

**Case C-133/24**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

16 February 2024

**Referring court:**

Tribunal da Concorrência, Regulação e Supervisão (Portugal)

**Date of the decision to refer:**

18 December 2023

**Applicants:**

CD Tondela – Futebol, SAD

Clube Desportivo Feirense – Futebol, SAD

Liga Portuguesa de Futebol Profissional (LPFP)

Académico de Viseu Futebol Clube, SAD

Os Belenenses – Sociedade Desportiva de Futebol, SAD

Moreirense Futebol Clube – Futebol, SAD

Marítimo da Madeira, Futebol, SAD

Vitória Sport Clube – Futebol, SAD

Futebol Clube do Porto, Futebol, SAD

Sporting Clube de Portugal – Futebol, SAD

Sport Lisboa e Benfica, Futebol, SAD

Associação Académica de Coimbra – Organismo Autónomo de Futebol, SDUQ, Lda

**Defendant:**

Autoridade da Concorrência (Competition Authority)

### **Subject matter of the main proceedings**

The dispute in the main proceedings is concerned with whether an agreement by which the main incorporated sports clubs in the Portuguese Primeira Liga (First League) and Segunda Liga (Second League) agreed not to sign up as between themselves professional football players who had unilaterally terminated their employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of it, in particular to extend the sports season, can be classified as an agreement of an association of undertakings that is restrictive of competition by object.

### **Questions referred for a preliminary ruling**

**‘(A) Does an agreement concluded online via the Zoom or Microsoft Teams platforms on 7 April 2020 by all of the First-Division incorporated professional football clubs and to which most of the Second-Division incorporated professional football clubs of a Member State subsequently signed up, by the same mechanism on the following day, in both cases in collusion with the association whose purpose in that Member State is to support and regulate professional football activities, and under which those clubs agreed as between themselves not to sign up any professional footballers in those divisions who had unilaterally terminated their employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of that pandemic, in particular to extend the sports season, constitute a rule of sporting interest for the purposes of the case-law in *Meca-Medina* (Case C-519/04 P, *Meca-Medina [and Majcen v Commission]*, EU:C:2006:492), in the circumstances described in this request for a preliminary ruling?’**

**(B) For the purposes of the case-law arising from the judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 97), and of 18 July 2006, *Meca-Medina and Majcen v Commission* (C-519/04 P, EU:C:2006:492, paragraph 42), may a rule, arising from an agreement concluded online via the Zoom or Microsoft Teams platforms on 7 April 2020 by all of the First-Division incorporated professional football clubs and to which most of the Second-Division incorporated professional football clubs of a Member State subsequently signed up, by the same mechanism on the following day, in both cases in collusion with the association whose purpose in that Member State is to support and regulate professional football activities, and under which those clubs agreed as between themselves not to sign up any professional footballers in those divisions who had unilaterally terminated their**

employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of that pandemic, in particular to extend the sports season, and having the characteristics and objectives, and applying in the circumstances, described in this request for a preliminary ruling, be regarded as proportionate and appropriate and therefore, in accordance with Article 165 TFEU, compatible with Article 101(1) TFEU?

(C) Does Article 101(1) TFEU preclude an interpretation to the effect that an agreement having the characteristics and objectives, and applying in the circumstances, described in this request for a preliminary ruling, concluded online via the Zoom or Microsoft Teams platforms on 7 April 2020 by all of the First-Division incorporated professional football clubs and to which most of the Second-Division incorporated professional football clubs of a Member State subsequently signed up, by the same mechanism on the following day, in both cases in collusion with the association whose purpose in that Member State is to support and regulate professional football activities, and under which those clubs agreed as between themselves not to sign up any professional footballers in those divisions who had unilaterally terminated their employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of that pandemic, in particular to extend the sports season, may be classified as a restriction of competition by object on the ground that it presents a sufficient degree of harm to competition?

#### Provisions of European Union law and case-law and case-law relied on

- TFEU: Articles 101(1) and 165
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1): Article 3
- Opinion of Advocate General Rantos in *European Superleague Company* (C-333/21, EU:C:2023:153): point 62
- Judgment of 25 March 2021, *Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission* (C-586/16 P, not published, EU:C:2021:241): paragraph 86
- Judgment of 25 April 2013, *Asociatia Accept* (C-81/12, EU:C:2013:275): paragraph 45
- Judgment of 16 March 2010, *Olympique Lyonnais* (C-[3]25/08, EU:C:2010:143): paragraph 40

- Judgment of 18 July 2006, *Meca-Medina and Majcen v Commission* (C-519/04 P, EU:C:2006:492)
- Judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98): paragraph 97
- Judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463): paragraphs 106 and 110
- Judgment of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140): paragraph 8
- [Judgment of 17 October 1972, *Vereeniging van Cementhandelaren v Commission* (8/72, EU:C:1972:84)]
- Judgment of the General Court of 16 December 2020, *International Skating Union v Commission* (T-93/18, EU:T:2020:610): paragraph 109

