

Update

European and Competition Law

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Can the recruitment processes and hiring of workers violate Competition Law?

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The time has come for companies, human resources professionals (HR) and recruitment agencies to pay attention to anti-competitive risks arising from recruitment and hiring practices.

The Portuguese Competition Authority (PCA) is watchful of anti-competitive agreements between employers that cause harm to workers and consumers, in particular:

- **Non-poach / wage-fixing agreements** - companies commit to not making job offers or hiring workers from each other; and
- **Wage-fixing agreements** - companies harmonize their workers' wages and / or other salary benefits.

First Accusation in Portugal

On the 13th of April 2021 the PCA issued [Statements of Objections](#) to 31 sports companies participating in the 2019/2020 edition of the First and Second Leagues and the Portuguese Professional Football League (LPFP) for an alleged restrictive agreement. According to the PCA, “[t]he agreement prevented the hiring by First and Second League of professional football clubs, of players who unilaterally terminated their employment contract invoking issues caused by the Covid-19 pandemic”.

It should be noted that the adoption of Statements of Objections does not determine the outcome of the investigation. The accused companies may exercise their right to be heard and defend themselves and demonstrate that the practice is not restrictive of competition, or does not constitute an appreciable restriction of competition, or that the economic benefits outweigh the negative effects of the restriction of competition.

Irrespective of the content of the final decision, it cannot ignore the pandemic outbreak of Covid-19. Regarding the economic impact from Covid-19 to the revenues of the Portuguese football league, LPFP says in a statement that “according to estimates already known, the immediate estimated revenue losses would be around 310 million euros, which will mean a decrease of 60%, compared to the 512 million euros of operating revenues in the 2018-19 season”ⁱ. At the EU level and in some Member States the pandemic has already justified the closing of proceedings or the substantial reduction of finesⁱⁱ.

Interim measures

The case was opened by the PCA in May 2020. The PCA imposed [interim measures](#) on LPFP to withdraw with immediate effect its decision of 8 April of 2020 that concerned an alleged impediment of hiring footballers. For this reason, if there were any negative effects on competition, they were null or practically non-existent, as a result of the swift intervention of the PCA. This is only the second time that the PCA has adopted interim measures in its almost 20 years of existence. In our opinion it will be more likely in the future for the PCA to apply such measures to prevent potential damages to competition, which are serious, irreparable, or difficult to repair.

Public Consultation

It is therefore no coincidence that the PCA submitted an Issues Paper to public consultation “[Labour market agreements and competition policy](#)” (until June 9). In its own words, “[t]his document raises the awareness of companies, human resources professionals and other employees, recruitment agencies, among others, on the potential negative effects for workers and consumers resulting from anti-competitive agreements in the labour market. The PCA lists a set of best practices related to the labour market directed at companies”.

Best Practices

The PCA also provides a “[Best Practices Code of Conduct](#)” with possible anticompetitive risks of these agreements and lists a set of best practices related to the labour market, such as:

- Do not agree with another company to fix the level of salaries, benefits, or any other form of compensation to employees
- Do not exchange company-specific information on employee compensation
- Do not participate in meetings with other companies about internal hiring and wage policies
- Do not refuse to solicit or to hire employees from another company
- Raise workers’ awareness, particularly amongst human resources personnel, to competition law, for example, through internal training

Why to prevent?

The compliance from HR professionals in all sectors of the economy is crucial to prevent the risks arising from violations of competition law:

- high fines are applicable for the violation of Competition Law (up to 10% of the turnover of the economic group)
- invalidity of agreements
- liability of administrators/managers and directors
- victims are entitled to compensation (actions for damages) and
- damages in reputation.

ⁱ LPPF's press release of 7th April 2020 (in Portuguese):

<https://www.ligaportugal.pt/pt/epocas/20192020/noticias/institucional/liga-portugal-esclarece-medidas-tomadas-em-reunioes-com-sindicato-de-jogadores/>

ⁱⁱ See also PCA's press release nr. 5/2020 of 23.3.2020 – "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis"