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Competition and Professional Sports – Note by Portugal

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Portugal

1. Introduction

1. Sports is a large and growing sector of the Portuguese economy that accounts for almost 1% of the domestic GDP and employment in Portugal¹. Football stands out as the main sport in Portugal².

2. In order to ensure competition in the acquisition and distribution of football broadcasting rights, the Portuguese Competition Authority (Autoridade da Concorrência - hereinafter “AdC”) has intervened on several occasions and in 2018 issued a recommendation to the Government proposing a centralised system for the sale of the broadcasting rights of professional football.

3. The AdC has also addressed anticompetitive agreements in the labour market for professional football players. In 2022, the AdC sanctioned 31 professional football clubs participating in the 2019/2020 edition of the First and Second Leagues and the Portuguese Professional Football League for a no-poach agreement in the football sector.

4. In this note, the AdC provides an overview of its experience regarding sports markets. The note summarises the investigations regarding the commercialisation and distribution of broadcasting rights, both in antitrust and merger cases (Section II) and a no-poach agreement in the football sector (Section III). The note also flags some challenges related to the enforcement of competition rules in sports markets (Section VI). Section V concludes with final remarks.

2. AdC investigations into the commercialisation of football broadcasting rights

2.1. Overview

5. In Portugal, football clubs have traditionally sold their broadcasting rights individually to intermediaries or, more recently, directly to telecom operators active in the downstream markets for pay-TV and multiple-play offers.

6. All football clubs competing in the First and Second League competitions used to sell their broadcasting rights to an intermediary, the Controlinvest Media Group (CIM Group). The CIM Group resold these rights to a premium sports channel, Sport TV, in which it held 50% of the shares.

7. In the 2013/2014 football season, Sport Lisboa Benfica (one of the three major clubs in Portugal) started to exploit its own broadcasting rights, as well as the broadcasting

1 The sports economy generated €1.9bn and employed 44,5 thousand workers, INE Report “Sport in Numbers – 2022”, available at: https://www.ine.pt/ine_novidades/DesportoEmNumeros2022/10/.

2 Professional football generated € 617M and employed 3595 workers in the football season 2021-2022, LFPP Report “Anuário do Futebol Profissional Português – época 2021/22”, available at: <https://www.ligaportugal.pt/pt/epocas/20222023/publicacoes/anuario-do-futebol-profissional-portugues-2021-22/>. The football broadcasting rights market alone is worth more than €150M in Portugal.

rights of a second league football club, through a dedicated pay-tv sports channel, Benfica TV.

8. In 2013, the AdC imposed a fine of €3.7 million on Sport TV for abusive discrimination in the distribution of Sport TV television channels to telecom operators. At the time Sport TV was jointly controlled by telecom operator ZON (currently NOS) and CIM Group.

9. In 2014, the AdC prohibited a merger that included the sale of a controlling stake in Sport TV by NOS to Portugal Telecom (currently Altice), which would have led to a joint control by NOS (25%), Portugal Telecom (25%) and CIM Group (50%).

10. In 2015, the AdC closed an investigation related to the selling of broadcasting rights to the First and Second League competitions by adopting a commitments decision. Following this Decision, the CIM Group agreed to give the clubs the right to terminate their contracts without penalties and committed not to acquire broadcasting rights on an exclusive basis for periods longer than three football seasons.

11. From December 2015 onwards, the two leading telecom operators (NOS and Altice groups) acquired the broadcasting rights of the First and Second national football leagues – in some cases starting in the 2016/2017 football season, although for most of them starting in the 2019/2020 season.

12. In July 2016, all the telecom operators active in the downstream markets for pay-TV and multiple-play offers, notably NOS, Altice, Vodafone and Nowo, established an agreement under which the parties agreed to grant access to the broadcasting rights individually owned (currently and in the future) and to share the purchasing costs of such rights (the “Sharing Broadcasting Rights Agreement”).

13. Moreover, the shareholding structure of Sport TV has changed. As mentioned earlier, until July 2016 Sport TV was jointly controlled by the CIM Group and by the telecom operator NOS, each holding 50% of its share capital. In July 2016, Vodafone acquired a 33% shareholding in Sport TV and in January 2017 the incumbent telecom operator Altice acquired a 25% stake. Sport TV is presently owned by the CIM Group, NOS, Altice and Vodafone, each with a 25% shareholding. Following these events, Sport TV acquired the broadcasting rights directly from several football clubs, which at the time were competing in the second league.

14. In December 2018, the AdC closed a series of investigations relating to football broadcasting rights and issued a Recommendation to the Government to adopt legislation concerning the auctioning of broadcasting rights of the national First and Second Leagues.

15. Following this Recommendation, the Government adopted Decree-Law No 22-B/2021, of 22 March 2021, stating that the broadcasting rights beyond the 2027/2028 season shall be marketed on a centralised basis, in accordance with the terms and conditions proposed by the Portuguese Professional Football League (LPFP) and the Portuguese Football Federation until the end of the 2025/2026 season, subject to the approval of the AdC.

2.2. The 2010-2013 AdC investigation of Sport TV’s abusive conduct

16. The investigation started in July 2010 following a complaint lodged by the pay-TV operator Cabovisão (currently Nowo) against the pricing model applied by Sport TV. The AdC investigation established that Sport TV, during the period from 1 January 2005 to 31 March 2011, applied discriminatory commercial conditions that limited the ability to compete of smaller telecom operators, such as Cabovisão. In 2013, the AdC imposed a fine

of €3.7 million on Sport TV for an abuse of a dominant position concerning discrimination in the distribution of Sport TV television channels to telecom operators.³

17. Regarding broadcasting rights, the decision referred to the market for premium sports broadcasting rights, with a focus on national football broadcasting rights but without looking into specific segments (notably based on the different football competitions). In June 2014, the Competition, Regulation and Supervision Court upheld the AdC's decision but lowered the fine to € 2.7 million. In March 2015⁴, the Lisbon Appeals Court also confirmed the AdC's decision.⁵

2.3. The 2014 Sport TV merger decision

18. In 2014, the AdC prohibited a proposed merger whereby the two main pay-TV service providers (ZON/NOS and PT/Altice), together with the CIM Group, would *inter alia* acquire joint control over the main pay-TV sport channel Sport TV. In practice, PT/Altice would enter an already existing joint-venture (Sport TV) between ZON/NOS and CIM Group. According to the AdC, this merger would raise serious foreclosure concerns, both upstream in the pay-TV sports channels' market and in the downstream pay-TV market, as well as coordinated effects.⁶

19. PT/Altice and ZON/NOS were neck-to-neck competitors in downstream markets, in particular pay-TV (standalone or in bundle) and triple-play. At the time of the assessment, ZON/NOS and PT/Altice supplied 50% and 40% of pay-TV subscribers in Portugal, respectively. The vertical and coordinated effects of the merger were highly entangled. The merger was found to raise issues of both customer and input foreclosure, and these theories of harm fed into the coordinated effects analysis.

20. Regarding customer foreclosure, concerns were mainly related to the fact that non vertically integrated telecom operators accounted for around 50% pre-merger, whereas post-merger such operators would only account for 10%, strengthening the ability and capacity for Sport TV's shareholders for engaging in customer foreclosure. Concerning input foreclosure, the merger was found to strengthen Sport TV's market power, thereby reinforcing the ability of its integrated shareholders (ZON/NOS and PT/Altice) to partially foreclose their downstream rivals' access to must-have sports premium channels.

21. With respect to coordinated effects, the merger would strengthen several of the market characteristics that favour coordination, as it would: deepen the structural links between ZON/NOS and PT/Altice; create privileged fora for information exchange, increasing information transparency; and eliminate a source of contention between ZON/NOS and PT/Altice, namely the conditions of PT's access to Sport TV channels. The

3 See, AdC Prohibition Decision (June 14, 2013, in PT): https://www.concorrenca.pt/sites/default/files/processos_e_decisoos/prc/decisoos/AdC-PRC_2010_02-Decisao-VNC-final-net.pdf.

