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No-Poach Agreements and the “by object” v “by effect” Clásico – A Few Remarks on the Tondela Opinion

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Kick-off – the Tondela Opinion and its Background

On 15 May 2025, AG Emiliou delivered his Opinion on the request for a preliminary ruling submitted by the Portuguese Tribunal da Concorrência, Regulação e Supervisão in Tondela et al.

The Opinion was eagerly awaited, as it represents the first occasion on which a no-poach agreement – an understanding between employers not to solicit or hire one another’s employees – has undergone in-depth scrutiny before the EU courts. The European Commission had already left its mark on the subject, first through its 2024 Competition Policy Brief on antitrust in labour markets and, subsequently, through its decision of 2 June 2025 imposing fines totalling EUR 329 million on Delivery Hero and Glovo, inter alia for their participation in a no-poach agreement.

AG Emiliou’s Opinion is therefore welcome, as it confirms a number of assumptions concerning the application of EU competition law to labour markets. Yet, like Giorgio Monti, I find parts of the reasoning in Tondela somewhat disconcerting. Several of the AG’s conclusions merit a second look, and the interested reader might appreciate a touch more nuance when EU competition law is transposed to labour-market contexts.

Portuguese Football in April 2020 – When the Clock ran past 90

To explain the puzzlement, I shall first set out the key facts.

As in many European leagues at the start of 2020, Portugal’s first and second divisions suspended all fixtures when the COVID-19 pandemic struck. It quickly became clear that the season might have to extend beyond its scheduled end date of 30 June 2020 so as to accommodate the full programme of 2019/20 matches. The clubs realised that this extension could clash with roughly one-third of the players’ contracts, which were due to expire on 30 June 2020, leaving them at risk of fielding depleted squads once those contracts lapsed.

They also foresaw grave cash-flow problems. If their worsening finances prevented them from paying future wages, players might refuse to play or even terminate their contracts for just cause – whether owing to non-payment or to non-deployment following the cancellation of matches. In turn, clubs with better financial funding could soak up players from clubs suffering from the

financial ramifications of the pandemic.

In an effort to resolve the impasse, the Portuguese national football association opened talks – principally about extending players' contracts – with the Portuguese union of professional football players. No accord was reached (see the summary of the request for a preliminary ruling in Case C-133/24, paras 16 et seq.).

Subsequently, 31 Portuguese clubs – every first-division club and most from the second division – together with the Portuguese national football association, took matters into their own hands. On 7 and 8 April 2020 they agreed not to sign any player who unilaterally terminated his contract owing to COVID-19-related issues or to an exceptional measure adopted in response to the pandemic, in particular a decision to extend the 2019/20 season.

The object of the agreement was to hold players to their contracts until the conclusion of the prolonged season and to deter terminations for just cause. It was also intended to preserve the competitive integrity of the Portuguese leagues and to stave off sector-wide financial harm. In essence, the agreement aimed to shield clubs from the twin threats of mass contract terminations and lay-offs triggered by an inability to meet salary obligations (the summary of the request for a preliminary ruling in Case C-133/24, paras 38, 40).

Object or Effect? Picking Sides for No-Poach Agreements

The most notable finding of AG Emiliou is that no-poach agreements such as the one concluded between the Portuguese clubs may amount to restrictions only "by effect". I shall return to that point below. Like the AG, I prefer to begin with the notion of restrictions of competition "by object."

AG Emiliou takes the view that no-poach agreements fall prima facie within the by object category (Opinion, para 49). Before reaching that conclusion, he embarks on a brief detour through the elusive concept of "restriction by object", tracing its evolution in the case-law and charting how it has settled into the form we know today (Opinion, paras 26 et seq.). He then observes that no-poach agreements "have all the characteristics to be considered prima facie restrictive of competition" and therefore generally belong in the "by object" category (Opinion, para 49). In particular, they would appear to fall under Article 101(1)(c) TFEU, as they entail the sharing of a supply between competitors – here, the supply of labour (Opinion, para 50).

This is the first point on which a reader might crave a touch more nuance. The AG notes that classifying no-poach agreements as restrictions by object applies to (1) "agreements in which two or more undertakings agree not to hire or solicit staff from each other", (2) "at least when entered into between actual and potential competitors" (Opinion, para 49). Both limbs warrant closer scrutiny.

Floodlights on Labour Markets – and their Intricacies

I shall begin with the second limb, for the notion of (potential) competitors on labour markets – and thus market definition – is of wider significance. I concur with AG Emiliou that the relevant

market in *Tondela* is, in all likelihood, the market for recruiting professional footballers (Opinion, para 64). Yet, while the AG confines himself to a terse delineation, defining markets for the recruitment of labour presents several challenges that warrant a step back.

Because competition law is largely designed around co-ordination on the supply side, defining markets where employers compete for employees – i.e. the upstream demand side – requires a change of perspective. Instead of examining demand-side substitutability, one must focus on supply-side substitutability: put simply, which jobs would employees regard as substitutes?

This shift forces us to confront the elusive nature of workers' preferences. Labour is a peculiar "good," inseparably tied to human suppliers whose priorities often (or even predominantly?) extend well beyond raw economics – think elements such as work-life balance or reputation. Literature recommends the SSNDW test (small but significant non-transitory decrease in wages) to delineate labour markets, yet a wage-centric lens may fail to capture the full range of supply-side considerations.

