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QUICK LINKS

Advocate General finds 'no-poach' agreements generally restrictive 'by object', but "*context always matters*"

On 15 May 2025, Advocate General (AG) Emiliou issued his opinion following a request for a preliminary ruling from a Portuguese court on the assessment of a 'no-poach' clause under EU competition rules.

Background

During the 2019/2020 football season, the World Health Organization declared the COVID-19 pandemic. As the world scrambled to respond, the Portuguese Professional Football League (LPFP) and the Union of Professional Football Players (SJPF) in Portugal began negotiations to ensure the sustainability of the sport in both sporting and financial terms. The LPFP also agreed with clubs in the Portuguese first and second divisions that no club would hire a player who unilaterally terminated their employment contract as a result of the pandemic.

In April 2022, the Portuguese Competition Authority imposed fines totalling around €11.3 million on 30 football clubs and the Portuguese Professional Football League. When a number of the clubs appealed, the Competition, Regulation and Supervision Court in Portugal sought a preliminary ruling from the Court of Justice of the European Union (CJ) on, amongst other things, whether such a 'no-poach' agreement constitutes a 'by object' restriction under Article 101(1) TFEU.

Framework for 'by object' restrictions

AG Emiliou began by recalling the case law on restrictions of competition 'by object' - a concept which the courts have said must be interpreted strictly, as referring to types of coordination between undertakings that reveal a "*sufficient degree of harm*" to competition such that it is unnecessary to assess their effects.

AG Emiliou noted that, according to the case law, three aspects must be examined to determine whether conduct constitutes a 'by object' restriction: (i) the content of the agreement; (ii) the relevant economic and legal context; and (iii) its objectives.

In terms of how to assess these elements in practice in order to determine whether conduct is restrictive by object, AG Emiliou opined that recent case law distinguishes two main methods of analysis. On the one hand, for those agreements belonging to a category of agreements whose harmful nature is generally accepted (e.g. price fixing or market sharing), the examination of the legal and economic context and the agreement's objectives need not be detailed – the authorities need only verify that there are no specific circumstances which cast doubt on the presumption that the agreement is harmful. On the other hand, agreements that have significant original features such that a

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"'*safe' prima facie evaluation of their object cannot be made*" require a more in-depth analysis to determine whether they are anti-competitive by their object.

No-poach agreements

Applying these principles to the 'no-poach' agreement at issue, AG Emiliou stated, "*right from the outset*", that no-poach agreements between actual or potential competitors (where they are not ancillary to a legitimate transaction) have "*all the characteristics to be considered prima facie restrictive of competition 'by object'*", characterising them as sharing a source of supply.

He noted that such agreements prevent efficient undertakings from competing to recruit the personnel they consider best for their needs, resulting in suboptimal allocation of human resources, loss of efficiency and/or innovation and lower wages for staff. Such negative effects on the labour market may in turn negatively affect the products or services offered by the undertakings in question.

Nevertheless, AG Emiliou caveated this conclusion, noting that "*finding that a given agreement belongs to a category of agreements that is typically restrictive of competition is by no means the end of the analysis*". In line with the case law, it is also necessary to consider its legal and economic context and objectives, to verify whether there are specific circumstances to cast doubt on the harmful nature of the agreement.

AG Emiliou identified several elements that appeared to exclude the inherently anti-competitive nature of the arrangement in question, including: (i) the exceptional circumstances of the COVID-19 pandemic; (ii) the scope of the agreement being narrowly limited to players unilaterally terminating contracts due to pandemic-related issues; and (iii) its objective of ensuring that the 2019/2020 season could be completed without affecting the integrity and fairness of the tournament. Moreover, he considered that "*it would not be unreasonable to take the view that, in so far as the agreement at issue was instrumental in securing an appropriate competitive structure within the league until the end of the season, its economic rationale was to preserve and enhance healthy competition*".

As such, AG Emiliou concluded that a more detailed and in-depth assessment of the anti-competitive object (and, if appropriate, effect) of the agreement is required. He proposed that the CJ answer the question referred to the effect that the no-poach agreement in question should not be classified as restrictive by object if its genuine rationale was to preserve the fairness and integrity of the sports competition affected by the pandemic.

