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ARTICLE

Premiership Rugby's Response to COVID-19: A Competition Law Analysis

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Professional sport has undoubtedly been hit hard by COVID-19. Clubs and governing bodies have had to adapt rapidly to the public health emergency and have come under great financial and regulatory strain. Some sports have weathered the storm better than others, though, and professional rugby union experienced significant off-field turbulence, with wages reductions seen across the English Premiership. This article will examine the conduct of Premiership Rugby and its clubs during theCOVID-19 crisis from a competition law perspective and will argue that, by acting in concert, Premiership and the clubs may have breached UK competition law.

Keywords: Rugby Union; Competition Law; Covid-19

1. Introduction

Professional sport has undoubtedly been hit hard by COVID-19. The pandemic has seen sports fixtures and tournaments cancelled and postponed, with fans almost entirely absent from stadia for the best part of a year. This deprived many professional sports clubs of an important source of revenue, whilst the broader economic downturn will inevitably have its own impact.

Nonetheless, some sports have weathered the storm better than others. After some initial disruption in March 2020, the Premier League returned, and many of its stars' wages were unaffected (Reuters 2020). Premiership Rugby, too, resumed in the summer of 2020, but the league experienced far greater turbulence off the pitch.

March 2020 saw immediate, temporary pay cuts imposed across the Premiership as clubs came to terms with the crisis and tried to cut their losses (The Rugby Paper 2020a). As the pandemic continued, however, clubs sought to make these changes permanent, resulting in heightened tensions and, in some cases, legal action (The Rugby Paper 2020b). Players' salaries were quickly seen as too high and were an easy target for clubs looking to save money.

Of course, clubs and players are perfectly entitled to (mutually) vary their contractual agreements in response to the changing circumstances of a pandemic. COVID-19 does not, however, give businesses a 'free pass' as regards competition law (CMA 2020: para 2.4). The Competition and Markets Authority (the 'CMA') announced that it would not take enforcement action against businesses coordinating address concerns arising from the COVID-19 crisis (CMA 2020: para 1.5). However, this policy applied only in relation to 'temporary' action, which is 'appropriate and necessary in order to *avoid a shortage, or ensure security, of supply*', deals with 'critical issues' affecting the public interest, and which benefits consumers (CMA 2020: para 2.3). It seems unlikely that this policy would apply to professional sport or player wages.

This article will thus examine the conduct of the Premiership clubs (the 'Clubs') and Premier Rugby Limited ('PRL'), the league's governing body, of which the Clubs are voting members, during the COVID-19 pandemic. It will be argued that, by acting in concert to reduce players' wages, PRL and the Clubs may have breached UK competition law.[1]

2. The Facts

When the Premiership was suspended in March 2020, pay cuts were immediately at the top of the agenda, with temporary arrangements being reached across the league to reduce the Clubs' wage bills (Jones 2020). Though there may have been uniformity across much of the league, there was no real suggestion of collusion between clubs or abusive behaviour. Understandably, not all players were happy, but these were short term measures and are not the focus of this article.

This article is concerned with what happened once the Clubs decided that these arrangements needed to be made permanent. On 10 June 2020, PRL announced that the Clubs had voted unanimously in favour of lowering the level of the Salary Cap from the start of the 2021/2022 season (Premiership Rugby 2020). PRL explained the change as follows:

> 'From 2021–22:
>
> · The senior ceiling will be £5m (down from £6.4m), and it will continue to be linked to the central growth of Premiership Rugby.
> · Home-grown player credits will be retained up to £600,000.
> · International and EPS player credits will be retained but limited to a maximum of £400,000...
>
> For any existing contracts that continue into the 2021–22 salary year, and beyond, their cap cost will be counted at 75% of their overall actual value, to sensibly manage the transition to new cap levels.
> ...
>
> From 2024–25
>
> · The senior ceiling will return to a minimum of £6.4m.'

From the start of the 2022–23 season, the number of players excluded from the salary cap at each Club (the so-called 'marquee players') will also fall from two to one.

