

## THE UCI PROTOUR: AN ENDURING REFORM OR A “TRAIN WRECK” WAITING TO HAPPEN?

Lloyd Freeburn

*In 2005, significant reforms were introduced in professional road cycling by the sport's governing body, the “UCI”. Those reforms are now threatened by an entrenched dispute between the UCI and the owners of the sports' most prestigious races. The outcome of the dispute, while uncertain, will be influenced by the legal structures and characters of the bodies involved. These structures and the issues raised by the conflict, including the implications of European Community competition law, are examined. It is argued that despite some defects in its democratic structure, the role of the UCI as the governing body of the sport gives its position greater legitimacy than that of the private owners of cycling races.*

### Introduction

In 2005, the “UCI ProTour” began as a unified calendar of cycling road races established by cycling's governing body, the International Cycling Union.<sup>1</sup> For those familiar with the structure of other sports, this reform may seem modest and unremarkable. Nevertheless, since its inception, the ProTour has been locked in controversy. What may be a “life or death” struggle has ensued between the UCI and the organisers of a number of events, including the sport's premier race, the “Tour de France”, and the two other “Grand Tour” races, the “Giro d'Italia” and the “Vuelta a Espana”. The Grand Tour organisers are resisting losing control of their events to a wider competition and what they see as a takeover by the ProTour. The outcome of this struggle and the future of the sport remain in the balance.

At times, the dispute has resembled a modern soap opera, with accusations of treachery,<sup>2</sup> mafia-like behaviour,<sup>3</sup> guerrilla warfare, and sabotage and blackmail,<sup>4</sup> together with threats of legal action—though this is no trivial

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\* Lloyd Freeburn is a postgraduate law student at Melbourne University and the Director, Major Sport Projects within Sport and Recreation Victoria (SRV). SRV is the division of the Victorian State Government responsible for the management and supervision of the State's sporting infrastructure and its involvement in major events. Prior to this, Lloyd was Special Advisor, Operations and Group Manager, Support for the 2006 Melbourne Commonwealth Games. The author gratefully acknowledges the helpful comments of the anonymous reviewers of this article.

<sup>1</sup> As with all of cycling's professional bodies, known by its French acronym, “UCI”.

<sup>2</sup> J Stevenson, “UCI: ASO in ‘serious attempt to make ProTour fail’”, <<http://www.cyclingnews.com>> at 7 December 2004, quoting a letter written by then UCI President, Hein Verbruggen.

<sup>3</sup> “There is a clash going on at the moment between two cultures: the Anglo-Saxon culture and what I might call the ‘Mafia’ Western European culture.”: UCI President Pat McQuaid in H Kroner, “McQuaid starts cultural polemic”, <<http://www.cyclingnews.com>> at 8 January 2007.

<sup>4</sup> UCI, “UCI-ASO dispute, ASO is not exempt from the rules!”, <http://www.uci.ch> at 23 February 2007.

dispute. An international competition has lurched from crisis to crisis. The form of the sport and the livelihoods of those who work in it are at stake. From a sports law perspective, a key element of the conflict and its possible future direction is the legal character and governance structures of the sport and the bodies involved in it. These structures establish and govern the formal relationships of the various parties and are influencing the battlegrounds upon which the dispute is being fought out, including the potential application of European Community competition law.

While the outcome of the dispute remains difficult to predict, in this essay it is argued that the role of the UCI as cycling's governing body and the representative structure of the UCI endow its position in the conflict with a legitimacy—including a legitimacy under the European Community competition laws—which is not shared by its profit-motivated, commercial rivals. The UCI has established the professional road racing competition, a licensing regime and rules to support its vision of the future of the sport. The actions of the Grand Tour organisers put the future of the ProTour and the future of professional road racing in real jeopardy. It is suggested that the Grand Tour organisers do this without occupying any regulatory or representative role in the sport and in order to protect private commercial interests.

In addressing these issues, this paper will first examine the background to the ProTour and the dispute between the UCI and the Grand Tour organisers. The role of the UCI as a representative organisation and the governance arrangements of the ProTour will be examined. These governance arrangements influence the various European Community competition law issues involved in the dispute, which include the legitimacy of the ProTour rules and the sports event calendar, the closed nature of the ProTour system and the possibilities of a UCI boycott or that the Grand Tour organisers have acted as a cartel. The “Americanisation” and the globalisation of the sport are additional elements raised by the conflict. Finally, issues surrounding the media rights for the ProTour will be discussed. Many of these issues illustrate two key themes familiar in sports law: the blurring of the boundaries between “the rules of the game” and commercial rules; and the recognition of the cultural and social roles of sport in the treatment of sporting disputes under European Community law.<sup>5</sup>

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<sup>5</sup> Richard Parrish, “The Birth of European Union Sports Law” (2003) 2(2) *Entertainment Law*, 20–39; M. Beloff, T. Kerr and M. Demetriou, *Sports Law* (1999); Stephen Weatherill, “Resisting the Pressures of ‘Americanization’: The Influence of European Community Law on the ‘European Sport Model’” (2000) 8 *Willamette Journal of International Law & Dispute Resolution* 37.

## BACKGROUND

### *The ProTour*

The UCI ProTour is described as grouping “together the best races, the biggest teams and the best riders in the world. It is an international circuit with an individual ranking, a team ranking and a country ranking”.<sup>6</sup> The principal reform of the ProTour has been the establishment of a defined calendar of events in which all ProTour Teams are required to compete.<sup>7</sup> ProTour race organisers bear a reciprocal obligation to allow all ProTour Teams to compete in their events.<sup>8</sup> The ProTour consists of 20 teams<sup>9</sup> of about 30 riders per team,<sup>10</sup> who compete in 27 ProTour races over each year’s racing season.<sup>11</sup>

The ProTour is established and governed by the UCI’s regulations.<sup>12</sup> The regulations require that ProTour Teams and organisers of ProTour races both hold licences from the UCI.<sup>13</sup> ProTour licences are granted for four years<sup>14</sup> and are issued by the ProTour Licences Commission.<sup>15</sup> The regulations establish an application process for licences.<sup>16</sup>

### *The reforms of the ProTour*

Prior to the ProTour, teams could choose what races they would attend. In addition, race organisers had a general discretion as to what teams they invited to their events. This system led to some high profile races being contested by the major teams and the best riders. Other events were successful in attracting only some of the major teams and produced a lower standard of racing.<sup>17</sup>

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<sup>6</sup> UCI ProTour, *UCI ProTour* <http://www.uciprotour.com> at 27 December 2006.