In any event, geographic scope poses an even stiffer challenge. Studies suggest that employees' willingness to relocate for work is surprisingly low, though mobility varies across workforce segments: labour markets for low-skilled workers tend to be local or regional, whereas those for highly skilled employees may span far wider areas.

Absent further research, one would assume that the labour market for professional footballers stretches beyond national borders. Certainly, the regular stream of high-profile transfers between Europe's top clubs suggests considerable mobility – even if only at the margins of top players.

Non-Hire vs Non-Solicit: Different Formations

Turning to the first limb, what struck me most was AG Emiliou's statement that every "no-poach agreement" possesses all the hallmarks of a prima facie restriction of competition.

A finer distinction is required. As he notes, no-poach agreements come in two broad guises: non-hire and non-solicit agreements. The former undoubtedly resemble supply sharing within the meaning of Article 101(1)(c) TFEU and display the traits of a restriction by object. The latter, however, present a far less straightforward picture.

Non-hire agreements may indeed be considered inherently harmful to the competition for talent. At least where all – or nearly all – employers on a given labour market adopt such an agreement, employee mobility is driven to zero and competition grinds to a halt. Workers are locked into existing contracts and deprived of the leverage to secure better terms as they are unable to make credible threats to change employers. Downstream, this sub-optimal allocation of human capital produces detrimental knock-on effects on efficiency and innovation (see Opinion, para 52).

By contrast, the ramifications of non-solicit agreements are more nebulous. Because employees remain free to approach competitors of their current employer, such clauses do not invariably "freeze" the labour market. Workers can, in principle, still threaten to move, preserving much of their bargaining power. Accordingly, non-solicit provisions do not necessarily present the inherent competition risks required to label them restrictions by object. Their impact is highly context-dependent.

Two considerations, in particular, merit attention when assessing a non-solicit agreement:

- First, in labour markets with high transparency – where demand is advertised openly (for instance, via online job boards) – the chilling effect of non-solicit clauses may be modest. Conversely, in markets where vacancies are rarely publicised, the effects of non-solicit agreements may be more akin to those of non-hire agreements. If employee mobility is already dampened because posts are not openly advertised, a non-solicit clause may be the proverbial straw that breaks the camel's back.
- But second, even then, the impact of non-solicit agreements can remain limited. Highly skilled workers, who generally grasp their own "market value" and know their potential alternative employers, are less likely to be deterred from approaching a rival employer than employees with scant knowledge of market conditions.

These observations are hardly exhaustive, but they should suffice to show that treating every species of "no-poach agreement" as prima facie restrictive by object is an oversimplification.

Throw-In to Holism: The AG's Detour towards the "by Effect" Part of the Pitch

I must now address the elephant in the room: AG Emiliou's eventual finding that the no-hire agreement restricted competition by effect, not by object.

Although the Portuguese clubs plainly sought to halt competition for footballers, the AG focused on the agreement's legal and economic context and on its stated aims. He concluded that it should not be deemed a restriction by object, because its genuine purpose was to safeguard the fairness and integrity of the sporting contest disrupted by the pandemic (Opinion, para 71). That reasoning is noteworthy.

As Giorgio Monti rightly pointed out, conflating the impact on the upstream labour market with broader welfare considerations in the downstream market for professional football sits uneasily with the architecture of Article 101 TFEU – particularly the calibrated interplay between paragraphs (1) and (3). There is, I submit, no basis for treating agreements differently merely because they relate to labour markets.

One wonders whether the AG's "holistic" approach rests on the notion that no-hire agreements warrant a bespoke competition analysis simply because they touch matters related to labour markets. In para 69 he remarks that he would not be "against taking into consideration" "issues relating to labour […] within a competition analysis", yet in the same breath concedes that the interplay between "labour issues" and "competition issues" remains unclear, especially where an Article 101 TFEU case concerns "alleged harm caused to workers". This suggests a view that agreements affecting labour markets are a special breed, demanding a novel application of competition law.

Those remarks did, in fact, not just puzzle me. In my view, they convey a line of reasoning that points in the wrong direction. Article 101 TFEU cases are not brought for "alleged harm to workers"; they are brought for anti-competitive conduct in labour markets, which, in turn, harms workers. In the same vein, and on a more general note, there are no "labour issues" in anti-competitive practices affecting labour markets – only competition issues. The intricacies of labour

markets (and of labour law) must not obscure the basic truth that these markets, like any other, thrive on competition – which is why we in the antitrust community are talking about them in the first place.

Conclusion before the Full-Time Whistle

Tondela underscores that policing employer conduct in labour markets – no-poach agreements foremost among them – demands sensitivity to those markets' specific dynamics. Yet, I remain convinced that the existing EU competition law framework is more than equal to the job; the real task lies in mapping established principles onto labour-market nuances. While this can be quite the intellectual challenge, it is one that we must face in order to maintain and foster competition in line with the cardinal principles of EU competition law – including in labour markets. And I do hope that the ECJ's ruling will underscore this sentiment.

**?I have never acted for any of the parties involved and am in no way affiliated with them. The views expressed here are my own and do not necessarily reflect those of Hogan Lovells International, its clients, or its personnel.*

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This entry was posted on Monday, June 16th, 2025 at 3:55 pm and is filed under Advocate General, Compliance, European Court of Justice, European Union, Labour market, No-poach-agreement, Restriction by effect, Restriction by object, Sport
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