## **Provisions of national law relied on**

### **A. Rules on practices restrictive of competition**

- 1 Lei n.º 19/2012, de 8 de maio, que aprova o novo regime jurídico da concorrência (Law No 19/2012 of 8 May 2012 adopting the new legal framework governing competition) (DR (Official State Gazette) No 89/2012, Series I, of 8 May 2012): Article 9(1)(c))

### **B. Rules applicable to the registration and use of professional football players and to the employment relationship between clubs and players**

- 2 Lei n.º 54/2017, de 14 de julho, que estabelece o regime jurídico do contrato de trabalho do praticante desportivo, do contrato de formação desportiva e do contrato de representação ou intermediação (Law No 54/2017 of 14 July 2017 establishing the legal framework governing sportspersons' employment contracts, sports training contracts and representation or intermediation contracts) (DR (Official State Gazette) No 135/2017, Series I, of 14 July 2017): Articles 3(1) and (2), 9, 23 and 26(1) and (2))
- 3 Regulamento das Competições organizadas pela Liga Portugal adotado ao abrigo do n.º 1 do artigo 29.º do Regime Jurídico das Federações Desportivas, aprovado pelo Decreto-Lei n.º 248-B/2008 (Regulation governing competitions organised by the Portuguese League, adopted under Article 29(1) of the Legal Framework governing sports federations, adopted by Decree-Law No 248-B/2008): Articles 74, 76(5) and 79(6), And Annex II(2), (3) and (8))
- 4 Contrato Coletivo de Trabalho celebrado entre a Liga Portuguesa de Futebol Profissional e o Sindicato de Jogadores Profissionais de Futebol (Collective

Labour Agreement concluded between the Portuguese Professional Football League [(‘the LPFP’)] and the Union of Professional Football Players [(‘the SJPFP’)] (‘the CCT’): Articles 4(7.º-A), 10, 31, 39 and 46(1) and (3))

### **C. Extraordinary measures adopted as a consequence of the pandemic**

- 5 Decreto-Lei n.º 10-G/2020, de 26 de março (Decree-Law No 10-G/2020 of 26 March 2020) (DR (Official State Gazette) No 61/2020, 1st Supplement, Series I, of 26 March 2020), which established an exceptional and temporary measure for the protection of employment in the context of the COVID-19 pandemic: Article 6
- 6 Decreto-Lei n.º 18-A/2020, de 23 de abril (Decree-Law No 18-A/2020 of 23 April 2020) (DR (Official State Gazette) No 80/2020, 1st Supplement, Series I, of 23 April 2020), which established exceptional and temporary measures in the field of sport in the context of the COVID-19 pandemic
- 7 Resolução do Conselho de Ministros n.º 33-C/2020, de 30 de abril (Council of Ministers Resolution No 33-C/2020 of 30 April 2020) (DR (Official State Gazette) No 85/2020, 3rd Supplement, Series I, of 30 April 2020), which established a strategy for lifting lockdown measures in the context of the fight against the COVID 19 pandemic

### **Succinct presentation of the facts and procedure in the main proceedings**

#### ***1. Context***

- 8 The LPFP is a private-law not-for-profit association the object of which is to support and regulate professional football activities in Portugal and the ordinary membership of which is made up of unincorporated and incorporated sports clubs. The LPFP organises three professional men’s football competitions: the Primeira Liga (First League), the Segunda Liga (Second League) and the Taça da Liga (League Cup).
- 9 In the 2019/2020 season, 18 teams took part in the Primeira Liga and 13 in the Segunda Liga.
- 10 During that season, on 30 January 2020, the WHO declared the coronavirus outbreak to be a public health emergency of international concern and, on 11 March 2020, declared COVID-19 to be a pandemic.
- 11 On 12 March 2020, the Portuguese Government adopted several measures aimed at containing the risk of the virus spreading. Owing to the worsening of the situation brought about by the pandemic, a state of emergency was decreed and successively extended until 2 May 2020.

