] We cannot fail to mention that, in the event of a conviction, the calculation of the applicable fines may raise some interpretative problems, since the sports companies in question are associated with the PPFL, which could result in a double consideration of their turnover for the assessment of their fines and the fine to be imposed on the PPFL.

[9] We also highlight that in June 2020, the PCA issued a recommendation to the Portuguese Football Federation that aimed not to impose a maximum limit on the entire salary mass of each club participating in the Women's League. At stake could be a wage-fixing agreement, which consists of the fact that companies harmonise the remuneration and/or remuneration complements of their workers, which may, in this way, be configured as a restrictive practice of competition since, in addition to leading to a lower remuneration than workers would receive in a situation of arm's length competition between companies, it can also facilitate other coordinated behaviours.

[10] It should be noted the existence of economic studies that determines a high level of concentration in the Portuguese labour market. On this matter, see MARTINS, Pedro, "Making their own weather? Estimating employer labour-market power and its wage effects", *Working Paper 95*, Queen Mary – University of London, 2018.