<sup>7</sup> *UCI Cycling Regulation* 2.15.127. Teams are subject to fines, suspension and revocation of their licences in the event of failures to participate: reg 2.15.128.

<sup>8</sup> Reg 2.15.205.

<sup>9</sup> Reg 2.15.009 provides for a maximum of 20 UCI ProTour team licences.

<sup>10</sup> Reg 2.15.110. As a sporting team, a ProTour squad is a significant enterprise with approximately 60 personnel including 30 riders, a manager, two office staff, four or five *directeurs sportifs*, six full-time and six part-time masseurs and the same number of mechanics, three bus drivers and four doctors: A Peiper, “What have we learned...?”, *RIDE Cycling Review*, Issue 34, Spring 2006.

<sup>11</sup> Reg 2.15.142 provides that a maximum of 30 UCI ProTour event licences may be issued with a maximum of five licences per country. There are currently 27 races listed on the ProTour calendar from 11 March – 20 October 2007: UCI ProTour, *UCI ProTour* <http://www.uciprotour.com> at 18 February 2007.

<sup>12</sup> The UCI Management Committee has power to make Regulations relating to the sport of cycling: *UCI Constitution*, 12 January 2006, art 46(1)(l).

<sup>13</sup> Reg 2.15.001, 2.15.003.

<sup>14</sup> Reg 2.15.031.

<sup>15</sup> Reg 2.15.009–2.15.026.

<sup>16</sup> Reg 2.15.017–2.15.026.

<sup>17</sup> [Cyclingnews.com](http://www.cyclingnews.com), “ProTour popular among fans. But teams want more certainty”, <http://www.cyclingnews.com> at 2 July 2005; UCI Press Service, “2005 UCI ProTour: a promising first season”, (Press Release, 18 October 2005); UCI Press Service, “UCI ProTour and UCI Continental Circuits: assessment 2005–2006”, (Press Release, 25 September 2006).

The ProTour was introduced to correct what had been identified as “structural weaknesses recurrent in cycling at the beginning of 2000”.<sup>18</sup> Those weaknesses were:

- The structure of the annual cycling calendar was not clear, consisting of several hundred races without a clear hierarchy.
- There was a lack of globalisation with 70% of races in four countries: Spain, Italy, France, and Belgium.
- Teams were too dependent on their main sponsors, whose withdrawal could lead to the collapse of the team.
- Many big teams were structurally weak.
- Few guarantees could be given to sponsors on the participation of their team in major events.
- There was uncertainty of the TV coverage of races, in an atmosphere of increasingly fierce competition between sports.<sup>19</sup>

The objectives of the ProTour were to:

- create a very high level competition (the best teams and the best riders in the best races);
- give guarantees of stability to teams, organisers and sponsors; and
- develop TV coverage of races and commercial opportunities which parties involved in cycling could benefit from, by developing a quality label bringing together the best among them. An extension of this development of the TV coverage was the objective of the UCI to bundle for sale the media rights for ProTour events with the annual UCI’s Road Cycling World Championships.<sup>20</sup>

### *Success of the ProTour*

At the conclusion of the second ProTour season in September 2006, the UCI’s assessment of the success of the ProTour in meeting these objectives was overwhelmingly positive. It claimed that the requirement that ProTour teams take part in all races in the calendar has led to closer, more competitive racing due to the presence of a greater number of top level riders.<sup>21</sup> The UCI ProTour

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<sup>18</sup> UCI Press Service, “UCI ProTour and UCI Continental Circuits: assessment 2005–2006” (Press Release, 25 September 2006).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid. UCI had earlier reported that “a study by Sport Marketing Survey has shown that the majority of cycling spectators in Europe thought that the UCI ProTour made races more interesting and considered them to be closer.” UCI ProTour, “2005 UCI ProTour: a promising first season” (Press Release, 18 October 2005).

classifications are considered to more accurately reflect the rankings established on the road through competition; there was also a clearer calendar and wider media coverage<sup>22</sup> and, for the first time in the history of cycling, teams and race organisers by virtue of having a licence lasting up to four years have assurances about their futures. Teams are guaranteed to be able to participate in all the biggest races in the calendar for the next four years. Team sponsors, knowing what they are dealing with, are agreeing to commit themselves for this period and will not suddenly withdraw their sponsorship. Organisers know they will be hosting the top teams.<sup>23</sup> Credit has also been claimed for significant development of the continental circuits' calendars.<sup>24</sup> This success has been achieved with the ProTour teams participating in the events owned by the Grand Tour organisers while they have been included on the ProTour calendar.

## **The UCI / Grand Tour Organisers Dispute**

### *The Grand Tours*

The three biggest stage races<sup>25</sup> in cycling are the "Grand Tours": the Tour de France, the Giro d'Italia and the Vuelta a Espana: the Tours of France, Italy and Spain. The organisers of the three Grand Tours are, respectively, "Amaury Sport Organisation" ("ASO"), "RCS Sport" and "Unipublic". Together, these race organisers own 11 races, including the Grand Tours, of the 27 races on the ProTour calendar. The Grand Tour organisers are not national sporting federations but commercial companies.<sup>26</sup>

While the opposition of the Grand Tour organisers to the ProTour was stated at least as early as 26 September 2004,<sup>27</sup> since then, the 11 events owned by them have been included in the two completed ProTour seasons through compromise arrangements. These compromises did not require the organisers to obtain UCI licences for their events.