4 See, AdC Press Release (June 11, 2014): <https://www.concorrenca.pt/en/articles/competition-court-confirms-competition-authoritys-ruling-against-sport-tv>.

5 See, AdC Press Release (March 17, 2015): <https://www.concorrenca.pt/en/articles/portuguese-competition-authoritys-decision-against-sport-tv-confirmed-lisbon-court-appeal>.

6 See, AdC Decision (July 31, 2014): https://www.concorrenca.pt/sites/default/files/processos/ccent/AdC-CCENT_2013_04-Decisao-VNC-final-net.pdf.

AdC therefore concluded that the merger would strengthen the conditions for coordination in a market vulnerable to coordinated behaviour.

2.4. The 2013-2015 AdC investigation into exclusivity agreements between the football clubs and the CIM Group

22. In 2013, the AdC opened an in-depth investigation following a complaint lodged by the LPFP, the association that gathers all professional football clubs that participate in Portuguese football competitions.

23. The investigation concerned the acquisition of broadcasting rights of the national First and Second football leagues. As mentioned above, the football clubs participating in these competitions used to sell their broadcasting rights to the CIM Group.

24. In October 2014, the AdC addressed a preliminary assessment to the CIM Group. In its preliminary assessment, the AdC considered that the agreements between the CIM Group and the football clubs could create a foreclosure effect. The contractual terms in question were: (i) exclusivity exceeding (in most of the cases) 5 seasons; (ii) a suspension mechanism extending the duration of the exclusivity; and (iii) a right of first refusal granted to the CIM Group.

25. To meet these concerns, the CIM Group offered commitments that were market tested by the AdC. With respect to the ongoing contracts, the commitments included giving the football clubs the rights to (i) waive the rights of first refusal; (ii) terminate their contracts without any penalty or compensation; and (iii) opt-out from the suspension mechanism. With respect to future agreements regarding the acquisition of similar broadcasting rights, the CIM Group also undertook not to include: (i) any exclusivity obligations exceeding 3 years; (ii) any kind of suspension mechanism that could extend the duration of a contract beyond 3 years; and (iii) any rights of first refusal.

26. In June 2015, after market testing these commitments, the AdC adopted a decision making the commitments legally binding on the CIM Group.⁷

2.5. The 2016-2018 AdC investigations into the exclusivity agreements between the football clubs and NOS/Altice and the Sharing Broadcasting Rights Agreement

27. NOS and Altice have entered into exclusive broadcasting agreements with most of the football clubs competing in the national First league (including long-term agreements with the major clubs Sport Lisboa e Benfica, Futebol Clube do Porto and Sporting Clube de Portugal, hereinafter, Benfica, Porto and Sporting, respectively).

28. The duration of the exclusive agreements between NOS, Altice and the football clubs competing in the First football league ranged from 3 to 10 years, although most agreements lasted 7 to 10 years. The agreements with the major clubs Benfica, Porto and Sporting (which account for roughly 45-55% of the market for the acquisition of

7 See, AdC Press Release (June 2, 2015): <https://www.concorrencia.pt/en/articles/pca-converts-mandatory-conditions-commitments-presented-controlinveste-media-group;>
Decision (in https://www.concorrencia.pt/sites/default/files/processos_e_decisoos/prc/decisoos/AdC-PRC_2013_02-Decisao-VNC-final-net.pdf.

broadcasting rights of football events played regularly throughout the year⁸) lasted for 10 years.

29. The wide scope and long duration of the bundle of exclusive agreements between NOS, Altice and the football clubs could act as an entry barrier that limits competition in the market. Given the importance of premium football content for TV operators, a restriction of competition on the upstream market for the acquisition of broadcasting rights is likely to have effects on the downstream markets.⁹

30. The AdC also considered that the Sharing Broadcasting Rights Agreement between all the operators active in the Portuguese telecom market (NOS, Altice, Vodafone and Nowo) could raise competition concerns, but since most of the broadcasting rights relating to the First and Second leagues were transferred to Sport TV, the agreement had a limited effect.¹⁰

31. However, the changes in the shareholding structure of Sport TV (which eventually became jointly controlled by the CIM Group and the three main telecom operators NOS, Altice and Vodafone) also raised competition concerns relating to coordination in acquisition, processing and distribution of the broadcasting rights, therefore requiring further action (see below).