To be classed as an 'existing contract' for these purposes, the contract had to have been entered into by 18 June 2020. The fact that these contracts could be counted at 75% of their actual value means that the *de facto* cap is higher than the intended £6m (including credits). However, it appears that Clubs nonetheless sought to reduce salaries, and it was reported that they were using this manufactured deadline of 18 June to help them do so (Cameron 2020).

On 10 June, the Rugby Players Association (the 'RPA')[2] also noted that PRL had been seeking to reduce players' wages permanently by 25% across all Clubs (RPA 2020). It does not appear that PRL was successful in imposing such uniform cuts at every Club, but permanent pay reductions were reported at most Clubs (Cameron 2020).

With PRL/the Clubs trying to procure uniform 25% pay cuts, the reduction of the salary cap appeared to assist the Clubs—giving them a tool with which with to beat players into accepting lower wages. The RPA said (RPA 2020):

> 'The changes to the Salary Cap as announced on Wednesday [June 10th] and the arbitrary June 18th deadline for contracts to be 'existing' ... has led to a significant number of our members faced with immediate contractual decisions to make about their long-term futures in order to facilitate this change for the clubs.'

Crucially, the RPA was not consulted on the salary cap changes (Cameron 2020). The players had no say.

Though not every Club may have cut pay by 25%, it is clear that the conduct of PRL enabled salary reductions at most Clubs (Cameron 2020). In an interview, Leicester Tigers and England prop, Ellis Genge, said that his club had suggested that its hand was being forced (Genge 2020):

> 'They have...been saying that it was PRL's decisions and...all the other clubs are making these cuts, so we have to do it and PRL are enforcing a reduced salary cap, so we have to do it.'

Yet it was the Clubs who (unanimously) voted through the salary cap changes, as members of PRL. There were also allegations of a 'gentleman's agreement' between the Clubs not to sign each other's players during the crisis (see Section 3.1.4 below). It thus appears that, by acting in concert, the Clubs and PRL were able to procure permanent salary reductions at most (if not all) Clubs. *Prima facie*, this seems to violate UK competition law.

3. Applying Competition Law

As a result of the UK's withdrawal from the EU, Articles 101 and 102 of the Treaty on the Functioning of the European Union (the 'TFEU') are no longer applicable within the UK, although UK legislation must continue to be interpreted consistently with pre-existing EU competition case law (Section 60A of the Competition Act 1998).

Therefore, the conduct of PRL and the Clubs falls to be considered under the Competition Act 1998 (the 'Act'). The application of the Act's provisions on anti-competitive agreements (the 'Chapter I Prohibition') and abuse of dominant position (the 'Chapter II Prohibition') shall be considered in turn.

3.1. The Chapter I Prohibition – Restricting Competition

The decision to lower the Salary Cap (the 'Decision') amounts to a 'decision of an association of undertakings' (PRL) in the terms of section 2(1) of the Act.[3] It is argued that the Decision had as its 'object or effect the...restriction or distortion of competition within the United Kingdom' (Section 2(1)(b) of the Act).

Ultimately, the Decision resulted in permanent salary reductions across the Premiership—the Decision has, directly or indirectly, fixed wage levels within the league. Wage-fixing is akin to price-fixing, a 'hardcore' restriction of competition referenced expressly in s.2(2) of the Act. Colluding on players' wages amounts to fixing the price of their services. Such practices are, for example, considered *per se* violations of US anti-trust law (DOJ & FTC 2016) and run contrary to

the operation of a free market. In April 2020, the Lithuanian Competition Council announced an investigation into an alleged anti-competitive agreement between the national basketball league and its clubs regarding the payment of players' salaries, in the wake of COVID-19 (Pocius et al. 2020). It is clear that competition authorities are paying increased attention to the operation of the labour market (Balki et al. 2020).

