The Portuguese Competition Authority (“PCA”) last week ordered the Portuguese Professional Football League (“LPFP”) to suspend no-poach agreements implemented between clubs. This follows the adoption by the LPFP of a resolution whereby football clubs agreed not to hire football players from other clubs “who unilaterally terminated their employment contract due to issues caused by the COVID-19 pandemic”.

The LPFP resolution is an attempt by the Portuguese league to create contractual stability in the wake of the economic effects of the global pandemic. On 7 April, FIFA published a set of guidelines to address some of the practical contractual issues...
that have arisen over recent months (covered on Sports Shorts here). The guidelines considered that some clubs would have to renegotiate contracts with players to agree reductions or deferrals in wages. In some circumstances, FIFA acknowledged that it would recognise unilateral variations to players’ contracts. Over the last two months, there have been many stories of teams and players that have failed to agree on wage reductions, with some teams choosing to proceed with a unilateral contractual variation and others taking more drastic action (such as FC Sion which sacked nine first-team players after they refused to take a pay cut).

These no-poach agreements however, according to the PCA’s order, remove competition for the acquisition of human resources and deprive workers of labour mobility. The order is an interim measure which means that the PCA still needs to take a final decision on whether this resolution is legally justified or breaches competition rules.

Whilst the LPFP will no doubt have strong arguments to support this resolution (e.g. (i) preserve the quality of sport, (ii) protect the financial interests of clubs affected by COVID-19, (iii) manage the expectations of fans, etc.), competition authorities worldwide have recently taken a tough stance on such agreements. No-poach agreements, or agreements not to approach other companies’ employees to hire, are generally viewed as “by object” or “per se” restriction of competition laws (with limited exceptions) and as such likely infringe Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and national equivalents.

As regards football players in particular, the EU Commission previously considered as a breach of Article 101 TFEU a FIFA rule, which substituted the usual regime of supply and demand for a uniform mechanism preventing football clubs from the opportunity of hiring football players under normal competitive conditions. The Commission further underlined that absent this rule, clubs could hire players who had unilaterally terminated their employment contract based on requirements set out in national laws or foreseen in their contracts (see paragraph 31 of Commission decision of 28 May 2002 in Case IV/36.583 SETCA-FGTB/FIFA). The hiring of players is generally regarded as an extremely important aspect of sporting competition between clubs and that kind of sporting competition easily translates into commercial competition.

The UK Competition and Markets Authority (“CMA”) is yet to adopt a decision on no-poach agreements in this context, however in April there were rumours about no poach agreement(s) (a “transfer truce”) being agreed here in the UK. UK leagues and clubs would therefore be well advised to review and re-consider the viability of such no-poach policy adopted in the wake of COVID-19 and consult with the CMA before engaging in such form of cooperation.

Finally, and as a side note, there are questions as to how effective domestic no poach agreements are in the context of a global transfer market. In particular, the Portuguese Primeira Ligacould have seen some of its most promising talent go abroad to any of the other top European leagues. The hope however, is that once the action returns, clubs and leagues will be able to go about their business as usual.

The press release from the Portuguese Competition Authority is available in English at this link.