2.6. Recommendation to the Government

32. Given the sequence of events that occurred in the Portuguese market, including the changes in the shareholding structure of Sport TV, the AdC considered that an overarching intervention was necessary to address all the competition concerns identified (see section II.5).

33. In this context, in December 2018, the AdC issued a Recommendation to the Government to adopt legislation regulating the marketing of the broadcasting rights of the First and Second football leagues, notably by imposing a centralised commercialisation of these rights through triennial auctions carried out by the LPFP or any other organization that represents the professional football clubs.

34. In accordance with the Recommendation, the auctions should comply with specific rules and procedures subject to the approval of the AdC, including rules to promote competition that guarantee the existence of at least two acquirers (no-single-buyer rule) and prevent the joint participation of competing firms in the premium sports channels or telecom markets via a common company (participation rules).¹¹

8 This market definition includes the national First and Second football leagues, the Portuguese Cup, the League Cup and the UEFA Champions League and Europa League.

9 See, AdC Decision (in PT): https://www.concorrenca.pt/sites/default/files/processos_e_decisoos/prc/decisoos/AdC-PRC_2016_02-Decisao-VNC-final-net.pdf and https://www.concorrenca.pt/sites/default/files/processos_e_decisoos/prc/decisoos/AdC-PRC_2016_03-Decisao-VNC-final-net.pdf.

10 See, AdC Decision (in PT): https://www.concorrenca.pt/sites/default/files/processos_e_decisoos/prc/decisoos/AdC-PRC_2016_09-Decisao-VNC-final-net.pdf.

11 See, AdC Recommendation (in PT): <https://www.concorrenca.pt/sites/default/files/processos/epr/Recomenda%C3%A7%C3%A3o%20>

35. Following this Recommendation, the Government adopted the Decree-Law No 22-B/2021, of 22 March 2021, stating that the broadcasting rights beyond the 2027/2028 season shall be marketed on a centralised basis, in accordance with the terms and conditions proposed by the Portuguese Professional Football League and the Portuguese Football Federation until the end of the 2025/2026 season, subject to the approval of the AdC.

3. AdC advocacy initiatives and investigations tackling anticompetitive agreements in sports labour markets

36. The AdC has undertaken a series of initiatives regarding the application of competition rules in labour markets, including in the sports sector, to ensure efficient, open and competitive labour markets.

37. In this respect, the AdC undertook **advocacy efforts** to increase awareness regarding the relevance of open and competitive labour markets and the harm that anticompetitive agreements may bring.

38. In September 2021, after a public consultation, the AdC published an Issues Paper on Labour Markets Agreements and Competition Policy¹² in which it stated that horizontal agreements regarding no-poach and wage fixing are likely to infringe the Portuguese Competition Act and, if applicable, the Treaty on the Functioning of the European Union (TFEU, Article 101).

39. In particular, the AdC considers that these agreements limit the individual freedom of firms to define their strategic commercial conditions (*e.g.*, hiring and/or setting wage conditions) and may be responsible for adverse effects on the market by introducing inefficiency, limiting production, reducing innovation, discouraging investment in human capital, among others.

40. Alongside the Issues Paper, the AdC published a set of best practices guide¹³ seeking to raise awareness of companies, human resources professionals, recruitment agencies, among others, on the potential negative effects for workers and consumers resulting from anticompetitive agreements in the labour market.

41. Finally, the AdC has also addressed competition issues in sports labour markets by means of a Recommendation. In May 2020, the Portuguese Football Federation published a draft Regulation for the Women's League, which included a proposal for a maximum limit on the total salary of each club that participates in the League. In June 2020, the AdC issued a Recommendation to the Portuguese Football Federation, warning that this could constitute a restrictive practice of competition.¹⁴

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12 See, AdC Issues Paper on Labor Markets and Competition Policy (2021): https://www.concorrenca.pt/sites/default/files/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf.