Importantly, the Decision was not adopted pursuant to any collective agreement between the Clubs, PRL and the players. It is not, therefore, exempted from the Chapter I Prohibition, following Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

3.1.1. Restriction by object

It is first necessary to consider whether the Decision had the *object* of restricting or distorting competition. The CJEU stated in Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, ECLI:EU:C:2014:2204 (para. 51) that:

> 'It is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price…that it may be considered redundant… to prove that they have actual effects on the market…'

Such behaviour will be considered a restriction by object, where there is a 'sufficient degree of harm to competition' (*Cartes Bancaires* [para. 52]). In assessing the degree of harm of an alleged anti-competitive agreement or decision (*Cartes Bancaires* [para. 53]):

> 'regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part…it is also necessary to take into consideration the nature of the goods or services affected…'

While intent to restrict competition is not necessary to find a measure restrictive by object, such intent may nonetheless be relevant Case C-551/03 P *General Motors v Commission* [2006] EUECJ C-551/03 (paras. 77–79).

In the recent disciplinary case against Saracens, a Club, for breaching the Salary Cap Regulations, a competition law challenge to the validity of the salary cap was dismissed (*Premier Rugby Limited v Saracens*, independent disciplinary panel SR 201/2019, 4 November 2019). The independent disciplinary panel chaired by Lord Dyson rejected the argument that the salary cap was a restriction of competition by object, indicating that the aims of promoting financial stability and competitive balance are consistent with EU law (*Saracens* [para. 34]) and did not reveal a sufficient degree of harm (*Saracens* [para. 51]), given the need for some financial regulation.[4]

However, it is suggested that *Saracens* is distinguishable here, particularly given the Decision's impact on players. Indeed, James has suggested that the legality of salary caps could become more of a 'live issue' where they are considered to be too low (James 2017: p.266), while Beloff et al. also consider the level of a cap to be an important factor in assessing its legality (Beloff et al. 2012: para 4.63).

The Decision inherently restricted competition between players in the English market for playing contracts, between clubs in the English market for player services and, thus, between clubs in the English professional club rugby market—a wider market for success-based sponsorship and other revenues.

The Decision largely eliminated the possibility that some Clubs would continue to pay their players in full because they could afford to, while others made cuts. This reduced the prospect of players seeking to move to another Club during the crisis, as all Clubs were in the same position, undermining players' bargaining positions and giving them little alternative but to accept pay cuts. Indeed, the lower the level of the salary cap and thus Club budgets, the smaller the degree of variance there is likely to be between the spending of the Clubs, and thus the prospects of finding a better deal at another Club are reduced.

The flip side of this was that Clubs were prevented from picking off the top talent from other Clubs and signing it for themselves, preventing wealthier Clubs from taking advantage of the crisis to emerge as more dominant, on and off the field.

The 'harm' caused by the Decision was, thus, twofold. First, the Clubs were prevented from competing for player services and the resulting benefits that this brings; and second, players were prevented from competing for better salaries, forcing them to accept the pay cuts being offered. In other words, the Decision limited Clubs' ability to invest in their own success and drove down player wages.

The first of these harms is the same as that considered in *PRL v Saracens*. The panel did not consider this to be 'sufficient', in particular because the salary cap brought other advantages for Clubs—notably, enhanced on-field competition and financial stability (*Saracens* [para 34]).

However, a noteworthy point of difference is that there is now likely to be a greater disparity between salaries in the Premiership and in other European leagues[5] with whom the Clubs compete (both within and outside of the UK), on the field in EPCR tournaments and off the field in a wider market for player services and associated revenues. Competition is thus liable to be harmed more notably. If the Clubs are less able to attract top talent, the value of the league as a whole will fall, harming (or at least limiting) the Clubs themselves in the long-term, and also diminishing the product available to consumers.

The second type of harm is distinct. Rather than merely supressing wage inflation, the Decision actively lowered salaries; it has (directly and/or indirectly) forced players to accept a reduction in their salaries. It is one thing to limit players' ability to earn more than they are currently earning in the name of maintaining competitive balance, but it is quite another to forcibly reduce their pay.