Opining on whether the agreement might even fall outside of Article 101(1) altogether (on the basis of the '*Meca-Medina*' line of case law), AG Emiliou's preliminary view was that the agreement at issue was justified by the pursuit of legitimate objectives in the public interest which are not *per se* anti-competitive and was genuinely necessary for that purpose. As for whether the effects of the agreement went beyond what was necessary to achieve its objective, he suggested that the referring court might need to look at whether other measures were available which were less restrictive of competition. On this latter point, AG Emiliou noted that the agreement had limited geographic and personal scope, and its impact on the economic activity of the football players was relatively minor. He also suggested that, given the urgency and complexity of the COVID-19-induced situation, the referring court should only consider alternative measures which were reasonably available and straightforward in design and implementation. In his view, alternative measures which were equally effective are hard to identify.

Conclusion

The CJ is not bound by AG Emiliou's opinion – it remains to be seen whether the court will reach the same conclusion that no-poach agreements between competitors are generally restrictive of competition 'by object'. It will also be interesting to see whether the court reaches the same view on the specific agreement in question in light of the unprecedented circumstances in which it was concluded.

The CJ ruling will be the first time an antitrust case focused on labour markets has received scrutiny from the EU's highest court, and the final judgment will likely establish a precedent for future enforcement actions against no-poach agreements and other restrictions in labour markets. In recent years the European Commission has, like other competition authorities around the world, taken an increasingly firm stance on labour market restrictions.

In May 2024, it published a policy brief indicating that no-poach agreements generally qualify as restrictions of competition by object, and are unlikely to be deemed ancillary restraints or exempt under Article 101(3) TFEU (see a previous edition of this newsletter). For now, AG Emiliou's opinion only reinforces the position set out in that policy brief. Businesses should exercise extreme caution regarding any agreements not to approach or hire competitors' employees.

OTHER DEVELOPMENTS

ANTITRUST

Japan starts public consultation on draft rules for smartphone software competition law

On 15 May 2025, the Japan Fair Trade Commission (JFTC) released draft implementation rules and guidelines in respect of the new Act on the Promotion of Competition for Specified Smartphone Software (the Smartphone Act), which is set to take effect in December this year. As reported in a previous edition of this newsletter, Apple and Google have been designated as 'Specified Software Operators' or 'SSOs', which are required to comply with certain obligations and prohibitions under the Smartphone Act.

The draft rules provide explanations of key concepts and guidance on the scope of the obligations and prohibitions set out in the Smartphone Act, including specific examples of what may constitute prohibited conduct for each of the relevant categories of software, as well as recommended practices for compliance with the Smartphone Act. For example, regarding the prohibition of unjust discrimination or otherwise unfair treatment (applicable to operating systems and app stores), the draft rules explain that applying certain criteria (e.g. ensuring cybersecurity, maintaining public order and morals, etc.) in the review of individual software is generally permissible, unless the implementation of such review is discriminatory without reasonable grounds.

As noted in our previous edition, the Smartphone Act permits "*justifiable measures*" that are necessary to achieve the objectives of security, privacy and youth protection, etc., provided that there are no "*less competition-restricting*" measures. The draft rules unveil two additional objectives which may qualify as "*justifiable measures*", namely: (a) the prevention of gambling and other criminal activities; and (b) the prevention of significant delays or abnormal operations of smartphones. These justifiable objectives must be carefully balanced against the imperative of promoting competition. By way of a hypothetical scenario, if an SSO uniformly displays an "*unsafe*" warning message to smartphone users who attempt to install alternative app stores, without having conducted a prior review of such app store, this will not be accepted as a "*justifiable measure*" and may therefore constitute an infringement under the Smartphone Act.

In addition, the draft rules include a draft policy on commitment procedures, which sets out the framework through which operators may voluntarily propose corrective plans in exchange for the JFTC suspending its enforcement action. In particular, the policy specifies that structural measures may, in some cases, be required to restore competitive order. It is expected that the commitment procedures will help address competitive issues at an early stage and facilitate the implementation of corrective measures.