13 See, AdC Best Practices in Preventing Anticompetitive Agreements in Labor Markets (2021): <https://www.concorrenca.pt/sites/default/files/documentos/guias-promocao-da-concorrenca/Best%20Practices%20in%20Preventing%20Anticompetitive%20Agreements%20in%20Labor%20Markets.pdf>.

14 See, AdC Recommendation (June 26, 2020): https://extranet.concorrenca.pt/pesquisAdC/EPR.aspx?IsEnglish=True&Ref=EPR_2020_19.

42. Moreover, the AdC has carried out **enforcement efforts** to address anticompetitive agreements that artificially create monopsony power.

43. In April 2022, the Portuguese Competition Authority issued a prohibition decision imposing fines of €11,3 million for a standalone no-poach agreement involving the Portuguese Professional Football League (LPFP) and 31 clubs¹⁵.

44. The case was opened *ex officio* by the AdC in May 2020, following two press releases issued by the LPFP on 7 and 8 April, which referred to a decision, adopted by agreement between the First League clubs, with the participation of the President of the LPFP, and to which the Second League clubs adhered.

45. This joint decision stated that clubs would not hire away from each other players who unilaterally terminated their employment contract due to issues caused by the Covid-19 pandemic. The agreement followed a period of ongoing tensions between the Clubs/LPFP and the Players' Union over salary cuts.

46. Given the nature and characteristics of the agreement, as well as the potential serious and irreparable, or of difficult reparation, harm that it could bring to competition in the market, the AdC imposed interim measures on 26 May 2020, forcing the LPFP to communicate to all its member clubs the suspension of the no-poach decision and to issue a press release giving notice of that.¹⁶

47. The investigation allowed concluding that the agreement had the object of keeping the players tied to the football clubs, with the purpose of reducing salaries, by limiting their incentive to terminate their contracts and was therefore not aimed at cooperation objectives which could be regarded as essential in the context of the Covid-19 pandemic. The AdC assessed the legal and economic context of the agreement and took into consideration several factors, such as the covid context, the market power of the clubs both upstream (labour market) and downstream (TV broadcasting, stadium viewing) and the fact that the football players are a critical input and have transferrable skills.

48. For those reasons, the AdC considered that the agreement could reduce the quality of football matches and harm consumers by reducing the competitive environment between clubs, preventing the recruitment of players who could fill gaps in football teams and forcing talented players to leave the country to pursue their professional activity.

49. The loss of consumer welfare was not compensated by efficiency gains that could benefit consumers since the AdC considered unlikely that any labour cost savings could have resulted in reduced ticket prices for consumers, particularly because, during the relevant period, there was no stadium attendance due to the Covid-19 pandemic. In this regard, the AdC also considered that there were less restrictive means of achieving some alleged efficiency gains related to the need to ensure the integrity of the competitions and rejected the same arguments for the application of the ancillary restraints' doctrine, notably by identifying alternative measures such as (i) bargaining collectively with the players' union or individually with the players and this way avoid any contract revocation or (ii) opening a specific transfer window just before the restart of the competition that could allow clubs to replace players that revoked their contracts.

15 See, AdC Press release (April 2022): <https://www.concorrenca.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time>.

16 See, AdC Press release (May 25, 2020): <https://www.concorrenca.pt/en/articles/covid-19-adc-imposes-interim-measure-portuguese-football-league-suspends-no-poach>.

4. Challenges related to the enforcement of competition rules in sports markets

50. Based on the AdC's experience, this section discusses potential issues relating to the enforcement of competition rules in sports markets.

51. From an economic perspective, there is a fundamental difference between the sports markets and other markets since the participants in a sports tournament do not benefit from the exclusion of other firms. In contrast, the viability of a sports competition depends on the existence of rivalry between teams or individuals because this attracts consumer interest and revenues.