These are players who, since having their pay cut, have been asked to play more games in less time than ever before (Monye 2020), in a game which is becoming increasingly dangerous (RFU 2021). These are players whose careers could end the next time they are tackled, and who are becoming increasingly aware of the long-term health consequences of playing professional rugby (BBC Sport 2020). These are players who have since been subjected to more onerous obligations in the 2020/21 Premiership Rugby Salary Regulations, and who have rent, mortgages and insurance policies to pay, and families to support. Most recently, the Clubs have reportedly declared that they will no longer pay agents' fees on behalf of players, placing further financial burdens onto the players (Mairs 2021, Cisneros 2021). These are players who do not earn sums comparable to their footballing counterparts, and who have been forced to take pay cuts to make amends for years of over-spending by Club owners, without their union having been consulted. The harm to players' interests, and thus competition, is significant. The wages they had previously agreed with their Clubs were lowered by virtue of anti-competitive conduct.

Players are, in many respects, in a similarly vulnerable position to that of consumers, whom competition law has primarily been designed to protect. Though they theoretically have greater power collectively, the Covid-19 crisis has shown that, in reality, they are easily exploited by the Clubs and PRL. The Clubs hold a monopsony over elite professional rugby in England (see section 3.2.1 below) and, thus, players are in a weak position – they have nowhere else to go if they want to play at the top of the game in this country; which they must do to be eligible to play for England (ESPN 2015). The fact that the RPA is arguably compromised by virtue of the funding it receives from PRL and the RFU further underlines their vulnerability (Cisneros 2020).

It is therefore argued that the Decisions did cause a 'sufficient degree of harm to competition' such that the competition was restricted *by object*.

Furthermore, it is relevant (albeit not decisive) that the Clubs (via PRL) *intentionally* restricted competition. The Clubs published a statement which said that they had 'no choice but to act in unison' (Godwin 2020) to procure wage reductions. This reinforces the view that the object of the Decision was to restrict competition.

3.1.2. Restriction by effect

Alternatively, it may be possible to demonstrate that the Decision has had an anti-competitive effect in the relevant markets set out above. It is suggested that the relative lack of inter-Club player movement in 2020[6] and the reductions in player wages across the league may evidence such an effect. However, a detailed financial analysis would be required to prove an 'appreciable effect' on competition to the requisite standard, and this is not the place.

Importantly, the *Saracens* panel emphasised the importance of selecting a 'realistic counter-factual' when considering the effect of an anti-competitive agreement (*Saracens* [paras 87–104]). Thus, in this case, one would have to first consider what would likely have happened in the absence of the Decision—would there have been free competition, or would some other form of restriction (perhaps via a collective agreement) have been imposed?

3.1.3. Proportionality

In certain circumstances, restrictions on competition which are *prima facie* unlawful may be deemed permissible. Following a line of EU case law, a restrictive measure may be treated as an 'ancillary restraint' if the restriction is ancillary to a primary, legitimate purpose (Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577). Such a restriction will not be unlawful if it is inherent and proportionate to that legitimate purpose; an approach which has been applied in the sporting context following Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

In performing the proportionality assessment, one must consider whether the restriction is 'limited to what is necessary' to fulfil the legitimate objective(s) but also the 'margin of appreciation' given to sports-governing bodies, under competition law, in organising sporting competition (*Meca-Medina* and *Saracens* [paras 44–46]).

The Decision does purport to have 'legitimate objectives'. It seems to protect the Premiership's financial stability and maintain competitive sporting balance in the league, by ensuring that Clubs do not spend more than they can afford and that some Clubs do not emerge from the crisis as 'too' dominant. These were endorsed as legitimate objectives by the panel in *Saracens* (paras 33–37), following earlier sporting jurisprudence (*Queen's Park Rangers v English Football League*, EFL arbitral panel 2017, and Case C-415/93 *Bosman* [1995] ECR I-4921).

However, it might be argued that the Decision was not *inherent* to those objectives, or that the action taken was disproportionate.

Speaking publicly about pay cuts, one Club owner said (Orange 2020):

> 'It's not the player's fault…but the owners and the [Directors of Rugby] have just got a bit carried away competing with each other and it's not sustainable and Covid has brought it into stark reality and, hopefully, it will be the impetus we need to fix it.'

Another Club owner was reported to believe that the pandemic was being used as an excuse for 'retrenchment by clubs who have failed to balance their books in the long run' (Schofield 2020a). This implies that the Decision may have been about more than just COVID-19, and that the crisis was being exploited to push through an agenda of suppressing player wages. Concerns about player wages being 'too high' had previously been aired by Clubs, pre-pandemic (Heagney 2020).