- 12 As regards the implementation of the competition rules during the health crisis, the European Competition Network issued a joint statement in which it acknowledged the possible need for cooperation between businesses.
- 13 On 12 March 2020, the LPFP decided upon and announced the indefinite suspension of the national championships of the Primeira Liga and the Segunda Liga, with ten fixtures still to play.
- 14 At European level, the International Association Football Federation (FIFA) set up a working group to address the regulatory questions raised by the pandemic and its impact on the Regulations on the Status and Transfer of Players.<sup>1</sup> This led to the document entitled ‘*COVID-19 – Football Regulatory Issues*’, which came into effect on 7 April 2020, and in which FIFA expressed its main concerns in this regard.<sup>2</sup>
- 15 In May 2020, FIFA announced the new transfer period dates for the 2020/2021 season. In the case of Portugal, the first transfer period ran from 3 August to 6 October 2020, and the second period started on 4 January and ended on 1 February 2021.
- 16 On 21 March 2020, the LPFP and the SJPF set up a COVID-19 Monitoring Committee and began negotiations to ensure the sustainability of the sport in both sporting and financial terms.
- 17 On 17 April 2020, the status of the negotiations between the LPFP and the SJPF was reflected in a statement by the LPFP which noted in particular that revenue losses represented a decrease of 60% by comparison with revenue for the 2018/19 season and that the LPFP had presented proposals due to be reflected immediately in the CCT. Of those proposals, the SJPF agreed in particular: (a) to an extension of employment contracts until the end of the season, their term being deemed to run until the last official match of 2019/2020; (b) to an extension of loan and transfer contracts until the end of the season, their term being deemed to run until the last official match of 2019/2020; and (c) that none of those measures constituted just cause for terminating sportspersons’ employment contracts. The SJPF expressed its disagreement in respect of certain financial matters, in particular with regard to agreements to reduce players’ salaries.
- 18 Since agreement could not be reached with the SJFP on these matters, clubs could avail themselves of the special measures proposed by the Government, in particular lay-offs or similar such measures, and were at liberty to negotiate with their players.

<sup>1</sup> Those regulations lay down global binding rules on the status of players, their eligibility to participate in organised football and their transfer between clubs belonging to different associations.

<sup>2</sup> The referring court refers in particular to the information contained on pages 3 to 7 and 9 of that document.

- 19 On 7 April 2020, the LPFP and the incorporated sports clubs were aware of the solutions proposed at international level as regards extending the terms of contracts with players for the 2019/20 season, and the dates of the registration periods.
- 20 At national level, however, it was not certain whether the sports season would continue, or, if it did, whether it would extend beyond 30 June 2020, what that potential extension of the sports season would mean in practice for existing employment contracts, in particular those expiring on 30 June 2020, or what would happen to the dates of the player registration periods for the 2020/2021 season.
- 21 It having proved impossible for the LPFP and the SJFP to reach a consensus on financial matters in connection with sportspersons' employment contracts, from 7 April 2020, incorporated sports clubs began to make or increased direct contact with players with a view to resolving these issues. Most incorporated sports clubs and their players concluded salary reduction agreements providing for the reduction in question to be refunded once certain conditions were met, in particular the resumption of competition.
- 22 For its part, Council of Ministers Resolution No 33-C/2020 provided that the Liga NOS and Portuguese Cup competitions would resume in stadiums, without spectators, from 30 and 31 May 2020.
- 23 On 4 May 2020, the LPFP, the SJPF and the Associação Nacional de Treinadores de Futebol (National Association of Football Coaches) concluded a memorandum of understanding on the duration of contracts and sports relationships.
- 24 That memorandum stated the following: (i) the 2019/2020 sports season would end on the day following the day on which the last official match of the competitions in that season was played; (ii) sportspersons' employment contracts or sports training contracts concluded between clubs participating in the NOS League and coaches players and due to come to an end during the current sports season would be deemed to be automatically extended until the end of that season; and (iii) the same would apply to temporary transfer contracts and sports relationships. The terms of that memorandum were included in a transitional provision of the CCT, Article 7.º-A, entitled 'Effects of changes to the competition calendar as a result of COVID-19 on the employment relationships of sportspersons'.
- 25 On 18 June 2020, the [Federação Portuguesa de Futebol] (Portuguese Football Federation) (FPF) amended Official Communiqué No 1 for the 2019/2020 season to the effect that the 2019/2020 sports season would start on 1 July 2019 and would end on 2 August 2020.
- 26 FIFA's proposal that player registration periods be relaxed (which did not come into effect until 25 June 2020) with a view to offering players additional

employment opportunities in the context of the pandemic was not included in the national legislation by the LPFP.

## **2. *Impact of the pandemic on professional football***

- 27 On 7 April 2020, incorporated sports clubs estimated an immediate interim revenue loss of EUR 310 million, representing a decrease of 60% by comparison with operating revenue in the 2018/2019 season.
- 28 On the transfer market, there was a 28% depreciation in the value of playing staff in the five main European leagues (English, Spanish, French, Italian and German) in the 2020 pandemic period. At the material time, national and international incorporated sports clubs showed little willingness to sign new players, resulting in a decrease in signings.
- 29 The LPFP anticipated that the consequences of the pandemic would pan out according to one of two scenarios, the first being that it would not be possible for the ten remaining fixtures to take place, the second that the ten remaining fixtures would take place behind closed doors.
- 30 It was considered that, in the 2019/2020 season, the aggregate revenues of incorporated sports clubs could decrease by 37% by comparison with the 2018/2019 season (under the first scenario) and by 15% by comparison with the 2018/2019 season (under the second scenario). Unrecoverable losses of revenue from television rights and significant losses of revenue from sponsorship, subscriptions and entrance fees, merchandising and sports betting were forecast. As regards the values linked to player transfers, a reduction of 65% could be expected under the first scenario and a loss of 28% under the second scenario.
- 31 During the months of May and June 2020, an unspecified number of incorporated sports clubs cut salaries by approximately 40% or 50% and resorted to lay-off procedures.
- 32 Losing a player as a result of the unilateral termination of his employment contract on grounds of issues arising from the COVID-19 pandemic immediately created the difficulty of finding not only an equivalent replacement but also the financial resources needed to sign one up, had a significant financial impact on the configuration of the squad and meant losing the financial revenue that might have been earned from transferring the outgoing player.