The draft rules are open for public consultation until 13 June. While further changes are expected, the draft rules shed light on the JFTC's proposed approach to the enforcement of the Smartphone Act and serve as a useful indication of the future direction of Big Tech regulation in Japan more generally.

GENERAL COMPETITION

UK Government issues final version of growth-focused strategic steer to CMA

On 15 May 2025, the UK Government issued the final version of its growth-focused strategic steer to the UK Competition and Markets Authority (CMA), following consultation on its draft strategic steer earlier this year. It also published a brief summary of the consultation themes and its response to those.

The initial draft strategic steer was published in February 2025 and outlined the Government's expectations for how the CMA should support the pro-growth and pro-investment agenda, whilst remaining independent in its

enforcement and decision-making (see a previous edition of this newsletter). Following the consultation, there are only limited differences between the draft and final steer, many of which are non-substantive. The most notable changes are the below additions:

- Express reference to the independence of the CMA in exercising its statutory functions – this is in direct response to feedback received during the consultation that the steer should confirm the independence of the CMA.
- A suggestion that the CMA should tackle anti-competitive conduct which harms businesses and consumers "*and limits the potential of our economy*". This additional wording is presumably directed at the CMA's enforcement priorities given this is not part of the legal test. The Government does not elaborate further on this addition in its summary of the consultation and its response.
- Express reference to the fact that the CMA should "*collaborate with all interested parties*" to ensure growth and innovation benefits are prioritised when using the Digital Markets Competition and Consumers Act (DMCCA) digital regime (recognising that the way these markets develop is not always predictable).

Whilst the steer is non-binding, it serves as an important signal of the Government's economic priorities and what it expects from the CMA moving forward. Sarah Cardell, Chief Executive of the CMA, emphasised "*the Strategic Steer reinforces the importance of a strong, independent competition and consumer protection regime, whilst situating this squarely in the context of the growth mission*". She acknowledged that the steer provides "*helpful clarity on how the CMA should prioritise and go about our work, promoting competition and protecting consumers with a sharp focus on supporting higher levels of investment and economic growth*". She further said the steer reinforces the approach the CMA has set in its 2025/2026 Annual Plan and in the roll out of its '4Ps' approach.

Stakeholders across the UK will be able to monitor how the CMA incorporates this strategic guidance into its activities, as the Government has made clear its expectation that the CMA clearly communicates how it is taking account of the steer, including in its annual report.

Proposals for EU-UK competition cooperation deal adopted by European Commission

On 20 May 2025, the European Commission announced that it had adopted the proposals for Council decisions to sign and conclude the EU-UK Competition Cooperation Agreement. This will be a 'supplementing agreement' to the EU-UK Trade and Cooperation Agreement (TCA), which provides for competition cooperation and coordination, allowing for the further possibility of entering into a separate agreement on competition cooperation in the future.

The announcement follows a Council Decision adopted in June 2023, which authorised the Commission to open negotiations with the UK. On 29 October 2024, the Commission confirmed that negotiations on the agreement between the EU and the UK had been finalised at a technical level.

The agreement will put in place a clear framework for cooperation when enforcing EU competition rules between the Commission and the national competition authorities of EU Member States (EU NCAs) on one side, and the UK's CMA on the other. It is the first EU competition cooperation agreement that enables EU NCAs to cooperate directly with a third-country competition authority.

The agreement will set out that important antitrust and merger investigations are brought to each other's attention. It will also, when necessary, allow the coordination of investigations between the jurisdictions involved. On the EU side, this could involve the Commission or EU NCAs, depending on the circumstances. To enable this, it also sets out clear principles of cooperation, aimed at preventing any conflicts between the jurisdictions. As a point to note, the consent of the company providing the information will continue to be required prior to the exchange of any confidential information between the authorities.

Next steps will involve the Council adopting a decision to sign and subsequently conclude the agreement (subject also to the European Parliament's consent), which will finalise the EU interinstitutional process. After both the EU and the UK have finalised their ratification procedures, the agreement will enter into force.

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