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<sup>22</sup> UCI ProTour, "2005 UCI ProTour: a promising first season" (Press Release, 18 October 2005).

<sup>23</sup> Ibid. In this respect, it has never been entirely clear why the organisers of the Tour of Italy and the Tour of Spain have so totally thrown their lots in with the Tour de France. The lesser status of the Italian and Spanish events has been improved by the ProTour.

<sup>24</sup> Thirty-two new events (a 9% increase), a 16% increase in professional teams in Europe and approximately 40% in America and Asia: UCI ProTour, "UCI ProTour Council Meeting" (Press Release, 22 September 2006).

<sup>25</sup> Stage races take place over a number of days, with the longest being the Grand Tours that run over three weeks. One day races are just that, the most prestigious of which are known as the "Classics".

<sup>26</sup> ASO, for example, is a company that belongs to the French press group "E.P.A." (Philippe Amaury Publications) which owns a number of news publications including the French daily "L'Equipe". ASO organises events including the Tour de France and a number of other cycling races, the French Golf Open, the Dakar motor sport rally, the Paris Marathon and equestrian events: Amaury Sport Organisation, "*Amaury Sport Organisation*", <<http://www.aso.fr>> at 28 November 2006.

<sup>27</sup> Cyclingnews.com, "ProTour: Belgian federation asks ASO to reconsider" <<http://www.cyclingnews.com>> at 28 September 2004.

### *The Grand Tour organisers' position*

With the start of the third season of the ProTour in 2007, ASO announced that it would not allow all 20 ProTour Teams to compete in its season opening ProTour stage race, the Paris–Nice stage race that started on 11 March 2007. It excluded the *Unibet.com* team<sup>28</sup> on alleged “logistical grounds”.<sup>29</sup> It has nevertheless been widely speculated that the exclusion of Unibet was instead related to objections by the French organisers to the team’s principal sponsor being a gambling company<sup>30</sup> and that Unibet was a victim of the dispute between the UCI and ASO.

The other two Grand Tour organisers followed ASO’s lead, also refusing to allow *Unibet.com* to compete in their events.<sup>31</sup> In addition, instead of observing the ProTour rules, the Grand Tour organisers proposed their own rules for the admission of teams to the events which they control rather than observe the rules adopted by the UCI for the ProTour.<sup>32</sup> In adopting this position, the Grand Tour organisers placed themselves in direct conflict with the sport’s governing body.

Two objections to the ProTour have been advanced by the Grand Tour organisers. The first is a commercial one. Understandably, the organisers do not wish to cede control of the commercial rights attached to their events to the UCI.<sup>33</sup>

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<sup>28</sup> Of this exclusion, ASO Director Patrice Clerc has said: “Their (Unibet’s) position doesn’t concern us. It’s a problem between them and the UCI, not between them and us. Unibet was completely informed about our position and our options from the beginning of the month of December. (Unibet was awarded a ProTour Team licence on 16 December 2006). But you know, if you sell something that doesn’t belong to you to someone else, I believe there’s a name for that...”: Johnson and Abrahams (eds), “An interview with Patrice Clerc: ‘We’re not afraid’”, <<http://www.cyclingnews.com>> at 23 January 2007.

<sup>29</sup> Laura Weislo (ed), “ASO: No Unibet in Paris–Nice”, <<http://www.cyclingnews.com>> at 13 January 2007. It is unknown what these “logistical grounds” could be. Significantly, “logistical grounds” has not prevented ASO from inviting the *Astana* team to compete, even though *Astana* was awarded a ProTour licence after *Unibet.com* received its licence.

<sup>30</sup> French legislation prohibits the advertising of gambling. This prohibition is subject to exceptions or, to the cynical, is selectively applied. The French gambling company PMU is a well-known sponsor of the Tour de France. A French ProTour team has the French government-owned national lottery as its principal and naming rights sponsor: Francaise des Jeux. There are strong grounds to doubt the validity of any logistical problems caused by Unibet. Instead, it would be logical to conclude that the exclusion of the team suited ASO, which sought to be free from being obliged to invite all 20 ProTour teams licensed by the UCI to its events.

<sup>31</sup> See, for example, S George, “Giro open to 18 ProTour teams and four wildcards”, <<http://www.cyclingnews.com>> at 25 January 2007; Hedwig Kroner, “Vuelta stands firm behind ASO”, <<http://www.cyclingnews.com>> at 4 February 2007. As at the start of May 2007, *Unibet.com* had been refused entry to the following ProTour races: Paris–Nice, Paris–Roubaix, Fleche Wallonne, Tirreno-Adriatico and Liege–Bastogne–Liege.

<sup>32</sup> J Wilcockson, “Grand Tours propose splitting with ProTour ... again”, <http://www.velonews.com> at 12 December 2006.

<sup>33</sup> “The UCI defends an economic and marketing project. It wants to install a commercial trademark which belongs to (the UCI), which would feed off other, already existing trademarks – ours. If the ProTour calendar was only a sporting calendar, I’d have no problem with it. But in this case, we will be careful over the defense and protection of our trademarks. If we have to go to court, we’ll go”: ASO Director Patrice Clerc quoted in

The second objection is that the ProTour is a “closed system”, with no promotion and relegation of teams and less opportunity for race organisers to select “wild card” teams to participate in their races.<sup>34</sup> Legal action before the European Commission challenging this aspect of the ProTour has been announced by the race organisers.<sup>35</sup>

### *The UCI's position*

The UCI was quick to point out that the actions and proposals of the Grand Tour organisers are against the rules of the ProTour, which require that all teams compete in all ProTour events and that all event organisers allow all ProTour teams to compete.<sup>36</sup>

In addition, the UCI announced a formal complaint to the European Commission “concerning the anti-competitive conduct of the organizers of the Grand Tours”.<sup>37</sup> On the establishment by the Grand Tour organisers of their own entry criteria for their events, the UCI (in respect of a similar previous proposal) had said:

*“It's an impossible option for them. You have to have race commissaires and anti-doping rules. Besides, the (UCI licensed) riders aren't allowed to start in another series or league. That is completely ruled out ...*

*“Establishing and modifying the rules that govern the sport of cycling is the exclusive province of the International Federation. Recognition of the legitimacy of this position must form the basis of any discussion of the rules, and therefore excludes the possibility of any unilateral decision outside this institutional context.”<sup>38</sup>*

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Jones, Johnson and Kroner, “Clerc calls for allies in ‘project which would work’”, <<http://www.cyclingnews.com>> at 28 September 2006.