At previous salary levels, there was not a striking competitive imbalance in the Premiership, and the league was financially stable. The salary cap was supporting these legitimate aims, as held in *Saracens* (paras 97–102). If the true objective of the Decision *was* to supress player wages due to Clubs' *historic* over-spending, this cannot be linked to the legitimate aims, as those aims were not compromised at previous salary levels.

Of course, COVID-19 has had a significant economic impact, and may have changed the landscape. It may therefore be legitimate to suggest that the financial stability and competitive balance of the league had been jeopardised by COVID-19. Indeed, salary cap reductions have been seen in other sports in response to the pandemic (for example, in Spanish football). The question must then be whether the Decision's harm to competition was proportionate to these aims.

Firstly, it is suggested that the lowering of the cap may not reflect 'losses' at all Clubs across the league. Many Clubs are backed by wealthy individuals, and have never been profitable businesses, so much simply depends on the willingness of these individuals to continue balancing the Clubs' books. This may have differed across the Clubs. Similarly, some Clubs' revenues will be worse affected than others, with some relying more upon hospitality income and other commercial interests than others.

In any event, all Clubs received £13.5m in 2019 as part of the deal that saw CVC Capital Partners invest in the Premiership (Rees 2019). In June 2020, the Clubs were also the recipients of a significant Government bailout, worth £135m (Ziegler 2020).

Further, Clubs are *not obliged to spend up to the salary cap*, so is it not disproportionate to restrict competition to such a degree, given the severe consequences that this has for Clubs and, particularly, the players? Bristol owner, Steve Lansdown, suggested that his bold ambitions should not be jeopardised by bringing every Club down to the 'lowest common denominator' (Schofield 2020a). Likewise, why should players at Bristol, for example, be made to pay for the shortcomings of other Clubs?

This raises the question of whether the Decision was 'limited to what is necessary' to pursue the legitimate objectives. Arguably, given that the Decision lowered the salary cap until 2024, it goes too far, beyond merely accounting for COVID-19. Moreover, the severe impact on players must call into question the necessity of the collusive action. As noted above, it is one thing to limit players' ability to earn more than they are currently earning in the name of maintaining competitive balance, but it is quite another to forcibly reduce their pay. It is not clear why the burden of the Clubs' finances should fall quite so heavily upon the players.

That said, the proviso that existing contracts would only count towards the cap at 75% of their value could be seen as a modicum of proportionality, although this appears to have been exploited to the Clubs' benefit. A thorough financial analysis of the Clubs' respective positions would be required for a definitive conclusion to be drawn on the necessity of the Decision.

Nonetheless, it is important to consider whether less restrictive measures could have been adopted to maintain financial stability and competitive balance. Doing nothing would have been one option; allowing Clubs to determine their own immediate futures. If a Club were truly on the brink of non-existence, are we to believe that it would not have taken drastic action to cut its wage bill, nor sought external investment? Would sacrificing some competitive balance in the short-term not have been a more proportionate course of action, given the serious harm to the interests of players (and other Clubs)?

A second option would have been to reach a collective agreement with the RPA in relation to players' wages during the pandemic. It is clear that the Clubs abandoned any attempts at meaningful negotiation and instead strong-armed the players into accepting the cuts they considered necessary, via the Decision. A collective agreement would not have been considered anti-competitive (*Albany*) and would have seen the interests of Clubs and players represented, leading to a more proportionate outcome.