## **3. *Agreement of 7 April 2020***

- 33 On 7 April 2020, the incorporated sports clubs in the Primeira Liga and the LPFP held a pre-arranged online meeting to discuss the impact of the pandemic on professional football. The incorporated sports clubs were represented at the highest level; the LPFP drew up and kept a list of those who attended that meeting.

- 34 The participants discussed the effects of the pandemic on sportspersons' employment contracts due to expire or start on the dates initially set for the end of the 2019/20 sports season, in the light of the suspension of competition.
- 35 On 7 April 2020, out of a total of 1 453 registered employment contracts, there were 514 employment contracts in force that were due to expire on 30 June 2020.
- 36 All those present determined that no incorporated sports club participating in the Primeira Liga in the 2019/2020 season would sign up a player who had unilaterally terminated his employment contract on grounds of issues arising from the COVID-19 pandemic or an exceptional decision adopted as a result of it, in particular to extend the sports season.
- 37 On 8 April 2020, at a new meeting with the president of the LPFP, some of the incorporated sports clubs in the Segunda Liga for the 2019/2020 season, also represented at the highest level, voiced the same concerns as those expressed the day before by the Primeira Liga clubs and signed up to the agreement reached at the meeting on 7 April 2020.
- 38 That agreement was intended to:
- (a) safeguard the situation of players whose employment or loan contracts would expire during the current sports season by compelling them to remain bound by their contracts until the end of the season extension, in view of the possibility of extending the sports season;
  - (b) safeguard the need to reach agreements with players on reducing or deferring the payment of remuneration by compelling them to accept such undertakings in order to avoid a situation in which incorporated sports clubs which have or are likely to have reduced financial capacity would not be able to pay their players' salaries and the latter would refuse to take part in matches in the event of these being resumed or would terminate their contracts with just cause for non-payment, or in which incorporated sports clubs would have to apply extraordinary unilateral measures across the board, such as lay-offs, in particular by suspending employment contracts, since all of these hypothetical situations would reduce the quality of the competition and ultimately cause economic damage to the entire sector;
  - (c) ensure that players did not have any just cause to terminate their contracts by claiming, in order to release themselves from those contracts, that they are unable to work because of COVID-19, by compelling them to remain bound by their contracts.
- 39 The LPFP had an interest in that agreement not only because it is the entity that manages football competitions in Portugal and is responsible for ensuring observance of the principles of preserving the stability and integrity of competitions and the long-term sustainability and economic and financial viability

of associated incorporated sports clubs, but also because its revenue comes from the payments made by incorporated sports clubs and sponsors.

- 40 Although the participants were aware of its nature as being restrictive of competition, the agreement sought to maintain the stability of playing staff levels, the integrity and quality of competitions and the solvency of the sector, not only in the short term but also in the medium and long terms, and to ensure normal sporting competition between clubs.
- 41 The agreement reached between the incorporated sports clubs in the Primeira and Segunda Ligas, with the participation of the LPFP, was not the subject of collective negotiation between the clubs and the SJFP, in particular in the context of the changes that were to be included in the CCT as a result of the COVID-19 pandemic.
- 42 That agreement started to be implemented on 7 April 2020. Owing to the interim measures ordered by the Competition Authority and requiring in particular that the practice in question be suspended for a period of 90 days, that agreement was definitively terminated on 2 June 2020.

***(a) Players affected and the position of the applicants on the relevant market***

- 43 The agreement at issue affected male professional footballers having a current sportsperson's contract with an incorporated sports club in the Primeira Liga or the Segunda Liga in Portugal who might terminate their contract on their own initiative on grounds of issues arising from the COVID-19 pandemic and might therefore find themselves without a current contract between 7 April and 2 June 2020.
- 44 The incorporated sports clubs that attended the meetings on 7 and 8 April 2020 accounted for all of the clubs in the Primeira Liga and almost all of the clubs in the Segunda Liga in the 2019/2020 season.
- 45 The practice of signing players under a current contract is employed primarily by the top clubs in the Primeira Liga. The practice of signing players without a current contract is more attractive to smaller clubs, since it does not entail the payment of compensation to the previous club.
- 46 Around 90% of transfers of players in the Primeira Liga and the Segunda Liga take place in the summer transfer window. This was the case in 2019 and 2020, although, in the latter year, the summer window also included at least the month of October because the sports season had been extended on account of the pandemic.