<sup>34</sup> Cyclingnews.com, “UCI versus Grand Tour organisers: The gloves are off”, <<http://www.cyclingnews.com>> at 10 December 2005.

<sup>35</sup> Cyclingnews.com, “Race organizers take action against ProTour”, <<http://www.cyclingnews.com>> at 25 November 2006.

<sup>36</sup> “On this occasion, the UCI formally reminds that all the teams benefiting from a ProTour licence have the right and the obligation to take part in the 27 rounds of the UCI ProTour calendar in 2007. In this sense, the recent declarations of ASO, RCS and Unipublic must be regarded as completely unfounded from the regulatory point of view”: UCI ProTour, “Press Release: Decisions by Licences’ Commission” (Press Release, 15 December 2006).

<sup>37</sup> UCI Press Service, “Press Release: Formal Complaint by the UCI to the European Commission against the Grand Tours” (Press Release, 9 January 2007).

<sup>38</sup> Former UCI President Hein Verbruggen quoted in Tan, Jones, Sunderland, “ProTour continues ... UCI and Teams align against Grand Tour organisers”, <<http://www.cyclingnews.com>> at 8 August 2005. Verbruggen continued: “The UCI is a democratic institution, the legal power in the sport of cycling. So with this stance, we have made an end to the blackmail of ASO. I'm sick to death of the arrogance of the French.”

On the “closed competition” criticism, the UCI points out that the conditions of entry are determined in a clear and transparent manner by the independent Licence Commission.<sup>39</sup> The UCI has also proposed referral of this matter to arbitration by the Court of Arbitration for Sport (CAS), a proposal that has not been taken up by the Grand Tour organisers.<sup>40</sup>

### *Recent developments*

On 5 March 2007, an interim compromise arrangement was reached between the UCI, the Grand Tour organisers and the IPCT representing the ProTour teams.<sup>41</sup> Under that agreement, 18 of the 20 ProTour teams receive automatic entry to the Grand Tour organisers’ events in 2007. The two excluded teams, *Unibet.com* and *Astana*, were to be considered in a “positive spirit” by the Grand Tour organisers for wild card entry to events. A process of monthly discussions was also put in place to attempt to find a longer-term solution to the impasse.<sup>42</sup>

This compromise followed an extraordinary turn of events in which the French Cycling Federation, the national federation which is a member of the UCI, agreed to a request from ASO to allow Paris–Nice to take place under its rules and regulations so as to avoid the governance of the event by the UCI.<sup>43</sup> Confusion reigned in the days that followed, with teams uncertain how to react to the UCI reminding them of UCI regulations that prohibit ProTour teams from racing in national calendar status events, the status of Paris–Nice on its removal from the ProTour calendar.<sup>44</sup> It appeared that the majority of ProTour teams may have observed the UCI’s rules and not competed in Paris–Nice.<sup>45</sup>

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<sup>39</sup> L Weislo, S George “McQuaid: UCI doesn’t want to stop Paris–Nice”, <<http://www.cyclingnews.com>> at 3 February 2007.

<sup>40</sup> UCI Press Service, “Press Release: UCI ProTour Council meeting” (Press Release, 21 September 2006); Cyclingnews.com, “Race organizers take action against ProTour”, <<http://www.cyclingnews.com>> at 25 November 2006.

<sup>41</sup> The International Professional Cycling Teams (IPCT) is a company set up by 17 UCI ProTeams to represent their interests. It has no official or regulatory relationship with the ProTour. See also n 113 below.

<sup>42</sup> S Stokes, C McCauley Applegate, “ProTour crisis gets peace deal” <<http://www.cyclingnews.com>> at 6 March 2007.

<sup>43</sup> H Kroner, S George, “Paris–Nice becomes ‘free event’”, <<http://www.cyclingnews.com>> at 22 February 2007.

<sup>44</sup> UCI Regulation 2.1.009: although the validity of this regulation as an unjustified anti-competitive restriction is not free from doubt; S Stokes, “Paris–Nice plunged into uncertainty”, <<http://www.cyclingnews.com>> at 22 February 2007; G Brown, “UCI instructs all ProTour teams to not race Paris–Nice”, <<http://www.cyclingnews.com>> at 22 February 2007; S Westemeyer and cyclingnews staff, “Cycling team managers committed to Paris–Nice”, <<http://www.cyclingnews.com>> at 23 February 2007; H Kroner, “ToC: Team directors shocked over Paris–Nice”, <<http://www.cyclingnews.com>> at 23 February 2007; UCI Press Service, “Press Release: Consequences of the ASO–FFC agreement of Paris–Nice”, (Press Release, 23 February 2007). To bolster support for its position, the UCI issued a lengthy document documenting the background to the dispute and explaining its version of the positions of the parties: UCI, “UCI–ASO dispute, ASO is not exempt from the rules!”, <http://www.uci.ch> at 23 February 2007.