52. Against this background, certain measures in the sports market can fall outside the scope of competition rules when they are considered ancillary to a legitimate aim.¹⁷ This argument was raised during the AdC's investigation into a no-poach agreement in the football sector (see Section III), claiming that the agreement was ancillary to ensure the integrity of the competitions. The AdC rejected these arguments based on proportionality grounds, stating there were less restrictive means to achieve that public interest objective. In general, this type of claim is put forward when a competition agency intervenes in a given sports market, and therefore a significant part of the ancillary restraints doctrine in the European Union has been built around such cases.¹⁸

53. Moreover, the joint selling of the broadcasting rights of a football tournament has been typically exempted from competition rules based on the premise that it is an effective mechanism to achieve a fair distribution of the revenues generated by the sale of those rights, thereby helping to preserve a competitive balance within the tournament that benefits consumers.¹⁹ The joint selling system is typically complemented with specific rules and procedures to promote competition for the acquisition and distribution of the broadcasting rights (e.g. no-single-buyer rule).

54. For that reason, the AdC decided to address the competition issues concerning the market for the sale of media rights for the national football by means of a Recommendation to the Government to adopt legislation regulating the marketing of the broadcasting rights of the First and Second football leagues, notably by proposing a joint selling system through periodic auctions with specific rules and procedures to enhance competition (see Section II.6).

55. Therefore, the AdC's Recommendation takes into account the specificities of sports markets and follows similar decisions from the European Commission and other competition agencies.²⁰

17 See Case C-519/04 P David Meca-Medina and Igor Majcen v Commission, EU:C:2006:492.

18 See e.g. Case C-519/04 P David Meca-Medina and Igor Majcen v Commission, EU:C:2006:492 and Case T-93/18 International Skating Union v Commission, EU:T:2020:610 (appeal pending under C-124/21 P International Skating Union v Commission). See also C-333/21 - European Superleague Company (pending).

19 See, Commission Decision 2003/778/EC [2003] L291/25 on the joint selling of the commercial rights of the UEFA Champions League (Case COMP/C.2-37.398); and Commission Decision 2006/868/EC on the Joint selling of the media rights to the FA Premier League (Case COMP/38.173).

20 See, Commission Decision 2003/778/EC [2003] L291/25 on the joint selling of the commercial rights of the UEFA Champions League (Case COMP/C.2-37.398); and Commission Decision 2006/868/EC on the Joint selling of the media rights to the FA Premier League (Case

56. Another challenge faced by the AdC in its investigations in the sports markets results from the fact that this industry is heavily regulated, with several rules and procedures in place both at the organizational and labour levels. Indeed, the organization of sports competitions requires a governance structure that defines the conditions under which teams and/or individuals can compete. The rules can relate to the game itself (*e.g.*, size of a pitch) but may also regulate other activities (*e.g.*, transfer windows, financial rules, role of agents, etc.).

5. Concluding remarks

57. The characteristics of the sports market raise some challenges for competition authorities, requiring a detailed understanding of the legal framework and functioning of the sports market at stake in the assessment of cases.

58. In any event, it is widely accepted in the jurisprudence that competition law applies to sports markets.²¹ There is a well-developed body of enforcement decisions sanctioning anti-competitive behaviour in this sector, including for example concerning the organisation of sports leagues, revenue-generating activities connected with sport and in sports labour markets.²²

59. Competition enforcement in the sports industry ultimately ensures that these markets can grow and consumers can benefit from a higher-quality end product at lower prices.

60. Based on the AdC's experience, the specific features of the football industry should not deter enforcement since competition law has a clear and significant role to play in the sector.

COMP/38.173). For an overview of other jurisdictions with joint selling systems, please see OECD (2023), Competition and Sports, Latin American and Caribbean Competition Forum, Background Note by the Secretariat, [https://one.oecd.org/document/DAF/COMP/LACCF\(2023\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/LACCF(2023)5/en/pdf).

21 See applicable conditions under Case C-519/04 P David Meca-Medina and Igor Majcen v Commission, EU:C:2006:492; EC (2007). See also “The EU and Sport: Background and Context”, Commission Staff Working Document, Accompanying document to the White Paper on Sport, (SEC(2007) 935 final, <https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN>).

22 OECD (2023), Competition and Professional Sports, Background Note by the Secretariat, <https://www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf>.