**(b) Damage caused by the agreement at issue to professional footballers**

- 47 Because of the agreement at issue, a player whose contract expired between 7 April and 2 June 2020 would only be able to find an employer club outside Portuguese territory or a club participating in a competition below the level of the two main professional football leagues in Portugal.
- 48 The agreement in question had the effect of immediately reducing the number of employer club options available to the players concerned, and was at the same time liable to increase uncertainty as to the possibility of finding an employer club matching the player's expectations if these related to the national market made up of the Primeira Liga or the Segunda Liga.
- 49 That agreement was also liable: (i) to increase the effort involved in looking for a club; (ii) to reduce the remuneration offered by clubs with which players concluded contracts, owing to the reduced range of interested clubs; (iii) to reduce players' expectations as regards terms of progression or visibility; (iv), in the case of players intending to remain in national territory, to reduce the players' well-being, since it could lead to forced relocation to another country; and (v) to increase the bargaining power of national incorporated sports clubs, in particular by compelling players to accept terms of pay and other conditions worse than those which they would accept if the agreement did not exist.
- 50 In addition, the agreement was also liable to prompt players to move abroad, even though none of the players concerned had been signed by a foreign club.

**(c) Advantages of the agreement**

- 51 In most cases, the agreement in question provided a means of maintaining playing staff levels and promoting the resumption of competition, thereby ensuring that the final results of competitions were not jeopardised and that the quality of the game was not diminished.

**The essential arguments of the parties in the main proceedings**

- 52 The applicants dispute the assertion that this case falls within the scope of Article 9 of the Legal Framework governing Competition and Article 101 TFEU, since, in their submission, the Competition Authority committed an error both in taking the view that the agreement reached on 7 and 8 April 2020 is an 'agreement' for competition purposes and in classifying the situation at issue as a restriction by object, without demonstrating that the conduct in question presents a sufficient degree of harm, in particular inasmuch as there is an insufficient body of precedence to support such a conclusion.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 53 The referring court asks whether aforementioned agreement is contrary to Article 101 TFEU, in the light of Article 165 TFEU, and whether that agreement can be classified as a restriction by object.
- 54 Given that Article 101 TFEU applies to practices ‘which may affect trade between Member States’, and since the criterion that trade between Member States must be affected has been held to be met, the referring court must apply European competition law together with national law, owing to the direct effect of Article 101 TFEU and Article 3 of Regulation (EC) No 1/2003.
- 55 Furthermore, since it is the settled case-law of the Court of Justice that, inasmuch as it constitutes an economic activity, sport falls within the scope of EU economic law, notwithstanding its specific nature, the analysis cannot be merely abstract but must take into account the legal and factual context of the conduct in question.
- 56 It may also be inferred from paragraph 40 of the judgment of the Court of Justice of 16 March 2010, *Olympique Lyonnais*, C-325/08, that the specific characteristics of sport and the social and educational functions that underlie it, as referred to in Article 165 TFEU, are relevant for the purposes of a possible objective justification for restrictions of competition.
- 57 Since the agreement between the applicants included all of the incorporated sports clubs in the Primeira Liga and most of the incorporated sports clubs in the Segunda Liga, the relevant market extends over the whole of the territory of a Member State for the purposes of the judgment in *Vereeniging van Cementhandelaren v Commission*, and Article 101 TFEU is there applicable in the abstract. It may also be noted that the market for the signing of male professional football players has a strong international character.
- 58 An agreement between businesses not to recruit workers from other companies, known as a ‘no-poach agreement’, consists in the conclusion between companies of a horizontal agreement whereby the companies concerned give a mutual undertaking not to make spontaneous offers [of employment to], or to recruit, workers from the other companies.
- 59 This type of agreement can occur in any sector of economic activity and is in principle covered by competition law, in so far as it limits the individual freedom of undertakings to define the terms of their commercial strategy, including the recruitment of human resources.
- 60 In the abstract, no-poach agreements have consequences on the labour market, since they have the effect of reducing workers’ bargaining power because they minimise or cancel out external factors that might interfere with that relationship.
- 61 This can lead to pay reductions, detract from labour mobility and limit the possibility of obtaining more favourable conditions for workers, and, in general,

constitutes a distortion, restriction or prevention of free competition on the labour market.

- 62 The referring court notes that it is not aware that the European Commission has adopted any decisions on no-poach agreements for the purposes of the application of Article 101 TFEU.
- 63 Although the Commission published the communication entitled ‘Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements’, the fact remains that, while the Commission addresses the issue of buyers’ cartels from the point of view of the restriction of competition by object in paragraph 316 of those guidelines, it does not refer to no-poach agreements.
- 64 It follows from the foregoing that there is no precedence in relation to no-poach agreements. This, however, does not mean that this type of agreement cannot be classified as a restriction of competition by object.
- 65 Nonetheless, this case exhibits characteristics which distinguish it from a classic situation in which two competing undertakings agree between themselves at an entirely ordinary point in time not to recruit each other’s workers.