Alternatively, PRL (the Clubs) could have imposed a *minimum* spend; requiring Clubs to spend a certain amount *despite* the crisis. If Clubs were truly unable to meet their obligations, they would have had to seek external investment. There is clear investment interest in professional rugby, with CVC having recently invested in PRL and, during COVID-19, the Pro14 (CVC 2020) and the Six Nations (CVC 2021). There are also reports that investors are eying up the All Blacks (Ahmed, Smyth and Wiggins 2021), South Africa Rugby (Slot 2021a) and Rugby Australia (Doran 2021), whilst Saracens recently sold a majority controlling stake to a consortium of investors willing to invest £32 million into the club (Saracens 2021). Thus, there may well be commercial entities that would have footed the bill (Slot 2021b). The Decision disincentivised Clubs from seeking investment or strengthening their businesses at a challenging time. As Lansdown said during the crisis (Schofield 2020a):

> 'Don't throw the baby out with the bathwater just because times are tough now… If you start cutting back too hard then you just devalue your product… We have the ability to become a global brand which commands attract global interest and investment, but we will not do that if we retrench. We have to be ambitious.'

It may therefore be that the Decision disproportionately restricted competition, to the detriment of Clubs (and PRL) as well as players. It is thus arguable that the Decision violates the Chapter I Prohibition.

3.1.4. A non-poaching agreement?

It was also reported that there was an agreement between the Clubs not to sign each other's players. Such an arrangement already exists to an extent under the Salary Cap Regulations, by virtue of the rule that a 'marquee player' may not be someone who has played for another Club during the previous year (Regulation 3.26).[7] Nevertheless, in July 2020, the Daily Mail reported (Foy and Kelleher 2020):

> '... the leading English clubs are thought to have made a pact not to poach each other's players in the event of universal pay cuts creating the threat of a mass exodus. This was a stance to try to force players to accept lower wages and stop them claiming the shortfall later.'

The Telegraph reported similarly (Schofield 2020b), and a Club official appeared to acknowledge the existence of such an 'unwritten rule' in another interview (McGinty 2020).

Such an agreement would be a clear infringement of the Chapter I Prohibition, eliminating competition between Premiership players and between Clubs by preventing Clubs from bidding for players' services altogether. With little chance of being offered a wage elsewhere in England, players would have been coerced into accepting a salary reduction at their current Clubs. Had such an agreement not been in place, richer Clubs would likely have made offers to players affected by pay cuts at other Clubs and could have picked up the strongest talent. This may also explain the relative lack of inter-Club transfers during the crisis.

If such an agreement existed, it would be a clear restriction by object, similar to that which was seen in the landmark High-Tech Employee Antitrust Litigation in the US (*In Re: High-Tech Employee Antitrust Litigation*, U.S. District Court, Northern District of California C 11-2509 LHK). It is difficult to see how this could be justified as a proportionate means of pursuing a legitimate objective, in light of the above analysis. It would also form an important part of the 'overall context' against which the proportionality of the Decision would have to be considered (EU Commission 2007) and would strengthen the argument that the Decision was unlawful.

3.2. The Chapter II Prohibition – Abuse of Dominant Position

The conduct of PRL and the Clubs may more readily be considered a violation of the Chapter II Prohibition, by characterising it as an abuse of dominant position.

3.2.1. A dominant position

PRL evidently holds a dominant position in the English market for elite player services, and for revenues associated with professional club rugby. Though it might be more accurate to say that the Clubs collectively hold this dominant position, it has been accepted that a sports association may be considered an undertaking for the purposes of Chapter II, to the extent that it is the emanation of its members which are active in the relevant market (Case T-193/02 *Laurent Piau v. Commission* [2005] ECR II-0209). That is quite clearly the case here, as the Decision was made after a vote by the Clubs. The Clubs also hold a position of collective dominance (Cases T-68/69 *Società Italiano Vetro SpA v Commission* [1992] II ECR 1403).

A dominant market position is defined as (Case 27/76 *United Brands v Commission* [1978] ECR 207):

> 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'

The structure of the Premiership and the RFU Championship ensures that the Clubs are able to behave independently of their competitors in the Championship, and allows them to behave, to a large extent, independently of consumers (and players). The Clubs hold perpetual shares in PRL, even if relegated to the Championship, and thus their position at the top table is all but guaranteed (Williamson 2015).[8] PRL (and the Clubs) have a *de facto* monopoly over the English professional club rugby market, as the Championship itself has negligible commercial reach.[9]

In the market for elite player services, the Clubs have a *monopsony* as the dominant purchasers (see, for example, Manning 2021). In both markets, PRL and/or the Clubs have a substantial share, undoubtedly above 50%. Thus, their dominance can be presumed (Case C-62/86 *AKZO Chemie BV v Commission* [1993] 5 CMLR 215).