<sup>45</sup> Though it does appear that at least three French ProTour teams intended to take part in the race and some riders were unhappy at not being able to race: see S George, S Westemeyer, “UCI lambasts ASO & cuts ties to Paris–Nice”, <<http://www.cyclingnews.com>> at 24 February 2007; H Kroner, S Westemeyer, “Teams deny



Despite averting this disaster for the sport, the parties had barely departed from the Brussels airport where the 5 March meeting was held before hostilities were resumed. The Grand Tour organisers continued to deny *Unibet.com* entry to events, allegedly on the grounds that *Unibet.com* was “illegal” under French and Belgian legislation regulating online gambling.<sup>46</sup> Litigation has ensued between the UCI and ASO<sup>47</sup> and between *Unibet.com* and ASO.<sup>48</sup>

In addition, the EU Commission has become an active participant in the dispute.<sup>49</sup>

*“You cannot exclude a team from participating in a sport in any given country just because you don’t like its sponsor.”*<sup>50</sup>

As the 2007 season draws to a close, developments in the dispute have not been kind to the sport. The exclusion of *Unibet.com* from the sport’s premier events has driven the company out of procycling, forcing the collapse of the team. Relations between the UCI and ASO have, if it was possible, worsened with bitter exchanges occurring over doping issues during the 2007 Tour de France. For 2008, the UCI has acceded to the requests of the Grand Tour organisers to not be part of the ProTour, proposing to place their races within separate race calendars. Even this has not pleased ASO, which, while happy that the Tour de France will no longer form part of the ProTour, is unhappy that its other races will also be removed from the ProTour calendar.

Against this unhappy backdrop, we can turn to consider the role of the UCI in the sport of cycling.

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Paris–Nice participation”, <<http://www.cyclingnews.com>> at 25 February 2007; J Quenet, “Petacchi disagrees with teams”, <<http://www.cyclingnews.com>> at 25 February 2007.

<sup>46</sup> L Weislo, S Westemeyer, “UCI begins legal action against ASO”, <<http://www.cyclingnews.com>> at 21 April 2007.

<sup>47</sup> In a setback to the UCI, in an action brought against ASO for breach of the compromise agreement by excluding *Unibet.com*, a Belgian Court ruled that the 5 March compromise agreement was not legally binding: H Kroner, S George, S Westemeyer, “Unibet to pursue damages after ASO denies Fleche Wallonne start” <<http://www.cyclingnews.com>> at 25 April 2007.

<sup>48</sup> Ibid. The *Unibet.com* team’s holding company obtained an order from a court in Liege, Belgium, against ASO requiring ASO to allow the team entry to the Fleche Wallonne and Liege–Bastogne–Liege races under penalty of a €5 million penalty per infringement. Despite this order, ASO refused to allow Unibet to compete in either race.

<sup>49</sup> Charlie McCreevy, the European Commissioner for the Common Market and Oliver Drewes, EU Commission spokesman for Internal Market and Services have both stated that they consider the exclusion of *Unibet.com* from races to be illegal under European law: [www.cyclingnews.com](http://www.cyclingnews.com), “What is happening is not legal”, 27 April 2007. See also S George, S Westemeyer, “Unibet to pursue damages after ASO denies Fleche Wallonne start”, above n 44.

<sup>50</sup> Oliver Drewes, EU Commission spokesman for Internal Market and Services quoted in G Johnson, B Abrahams, S Westemeyer, “European Commission calls on ASO for explanation”, <<http://www.cyclingnews.com>> at 1 May 2007.

## The role of the UCI

### *The structure of the UCI*

The UCI is the association of national cycling federations.<sup>51</sup> It “is a non-governmental international association with a non-profit-making purpose of international interest” and legal personality under Swiss law.<sup>52</sup> It is the sole worldwide body responsible for the management of the sport of cycling.<sup>53</sup>

A key defence of the UCI to the charges of the Grand Tour organisers is that the UCI is the international federation for the sport of cycling. Its structure and decision making are democratic and transparent. Accordingly, the structure and rules of the ProTour have a legitimacy flowing from the nature of the UCI.<sup>54</sup> This representative, democratic process is contrasted with the unilateral discretion exercised by the Grand Tour organisers.<sup>55</sup>

The UCI makes high claims as to its democratic status:

*“It elects its bodies with the strictest respect for the principal [sic] of democracy, enabling equal representation of all those involved in the cycling world. Its clear and transparent mechanisms of delegation ensure that all interests are represented.”*<sup>56</sup>

This defence begs the question: how representative or democratic is the UCI and the ProTour? To answer this question, it is necessary to examine the principal decision-making bodies and structure of the UCI which are established by the UCI’s *Constitution*.

### *Members of the UCI*

The members of the UCI are the national federations<sup>57</sup> (one per country).<sup>58</sup> National federations are required to comply with the *Constitution* and regulations of the UCI as well as with all decisions taken in accordance with those instruments.<sup>59</sup>

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<sup>51</sup> *UCI Constitution*, 12 January 2006, art 1.1.

<sup>52</sup> *Ibid* art 1.2.

<sup>53</sup> UCI, “UCI Rules of good governance”, <http://www.uci.ch> at 19 February 2007, 5.

<sup>54</sup> *Ibid*. See also Tan, Jones, Sunderland above n 35.

<sup>55</sup> See above, n 36: L Weislo and S George, “McQuaid: UCI doesn’t want to stop Paris–Nice”.

<sup>56</sup> *Ibid* at <http://www.uci.ch/imgarchive/AboutUCI/Mission/Reglesgouvernanceenglishversion.pdf>, 19 February 2007.

<sup>57</sup> *UCI Constitution* art 4.

<sup>58</sup> *Ibid* art 5.