***Subject matter of the decision***

- 66 The Competition Authority was in no doubt that the agreement at issue constituted an infringement by object.
- 67 The difference between an infringement/restriction by object or by effect lies in essence in the very nature and purpose of the conduct, with the result that, if the purpose of the conduct proves to be contrary to competition, there is no need to determine its effects on competition.
- 68 According to the referring court, a superficial analysis of the agreement at issue would readily support the conclusion that there is a restriction by object, given that no-poach agreements generally eliminate competition in a similar way to product price-fixing agreements or customer allocation agreements.
- 69 Nonetheless, the concept of restriction ‘by object or by objective’ must be interpreted restrictively and applied only to practices which, following an individual and detailed examination, is shown to present a sufficient degree of harm to competition.
- 70 This analysis calls for a review of the content of the agreement, the objectives it seeks to attain and the economic and legal context in which it sits, with due regard for the nature of the good/service concerned and the actual operating conditions and structure of the market or markets in question. Furthermore, although this is not a necessary criterion in determining whether the agreement serves an anti-competitive purpose, account may also be taken of the intention of the parties.

71 The referring court considered it proven that, by the agreement at issue, the clubs and the LPFP had sought: (i) to protect contracts expiring at the end of the current 2019/2020 season, that is to say on 30 June 2020; (ii) to ensure that players would not have just cause for terminating their contracts by claiming, in order to release themselves from them, that they were unable to work on account of COVID-19; and (iii) to cater for the need to conclude with players agreements to reduce or defer the payment of remuneration.

*(i) Contracts which expired at the end of the 2019/2020 season, that is to say on 30 June 2020*

72 Employment contracts and transfer contracts in football are usually linked to registration periods and, from a sports point of view, the opening of the first registration period usually coincides with the first day of the new season. Most of the leagues worst affected by COVID-19 chose to have the season start on 1 July and end on 30 June. This was the case in Portugal too.

73 Given that a sportsperson's employment contract cannot have a duration of any less than one sports season or of any more than five seasons, this type of contract usually expires at the end of a sports season.

74 Decree-Law No 18-A/2020 of 23 April 2020 gave legal permission for amendments to be made to the regulations of sports federations so as to address the context created by the pandemic. It was only from that date onwards that the dates of the current sports season could be changed, competition having been allowed to resume as from 30/31 May 2020 and a memorandum of understanding on the duration of contracts and sports relationships having been signed on 4 May 2020. On 8 June 2020, the CCT between the LPFP and the SJPF was amended on the basis of that memorandum.

75 That said, the referring court would point up the fact that, on the date on which the agreement at issue was concluded, there was some uncertainty as to what would happen to footballers' contracts if the sports season were extended, and to the dates of the footballer registration periods for the 2020/2021 season.

76 A fixed-term contract operates as an instrument to stabilise the sports employment relationship and is a mechanism which restricts competition on the labour market but is dictated by the need to protect competitive sport itself.

77 After all, unlike an ordinary employment contract, a sports worker cannot unilaterally release himself from his employment contract before it expires, unless there is just cause for doing so or provision is made for his right to terminate the current contract unilaterally without just cause in return for the payment of compensation. That said, a footballer's freedom to withdraw from a sports employment contract is severely restricted, since the fixed duration of that type of contract is described as being a 'stabilising duration'.

- 78 In order to ensure the stability of player staffing levels, and thereby safeguard competitions, in accordance in particular with the principle of competitive stability and the principle of sporting merit, the period of validity of sportspersons' employment contracts is linked to the duration of a given sports season.
- 79 Now, the impact of extending the sports season on sportspersons' employment contracts which expired on 30 June 2020 was eventually the subject of a collective agreement.
- 80 Thus, so far as concerns the contested agreement's objective of retaining players whose contracts expired on 30 June 2020 until the end of the extension of the current sports season, the referring court considers that, notwithstanding that, in the abstract, the rule adopted may be regarded as being equivalent to a clause prohibiting competition, the fact remains that that rule helps to safeguard what is already protected by rules of sport designed only for normal contexts, namely the stability of playing staff levels as a means of promoting sport.
- 81 Consequently, the referring court considers that, in an exceptional context, the rule agreed on 7 April 2020 in relation to contracts which expired on 30 June may be in keeping with legitimate objectives, protected by Article 165 TFEU itself, which are inherent in national and regulatory provisions that protect the principles of safeguarding the stability of competitions, and for that reason has doubts as to whether that rule presents a sufficient degree of harm, this being the criterion which case-law requires to be applied for the purpose of establishing the existence of a restriction of competition by object.
- (ii) Situation of players wishing to claim just cause for termination on the ground that they are unable to work on account of COVID-19*
- 82 Another situation which the agreement at issue protected had to do with ensuring that players would not be able to claim just cause by arguing, in order to release themselves from their contracts, that they were unable to work on account of the COVID-19 pandemic, by compelling them to remain bound by their contracts.
- 83 One of the ways in which a sportsperson's employment contract can be extinguished is termination for just cause on the player's initiative. Behaviours on the part of the employer that constitute just cause and give rise to a right to compensation include, in particular, culpable failure to pay remuneration on time or the application of unfair penalties.
- 84 Nonetheless, such rules must be viewed in the light of the fact that only a serious and culpable breach of contract making it practically impossible for the sports employment relationship to continue in being constitutes just cause for termination. The concept of just cause for termination on the initiative of the sportsperson is, therefore, stricter and more stringent than the concept of just cause for termination of a contract by an ordinary worker.

