

AdC issues sanctioning decision for anticompetitive agreement in the labour market for the first time

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1. Competition Authority Notice: Press Release 06/2022 of April 29, 2022

The Portuguese Competition Authority¹ reported on April 29th, 2022 that it had sanctioned an anticompetitive practice in the labour market for the first time in Portugal. Specifically, the AdC imposed a sanction on sports companies participating in the 2019/2020 edition of the First and Second Professional Football Leagues for having entered into an agreement deemed restrictive of competition insofar as it prevented the contracting, by teams of the First and Second Professional Football Leagues, of players who had unilaterally terminated their employment contract, invoking, for such, reasons arising from the COVID-19 pandemic.² In essence, the agreement sought to keep players tied to their sports companies by limiting the possibility of terminating their employment contracts and did not have any underlying cooperation objective deemed essential in the pandemic context.

2. What are "no-poach" agreements?

"No-poach" or "anti-poaching agreements" are agreements between employers under which they undertake not to hire each other's workers: this is a real limitation on the possibility of workers to move freely in the labour market.³ They are horizontal agreements in the sense that we are dealing with companies that, competing in the same market, commit not to hire or to make spontaneous offers to each other's workers.⁴ In the case sanctioned by the AdC, a possible agreement would decrease the competitive

¹Hereafter AdC.

²Competition Authority Notice 06/2022 of April 29th, 2022. Available at: <https://www.concorrenca.pt/pt/artigos/adc-emite-pela-primeira-vez-em-portugal-decisao-sancionatoria-por-praticas>.

³Hovenkamp, Herbert, "Summary: Antitrust in Labor Markets" (2019). Wharton PPI B-School for Public Policy Seminar Summaries. 13. https://repository.upenn.edu/pennwhartonppi_bschool/13.

⁴Competition Authority Notice 06/2022 of April 29th, 2022. Available at: <https://www.concorrenca.pt/pt/artigos/adc-emite-pela-primeira-vez-em-portugal-decisao-sancionatoria-por-praticas>

pressure between the targeted sports companies to the extent that the hiring of professional players would no longer be free and would be subject to a pre-arranged behaviour of non-hiring between employers.

In general, horizontal agreements are almost always anti-competitive agreements. To understand why these agreements are perceived from such a negative point of view, it is important to understand what are the characteristics of a perfectly competitive market. A perfectly competitive market is characterized as being a *"hypothetical market where competition is at the highest possible level, [, and] ... economists argue that perfect competition would produce the best possible outcomes for consumers, and society, due to improved and increased market efficiency."*⁵ An industry or market achieves perfect competition if it meets five requirements: 1) all firms sell identical products; 2) all firms are "price-takers" – they do not control the market price of their products; 3) all firms have a relatively small market share; 4) buyers have all the information about the product being sold and the prices charged by firms; 5) there is freedom of market entry and exit.⁶ Although it is very rare to achieve perfect competition in the real world, competition law discourages artificial changes to perfect competition and market efficiency. Hence these agreements are seen as problematic.

3. Consequences of "no-poach" agreements

Arising in the labour market, "no-poach" arrangements differ from typical seller-trade restrictions whose main impact is at the consumer level. In fact, "no-poach" arrangements have a particular impact on buyers, as the worker sells their services to a small number of potential employers or even only to their current employer.⁷

A competitive labour market provides workers with higher wages, better benefits and a more varied job offer because a competitive landscape among workers leads to more and better quality and quantity of goods and services. However, the "no-poach" agreements allow employers to have extreme power over wages, contributing to the increase of wage inequality, contaminating the hiring process in favour of employers,

⁵*Perfect Competition*", ECONOMICS ONLINE, http://www.economicsonline.co.uk/Business_economics/Perfect_competition.html.

⁶*Perfect Competition*, ECONOMICS ONLINE, http://www.economicsonline.co.uk/Business_economics/Perfect_competition.html.

⁷Amanda Triplett, "No More No-Poach": An Antitrust Plaintiff's Guide, 26 Wash. & Lee J. Civ. Rts. & Soc. Just. 381 (2019). Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol26/iss1/10>. (p.387)

which will result in a situation of stagnant wages. The no-poach is thus linked to the concept of monopsony⁸.

Finally, on the one hand, it must be said that these agreements decrease the worker's power to negotiate higher wages, leading to workers being unable to change jobs.⁹ On the other hand, we must pay attention to the fact that a competitive labour market has more benefits, such as higher wages and a greater supply of jobs. These benefits constitute a motivation for the worker, which will lead to higher quality and quantity of goods and services produced by him.¹⁰ A worker who performs his activity without this motivation will be a worker who will reduce the quality and quantity of his work, which will lead to a situation of less innovation and a reduction of "outputs."