<sup>59</sup> *Ibid* art 6. Federations and their members are required only to take part in cycling activities organised by one of them or by the UCI or a continental confederation (art 11). Membership of a competing union or association leads to automatic suspension (art 12). Federations pay annual membership contributions. These contributions

In the UCI's dispute with the Grand Tour organisers, prior to the actions of the French Cycling Federation in relation to Paris–Nice, six European national federations<sup>60</sup> declared their opposition to the ProTour “*in its current form*” and called for a round table discussion of parties involved in the sport to find acceptable solutions.<sup>61</sup> In response, the British, Irish and USA national federations have publicly supported the UCI. The British Cycling President Brian Cookson criticised the six national federations as not speaking for the majority and for not following the proper procedures available through the “European Cycling Union”, the UCI European Continental Confederation.<sup>62</sup>

### *UCI decision-making bodies*

The UCI Congress is the general meeting of members and the highest authority of the UCI.<sup>63</sup> The congress meets at least annually.<sup>64</sup> While each member of the UCI may be represented at the Congress,<sup>65</sup> and despite the UCI's claim to provide for “equal representation”,<sup>66</sup> not every national federation is entitled to a vote at the UCI Congress. While there are more than 170 national federation members, there are only 42 voting delegates, who have one vote each. The constitution of the UCI allocates a number of votes to each confederation<sup>67</sup> with Europe having a significant one third of the votes.<sup>68</sup>

Between meetings of the Congress, the UCI is managed by its Management Committee, which is vested with “the most extensive powers as regards the

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are paid to the continental confederations which keep two-thirds of the contributions as a contribution to their operating expenses and pass on one-third to the UCI (art 16).

<sup>60</sup> Perhaps not coincidentally, these six federations include the three national federations of the countries in which the Grand Tour organisers are based: France, Italy, and Spain along with Austria, Belgium, and Luxembourg.

<sup>61</sup> H Kroner, “Six national federations oppose ProTour”, <<http://www.cyclingnews.com>> at 1 December 2006.

<sup>62</sup> H Kroner, “ProTour: British Cycling supports McQuaid”, <<http://www.cyclingnews.com>> at 20 December 2006. National federations from the same continent are “grouped together in a continental confederation, an administrative unit and integral part of the UCI.” *UCI Constitution*, art 23. Continental confederations are required to promote the development of cycling in their continents (art 24). There are five continental confederations: Africa, America, Asia, Europe and Oceania (art 23.1).

<sup>63</sup> *Ibid*, art 27.

<sup>64</sup> *Ibid*, art 28. Certain powers and duties are reserved exclusively to the Congress including the alteration of the *UCI Constitution*, admission, expulsion and suspension of federations, setting the amount of annual contributions, and the election and dismissal of the President and the nine other members of the Management Committee (art 29).

<sup>65</sup> *Ibid*, art 32.

<sup>66</sup> See above n 53.

<sup>67</sup> *UCI Constitution*, art 25. Each confederation is required to establish rules setting out the method of designation of these voting delegates to the UCI Congress,

<sup>68</sup> *Ibid*, art 36. Votes are allocated as follows:

Africa:	seven delegates
America:	nine delegates
Asia:	nine delegates
Europe:	fourteen delegates
Oceania:	three delegates

management of the UCI and the regulation of cycling sports. It shall decide all matters not otherwise reserved to another policy body by (the) Constitution.”<sup>69</sup>

The routine and urgent business of the UCI is dealt with by an Executive Committee comprised of the President and the three Vice Presidents.

## **The representative nature of the UCI**

### *Distribution of voting power*

A number of criticisms can be made of the UCI’s representative structure.

The UCI constitution does not explain the rationale behind the distribution of votes on the UCI Congress amongst the confederations as provided by the *Constitution*. The democratic principle, if any, underlying this distribution of voting power is not obvious. There may be a ready explanation,<sup>70</sup> though one is not obvious from the *Constitution* itself. If there are valid reasons for this, it is suggested that for the sake of transparency, these reasons should be made clear.

### *A “Eurocentric” body*

In addition to this lack of transparency as to the reasons for the distribution of voting power within the UCI, the UCI’s voting system preserves significant voting power to the European Confederation and this dominance is constitutionally entrenched.<sup>71</sup> Under the *Constitution*, the European Confederation effectively holds a veto power over any adjustment in voting entitlements and is one vote short of having the power to veto any constitutional change at all.

This European power is further enhanced by the structure of the UCI Management Committee. Of the 15 members of the Management Committee, a

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<sup>69</sup> Ibid, art 45. Specific powers are specified in art 46 and include power to decide on contracts to be signed with third parties (art 46(i)), engage key staff (art46(j)), establish all Regulations relating the sport of cycling in general (art 46(l)), set up and appoint the members of the subcommittees necessary to the proper functioning of the UCI (art 46(o)), lay down the conditions of participation in cycling events including the granting of licences (art 46.2) and settle difficulties concerning the interpretation of the Regulations of the UCI (art 46.4). The Management Committee is composed of 15 members: the UCI President (who is also its Chairman); nine other members elected by Congress; and the presidents of the five continental confederations.

<sup>70</sup> For example, it may be based on population of registered riders or the number of national federations in each continent.

<sup>71</sup> Ibid, art 38: A statutory majority of two-thirds of votes cast (28 of 42 votes) is required for amendment of the UCI’s *Constitution*. A statutory majority of three-quarters of votes cast (32 of 42 votes, assuming all delegates vote) is required to alter a number of specific provisions including those relating to the number and distribution of voting rights amongst continental confederations and the composition and election of the UCI Management Committee. The European continental confederation as a bloc has 14 votes or one-third of the 42 total votes.

majority of at least eight are required to be European.<sup>72</sup> The structure of the Executive Committee concentrates this European power still further.<sup>73</sup> The representative basis for this entrenched European dominance is not self-evident or rooted in any democratic principle embodied in the *Constitution*.

*A representative body of national federations or continental confederations?*

Another observation on the representative nature of the UCI is that there are a number of provisions that would appear to encourage members of the Management Committee to take a “confederation perspective” rather than an individual “national federation perspective” in the performance of their roles. It is submitted that there is some confusion in the *Constitution* on the representative role of members of the UCI’s decision-making bodies as between their role in representing their national federation and their continental confederation.<sup>74</sup>

*A representative body?*

It is to be observed that the UCI is a representative organisation of national federations. It does operate in accordance with a constitution and has a democratic structure although, as discussed, there are some shortcomings in this democratic structure.