3.2.2. Abuse

The concept of 'abuse' was defined in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 as:

> 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through *recourse to methods different from those which condition*

> *normal competition* in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (Emphasis added)

The ease with which Clubs were able to lower salaries once they acted collectively, but without consultation of the players, tends to show an abuse of their dominant position.

The way in which the Clubs played the players off against PRL, when it was the Clubs themselves who were controlling PRL's Decision (Genge 2020), amounts, in this author's view, to 'methods different from those which condition normal competition.' After failing to reach a collective agreement they deemed amenable, the Clubs improperly *exploited* their position of collective dominance, and the players' relative weakness, to force contractual variations upon players by lowering the salary cap and imposing an arbitrary contract deadline, without consulting the players or their recognised trade union. The absence of a fair procedure is a key element of the abusive conduct.

The suggestion that the Clubs also had a non-poaching agreement further paints their conduct as abusive. By exploiting their position of dominance, the Clubs exploited the players, leaving them to pick up the pieces, and harming competition in the relevant markets.

Of course, infringements of the Chapter II Prohibition can be justified in the same way as Chapter I infringements and, thus, the same arguments regarding proportionality would be applicable here. Though PRL and the Clubs may have had a 'legitimate objective', it is arguable that these were pursued in a disproportionate manner, given the harm to competition detailed above. As such, it is arguable that the Decision also breaches the Chapter II Prohibition.

4. Conclusion

The actions of PRL and the Premiership Clubs in response to the challenges posed by COVID-19 in the summer of 2020 caused much distress for players and their representatives. The apparent strong-arming of players into accepting long-term contractual variations by clubs, unhappy at their unwillingness to agree to lower wages, took unsportsmanlike conduct in rugby to new heights. Players saw their earnings gouged, their contractual guarantees trampled on, and their expectations of fair treatment suffer a crippling blow.

This article has suggested that such conduct may violate UK competition law, as it saw the Premiership Clubs unlawfully operate like a cartel (via PRL) and abuse their dominant position, to the detriment of players and, arguably, the league itself. However, regardless of its lawfulness, it is quite clear that, for the good of the sport, such disrespectful treatment of players must be shown a red card.

Notes

[1] Premiership Rugby's move to suspend relegation from (and, to some degree, promotion to) the Premiership, in concert with the RFU, may also warrant competition law scrutiny. However, the focus of this article will squarely be on the approach taken to players' wages.

[2] The RPA is the only trade union recognised by the Clubs, PRL and the RFU to represent professional rugby players in England.

[3] It could also be viewed as an 'agreement between undertakings', between the Clubs, or between the Clubs and PRL.

[4] Professional rugby clubs have, in the past, found themselves in administration or have become insolvent (for example, Richmond in 1999 and, more recently, London Welsh and Leeds). However, the more recent instances of such difficulties have arguably had more to do with relegation from the Premiership than the costs of playing in it – noting that both London Welsh and Leeds were in the Championship at the relevant time(s).

[5] For example, the French TOP14 and the Pro14. The TOP14 has indicated that it will reduce its salary cap (France 24 2020), but it will remain significantly higher than that of the Premiership, while the Pro14 has no salary cap.

[6] From the season's suspension in mid-March through the summer, relatively few players moved between the Clubs on permanent deals (Wikipedia 2021). The picture is particularly stark if transfers of Saracens' (relegated) players are ignored.

[7] This rule may itself be challengeable under UK competition law.

[8] This in itself may be challengeable under UK competition law (Williamson 2015). See also *London Welsh RFC Limited v The Rugby Football Union and Newcastle Falcons RFC* (RFU independent appeal panel, 29 June 2012).

[9] There was no broadcast deal in place for the 2020/21 Championship season prior to COVID-19, and the league was suspended until March 2021 as it was unable to afford a comprehensive Covid-19 testing programme.

Competing Interests

The author has no competing interests to declare.

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