- 85 Except in cases in which the parties agree on a ‘termination clause’, a player may terminate a sportsperson’s employment contract only for just cause, and his freedom to release himself from the contract is severely restricted, since, as the referring court has emphasised, the fixed duration of the contract is a stabilising element.
- 86 According to the referring court, even if it were possible to speculate as to what grounds arising from the inability to work on account of the COVID-19 pandemic might come under the concept of just cause, the fact remains that such grounds would be very limited, since they would have to make it practically impossible for the sports employment relationship to continue in being.
- 87 Given that it was concluded in absolutely exceptional and uncertain times, a fact which further limited the situations genuinely constituting ‘just cause’ for termination, the referring court doubts whether the agreement at issue can be classified as a restriction by object.

*(iii) The reduction or deferment of the payment of remuneration*

- 88 The agreement at issue also referred to the need to reach agreement with players on reducing or deferring the payment of remuneration by compelling them to accept such undertakings, thus avoiding a situation in which incorporated sports clubs would be unable to make payments.
- 89 The referring court considers that there is some ambivalence in the objectives pursued by the agreement at issue. On the one hand, it had the objective of maintaining the stability of playing staff levels, the integrity and quality of competitions and the solvency of the sector, not only in the short term but in the medium and long terms too, and of ensuring normal sporting competition between clubs and a balance between them, while preserving a degree of equality. On the other hand, it also sought to keep the sector economically solvent.
- 90 According to the referring court, the sporting objectives pursued seem legitimate, given that they are of a piece with the general objectives recognised by Article 165 TFEU. What is more, pursuing an objective of protecting economic interests is not in itself contrary to competition, given that this is inherent in any undertaking, including a sports association where it exercises an economic activity.
- 91 It is therefore necessary to carry out an analysis whereby the specific features of sport are factored into the examination of the situation from the point of view of competition, so as to find a balance between the commercial and sporting aspects of professional football.
- 92 This calls for an examination of the proportionality of the measure adopted in the light of the case-law of the Court of Justice, in order to determine whether,

notwithstanding that it pursues legitimate objectives, the agreement at issue goes beyond what is necessary to attain them.

- 93 According to the judgment in *Meca-Medina*, restrictions are legitimate where they are inherent in the organisation and proper conduct of competitive sport and their very purpose is to ensure healthy rivalry between athletes. [In this connection,] it has been stated that a ‘financial solidarity regime which allows the revenue generated through events and activities at the elite level to be redistributed and reinvested at the lower levels of the sport’ is legitimate.
- 94 The Court of Justice has acknowledged that, in certain cases, ‘non-commercial’ objectives may be weighed against a clause that is restrictive of competition, and those objectives may be found to take precedence over that restriction, meaning that there is no infringement of Article 101(1) TFEU. This is known as the ‘ancillary restraints’ doctrine.
- 95 However, that doctrine must not be regarded as being of unlimited application, since, in the case of economic activities, this would have the effect of eliminating the applicability of Article 101 TFEU in connection with agreements restrictive of competition which are not actually necessary and proportionate for the purposes of attaining the non-economic aims pursued. The referring court considers this consequence to be unacceptable.
- 96 With regard to its economic dimension, as offset by its sporting objectives, it is to be noted that the agreement at issue was concluded at an exception time. Thus, so far as the economic impact [of the COVID-19 pandemic] is concerned, clubs experienced an abrupt and immediate drop in revenue leading to serious cash-flow problems. Incorporated sports clubs saw their main revenue streams suspended and needed to cut costs, player remuneration being one of the items of expenditure with the greatest impact on their budgets.
- 97 FIFA alluded to the potential prospect of incorporated sports clubs becoming insolvent and identified as a cause for concern the possibility that such clubs might not be able to pay salaries to players and coaches, a situation which could trigger litigation, frustrate contractual stability and lead to potential insolvencies.
- 98 At national level, a consensus was reached only on sport-related matters, but not on financial matters, in particular amendments to players’ terms of pay.
- 99 In those circumstances, incorporated sports clubs either managed to conclude agreements to reduce or defer the payment of salaries or resorted to legally permitted schemes such as lay-offs. Alternatively, and as a last resort, clubs fell into insolvency, leading to a reduction of the number of clubs.
- 100 In resorting to the hugely simplified lay-off scheme, incorporated sports clubs were liable to jeopardise the resumption of competitions, since that scheme essentially involves suspending employment contracts.