While these shortcomings may detract from the UCI’s claim to be a purely democratic institution, they do not provide any support to the position of the Grand Tour organisers in the context of the UCI / Grand Tour organisers dispute. In another type of dispute, for example a dispute involving the rights of a particular national federation or continental confederation or a dispute about a constitutional change proposal, these issues may assume greater relevance. With respect to the ProTour, however, the UCI’s position as a representative governing body is undiminished compared with that of the Grand Tour

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<sup>72</sup> Ibid: Of the 10 elected members (the President and the nine members elected by Congress), at least seven are required to belong to European federations. The eighth European member is the President of the European Confederation.

<sup>73</sup> Ibid, art 58: The Vice Presidents are elected by the Management Committee. Currently, three of the four positions are held by Europeans, including one Vice President position which is held by the immediate former President. The non-European Vice President is an Australian.

<sup>74</sup> Ibid, art 51: For example, while nominations for President come from the nominee’s federation, nominees for the other nine elected offices on the Executive Committee come from their respective continental confederations. Are they representing their federation or confederation? In addition, Management Committee members are not allowed to take part in voting on agenda items that are of particular interest to their national federation or in which they have a personal interest (art 55). However, they are not similarly prevented from participating in votes of particular interest to their confederation. Inconsistently, there is no similar prohibition on voting members of Congress participating in votes of Congress of particular interest to their federations, even though they are exercising votes allocated to their confederation in that forum. As with the Management Committee, members of the Executive Committee are prohibited from taking part in voting on items which are of particular interest to their national federation, but not their continental confederation (art 58).

organisers. The UCI's opponents are profit-motivated corporations who can lay no claim to a representative role in the sport.

Another aspect of the UCI's representative status that may be affected by the dispute relates to the positions which have been adopted by various national federations. These effectively partisan positions may find an outlet within the internal structures of the UCI, with those for and against the Grand Tour organisers taking opposite sides on issues being debated or determined within the organisation, including support for its elected officers. How this plays out within the UCI remains to be seen. The apparent lack of a unified European position in the European-dominated organisation may create some instability.

It falls now to consider how the democratic or representative nature of the UCI is reflected in the nature of the ProTour organisation and rules.

## UCI ProTour Council

### *Role of UPTC*

The UCI ProTour Council ("UPTC") administers the ProTour. With the exception of anti-doping, the UPTC is said to "act autonomously regarding all aspects linked to regulations, calendar and the general organisation of the UCI ProTour".<sup>75</sup> However, the UPTC is not a creature of the UCI Regulations and has no formal status under the UCI *Constitution*. It is most likely (though not certain) that the UPTC is a body established by decision of the UCI Executive Committee.<sup>76</sup>

### *Composition of UPTC*

The UPTC is made up of 12 members:<sup>77</sup>

- Six members are chosen by the UCI Management Committee.
- Two members are chosen by the Association Internationale des Groupes Cyclistes Professionnels ("AIGCP"). The AIGCP is described as an international union that defends the interests of professional cycling

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<sup>75</sup> UCI Press Service, "Press Release: UCI ProTour Council Meeting" (Press release, 12 April 2005).

<sup>76</sup> On the UCI website, a diagram setting out the management structure of the organisation shows the UPTC beside the UCI Management Committee: <<http://www.uci.ch>> at 25 February 2007. It also appears that the UCI Management Committee appoints the representatives of the UCI to the UPTC: UCI ProTour, "Change on the UCI ProTour Council", (Press Release, 10 January 2007), [www.uciprotour.com](http://www.uciprotour.com) at 25 February 2007. The UPTC succeeded the Professional Cycling Council ("CCP"), which was established on 28 January 2000 (its status was similarly unclear). The *UCI Rules of Good Governance*, above n 38, refers to the establishment of the PCC and to its authority for rule making for professional road cycling "by means of delegation" at 4.

<sup>77</sup> *Ibid.*

teams. The organisation has the 20 ProTour teams and 10 professional continental teams as members.<sup>78</sup>

- Two members are chosen by the Associated Professional Cyclists (“CPA”) representing the interests of riders. Members of the CPA are professional riders with licences belonging to UCI ProTeams and Professional Continental Teams and National Associations (European countries). The main objective of the CPA is the defence and the improvement of riders’ status.<sup>79</sup>
- Two members are chosen by the International Association of Organisers of Cycling Races (“AIOCC”) representing the interests of race organisers.<sup>80</sup>

### *Status of UPTC*

The status of the UPTC is important as the UCI Regulations bestow the UPTC with a range of important particular powers and functions.<sup>81</sup> The lack of any

<sup>78</sup> <http://www.unibetcycling.com>. See above n 38.

<sup>79</sup> <http://www.cpsite.org>. Other objectives include to be involved, in the same capacity as the AIOCC and AIGCP, in works and decisions taken by the UCI, to have permanent representatives in the main UCI commissions and on the UCI ProTour Council (UPTC) and to coordinate all actions of national associations and act as an intermediary in the event of problems which go beyond national boundaries. The CPA was formed on 15 May 1999. It replaced a predecessor body, the AICPRO. The CPA has a permanent office in Aigle in Switzerland and was established under Swiss law. In October 2006, the CPA created a “Council of Riders” which met for the first time on 29 January 2007. The Council of Riders is composed of 16 representatives belonging to UCI ProTour and professional continental teams. The body is intended to be a “credible and authorized interlocutor” on issues confronting cycling including doping and the UCI/Grand Tours dispute: [cyclingnews.com](http://www.cyclingnews.com), “CPA Riders Council to meet”, <<http://www.cyclingnews.com>> at 22 January 2007.

<sup>80</sup> UCI President McQuaid has accused the AIOCC of being controlled by the three major tours who held the Presidency and the two vice-president positions. See H Kroner, “McQuaid plays down federations’ protests”, <<http://www.cyclingnews.com>> at 3 December 2006.