"No-poach" agreements are able to restrict, or even eliminate, competition among employers for the acquisition of talented workers.¹¹ This was one of the central issues in our case: as noted by the AdC, an agreement which establishes in advance the non-contracting of professional players is likely to reduce the quality of soccer matches and, to this extent, to harm consumers, since it ultimately reduces the competitive environment between teams, prevents the hiring of players who could fill gaps in the teams' rosters, and ultimately forces talented players to leave the country to continue their professional activity.¹²

Competition Law prohibits "no-poach" agreements, as they limit the autonomy of companies in defining strategic commercial conditions. This limitation can occur in any sector, and in our case, allowing this type of agreement would mean limiting the autonomy of companies in defining their human resources hiring policy.¹³

⁸Rochella T. Davis, *Talent can't be allocated: a labor economics justification for no-poaching agreement criminality in antitrust regulation*, 12 Brook. J. Corp. Fin. & Com. L. (2018). Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol12/iss2/2/>.

⁹Najah A. Farley, "Regulating Non-Compete Agreements", in "The Regulatory Review", (2019).

¹⁰Noelle Mack, "No-Poach, No Precedent: How DOJ's Aggressive Stance on Criminalizing Labor Market Agreements Runs Counter to Antitrust Jurisprudence", 87 MO. L. REV. Available at: <https://scholarship.law.missouri.edu/mlr/vol87/iss2/9>.

¹¹Rochella T. Davis, *Talent can't be allocated: a labor economics justification for no-poaching agreement criminality in antitrust regulation*, 12 Brook. J. Corp. Fin. & Com. L. (2018). Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol12/iss2/2/>.

¹²Competition Authority Notice 06/2022 of April 29th, 2022. Available at: <https://www.concorrenca.pt/pt/artigos/adc-emite-pela-primeira-vez-em-portugal-decisao-sancionatoria-por-praticas>

¹³Competition Authority Notice 06/2022 of April 29th, 2022. Available at: <https://www.concorrenca.pt/pt/artigos/adc-emite-pela-primeira-vez-em-portugal-decisao-sancionatoria-por-praticas>

Notwithstanding this panoply of negative consequences, there is some literature that manages to draw a beneficial reality from these “no-poach” agreements, namely that they ensure longevity and minimize volatility through ways that make the company a better and more vigorous competitor.¹⁴

4. How to react?

In the context of "no-poach" agreements, the majority of the doctrine focuses on seeking solutions to be adopted as a reaction, i.e., mostly seeking an ex-post approach to the problem. However, as ORLY LOBEL¹⁵ states, an ex-ante attitude towards the existence of certain clauses in employment contracts is the real key to a competitive and healthy labour market. Furthermore, it would be beneficial to enshrine a legitimate right of action by employees on behalf of their co-workers.

Following on from what has been said, we think it would be interesting to adopt innovative legislative proposals that would reduce the number of workers covered by these agreements and also increase the control mechanisms.¹⁶ These legislative proposals should aim to expand their scope beyond workers who receive the minimum wage so that more workers can be encouraged to oppose these types of agreements, as well as to encourage government intervention to guarantee that these workers fight against these types of agreements with the support of the state.¹⁷

The AdC plays a key role within the national context. The "Guide of Good Practices"¹⁸ prepared by the AdC in 2021 deserves our attention because, through it, the AdC precisely intended to prevent the signing of these agreements. As this is a matter prohibited by the Treaty on the Functioning of the European Union, it is relevant to pay attention to the European Commission's Guide on this type of agreement¹⁹, which is

¹⁴Noelle Mack, “*No-Poach, No Precedent: How DOJ’s Aggressive Stance on Criminalizing Labor Market Agreements Runs Counter to Antitrust Jurisprudence*”, 87 MO. L. REV. Available at: <https://scholarship.law.missouri.edu/mlr/vol87/iss2/9>.

¹⁴Lobel, Orly, “Gentlemen Prefer Bonds: How Employers Fix The Talent Market”, 59 Santa Clara L. Rev. 663 (2020). Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss3/7>.

¹⁵Lobel, Orly, “Gentlemen Prefer Bonds: How Employers Fix The Talent Market”, 59 Santa Clara L. Rev. 663 (2020). Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss3/7>.

¹⁶Najah A. Farley, “*Regulating Non-Compete Agreements*”, in “*The Regulatory Review*”, (2019).

¹⁷Najah A. Farley, “*Regulating Non-Compete Agreements*”, in “*The Regulatory Review*”, (2019).

¹⁸Available at: <https://www.concorrenca.pt/sites/default/files/documentos/guias-promocao-da-concorrenca/Guia%20de%20Boas%20Praticas%20de%20Preven%C3%A7%C3%A3o%20de%20Acordos%20Anticoncorrencaais%20no%20Mercado%20de%20Trabalho.pdf>

¹⁹Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:PT:PDF>



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aimed at clarifying and assessing these "agreements", and thus its better interpretation may constitute a way to fight anti-competitive practices, in particular, the "no-poach."