- 101 Even if using that scheme did not jeopardise the resumption of competitions, it would have the effect of reducing players' salaries, which would be fixed at EUR 1 905, with no possibility of a future refund.
- 102 What is more, the application of the lay-off scheme generally prevented players from releasing themselves from clubs and did not constitute a just cause for termination. The fact that, in such circumstances, players would also have to remain at the clubs to which they were affiliated, and would unquestionably be demotivated as a result, would be detrimental to the quality of competitions.
- 103 In short, the agreement at issue did not ultimately have a significant impact on players' 'freedom to work', inasmuch as, in cases where use was made of the lay-off scheme, not only was their pay unilaterally reduced but being laid off was also not considered to be just cause for termination of a professional sportsperson's employment contract.
- 104 Nonetheless, the referring court notes that the measures resulting from the simplified lay-off scheme lasted for a period of one month, which could exceptionally be extended on a monthly basis for up to a maximum of three months. The referring court notes, however, that the agreement at issue was in force only between 7 April and 2 June 2020, that is to say for 56 days, which is less than the maximum three-month duration of the simplified lay-off scheme.
- 105 What is more, it was demonstrated that use of the lay-off scheme would jeopardise the quality of competition, owing to players' demotivation in the face of the imposition of unilateral measures, and that only a very small proportion of clubs resorted to that scheme without having entered into prior agreements on pay with their players.
- 106 It was also established that, from the date of the agreement at issue, incorporated sports clubs began to make or increased direct contact with players with a view to resolving financial issues. Several salary reduction agreements [providing for] a refund of the relevant reduction were concluded after that date. This would not have happened if the lay-off scheme had been used.
- 107 Players could choose not to accept any type of agreement in respect of their salary and to wait until the deterioration of the club's financial situation prevented it from fulfilling its obligation to pay salaries. Taken to the extreme, non-payment of salaries could also lead to the insolvency of clubs, thus affecting the number of clubs that would participate in future competitions and the quality of those competitions both now and in the future.
- 108 While it is true that the agreement at issue laid down a rule that is restrictive of competition on the labour market, the purpose of that rule was to allow playing staff levels to be maintained and thus to avoid any ethically improper exploitation on the part of incorporated sports clubs with more stable financial resources and in a position to purchase players from other incorporated sports clubs with fewer

resources, a scenario which could have called into question the principle of solidarity.

- 109 The principle of equal opportunities, which is a constituent element of fair competition, was also safeguarded. After all, economically stronger clubs are pitted against clubs not able to generate comparable revenues. The situation created by the pandemic would considerably accentuate such disparities. The fact that the former would be able to sign up players from the latter and thus leave them without their main assets would create a marked inequality of competition that would jeopardise the integrity of competitive football.
- 110 However, the referring court doubts whether the rule arising from the agreement at issue is proportionate.
- 111 Neither can it be ignored that players were not heard, a fact which prevents the procedure from being described as transparent and fair. It is true that an attempt was made to safeguard sporting values by forcing players to make a sacrifice. The referring court nonetheless notes that, in the case of lay-offs, that sacrifice could have been greater.
- 112 Players not wishing to sign a salary reduction or deferral agreement would not be committing a breach. Should incorporated sports clubs not be able to pay their salary, players would have just cause to terminate their contracts.
- 113 Although this circumstance might lead to the conclusion that the measure at issue was disproportionate and render Article 101 TFEU applicable in the present case, the referring court has some doubts in this regard.
- 114 In this connection, it notes that: (i) the duration of the agreement at issue was ultimately derisory, the latter having lasted only 56 days; (ii) demand was largely stagnant; (iii) the agreement was entered into only by national clubs, when the player signing market is for the most part international (the fact that, of the 2 671 clubs in existence worldwide, only 36 are Portuguese greatly reduces the possibility of competition being adversely affected); (iv) while the agreement was in force, competition was suspended, thus reducing the potential effects of that agreement on the downstream market identified by the Competition Authority; (v) player registration periods were closed, so that, even if players could be signed, a club would not obviously look to sign a player that it couldn't play; and (vi) given that demand for players was reduced as a result of the pandemic, but also as a result of the legal constraints making it impossible to register and use new players, the number of players falling within the scope of the agreement was also small.
- 115 Furthermore, it has been established that players did not perceive the agreement at issue as a factor pressuring them to accept more unfavourable terms of pay or not to terminate contracts unilaterally, and the vast majority of them did not suffer losses given the significant size of the international market.

- 116 Nonetheless, the Competition Authority, considering the agreement before it to be restrictive of competition by object, felt it unnecessary to assess its effects on the operation of the markets.
- 117 However, the referring court has doubts as to whether, in the light of the highly exceptional circumstances it has described the agreement at issue presents a sufficient degree of harm to competition, and whether its effects should be examined in order to determine whether competition was indeed prevented, restricted or distorted.
- 118 It also doubts whether the agreement at issue can be considered to have been, by its very nature, harmful to the normal functioning of competition. As the Competition Authority itself recognises, the Court of Justice has not delivered any judgments dealing with cases identical to this one and the application/interpretation of the law that is required in this case cannot be regarded as being clear, unambiguous and beyond reasonable doubt.