<sup>81</sup> Powers of the UPTC under the UCI Regulations include to:

- enter ProTour events on the calendar with the UCI Management Committee entering the other events: reg 1.2.005, 2.1.001;
- regulate what races a ProTour rider can participate in: reg 2.1.005, 2.2.008;
- determine the amount that a race organiser must pay to teams for the travel and subsistence expenses of the teams. In other events, these amounts are to be negotiated between the parties: reg 2.2.009;
- determine minimum prize amounts (determined by the UCI Management committee for other races): reg 2.6.022;
- determine disputes relating to the ProTour: reg 12.3.09;
- determine a dispute between commissaries and a race organiser about the exclusion of a rider or team from a race for disciplinary reasons: reg 2.6.036;
- determine the geographic distribution of the maximum 20 available ProTour team licences: reg 2.15.009;
- determine the form of applications, the application fees and the licence fees for ProTour team and event licences: regs 2.15.013, 2.15.015, 2.15.027, 2.15.150, 2.15.170;
- fine teams who contravene regulations prohibiting links between the team and members of another team or with an event organiser “likely to influence the sporting course of events or to be perceived as so doing”: reg 2.15.052;
- determine the amount of the annual registration fee payable by ProTour teams: reg 2.15.066;

apparent formal status for the UPTC under the *Constitution* or regulations of the UCI creates some unnecessary questions about its legitimacy as the governing body of the ProTour. Nevertheless, it is clear that the UPTC endeavours to appear to be representative by including representatives from the riders, teams and race organisers. However, important questions remain<sup>82</sup> which, in the interests of good governance, should be not be left to doubt.

### *UCI Licence Commission*

Crucial to the legitimacy of the ProTour is the UCI Licence Commission which “allocates and withdraws the licences for the UCI ProTour, reduces their period of validity, and pronounces on the registration of UCI ProTeams and on other disputes regarding UCI ProTour licences”.<sup>83</sup> Unlike and in contrast to the UPTC, the UCI Licence Commission is a creature of the UCI Cycling Regulations.<sup>84</sup>

It is significant that the UCI Regulations contain extensive requirements to be met by applicants for team and event licences. As well as regulating financial stability through auditing requirements and by requiring the provision of bank guarantees, the structure of teams, team/sponsor relationships and team/rider and employee relationships,<sup>85</sup> the regulations specify the objective criteria to be applied by the Licence Commission in considering applications.<sup>86</sup>

The matters to be considered by the Licence Commission are directed at promoting the general welfare of the sport. In considering team licences, the criteria to be applied are:

*“1. quality and rapidity in the fulfilment of the conditions for the granting of a licence;*

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- approve the terms of the collective joint agreement negotiated between the CPA and the AIGCP: reg 2.15.111;
  - submit proposals for event licences to the licence commission: reg 2.15.154.

<sup>82</sup> For example: How does the UPTC make decisions? What is its relationship to the official structures of the UCI? Who does it report and answer to? Can it be directed by the UCI Management Committee or other UCI body? What level of independence does it have in decision making?

<sup>83</sup> UCI Regulation 2.15.213.

<sup>84</sup> The Licence Commission comprises a president and two other members having no links with organised cycle sport: reg 2.15.214. The members are appointed by the Management Committee of the UCI on the proposal of the UPTC. They are appointed for four years, subject to unlimited renewal: reg 2.15.215. Hearings are not in public and deliberations are held in camera: reg 2.15.218. Decisions are by majority and to be in writing: reg 2.15.220. Decisions assenting to the request of a licence applicant or holder or a UCI ProTeam do not need to be justified. Other decisions must be justified: reg 2.15.221. The Licences Commission is required to issue reasons for negative opinions on the granting of a licence and to provide an opportunity for applicants to obtain a hearing to defend their applications. Decisions of the licence commission may be appealed solely to the Court of Arbitration for Sport (CAS): reg 2.15.226.

<sup>85</sup> See UCI Cycling Regulations, Part 2 Road Races, Chapter 15.

<sup>86</sup> UCI Regulation 2.15.011 in relation to team licence applications and 2.15.149 regarding event licence applications.



2. *assurances of financial soundness and stability for the four coming years;*
3. *quality of the riders, inter alia as regards their placings and results;*
4. *compliance with UCI regulations;*
5. *compliance with contractual obligations, including the provisions of the standard contract between the rider and the team under article 2.15.139 and those of the joint agreement signed by the Associated Professional Cyclists (Cyclistes Professionnels Associés – CPA) and the International Association of Professional Cycling Teams (Association Internationale des Groupes Cyclistes Professionnels, AIGCP);*
6. *compliance with legal obligations;*
7. *compliance with sporting ethics, including matters of doping and health;*
8. *absence of other elements likely to bring cycle sport into substantial disrepute.*<sup>87</sup>

Similarly, in relation to event licences, the matters to be considered include the sporting level of the event, the quality of the event organiser with particular regard to safety, levels of media coverage, and compliance with contractual and legal obligations and with sporting ethics.<sup>88</sup>

These considerations provide a crucial point of difference in the positions of the UCI and the Grand Tour organisers when considering the matters at issue between the parties. In particular, the detailed scrutiny of each team's financial backing and status, which is carried out by the UCI through the licensing process, is hugely important for the operation of the sport. The collapse of teams through inadequate financial provision or through the sudden withdrawal of sponsors has been common in the past.<sup>89</sup> These collapses have catastrophic effects for the riders and other staff dependent on the team. The UCI has rightly sought to avoid these effects by addressing the adequacy of each team's financial support and by providing a level of certainty and stability through its

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<sup>87</sup> UCI Cycling Regulation 2.15.011.

<sup>88</sup> UCI Cycling Regulation 2.15.149.

<sup>89</sup> For an account of a collapse of a team following the withdrawal of a sponsor, see J Quenet, "Phonak: Going...gone!", RIDE Cycling Review, Issue 34, Spring 2006.

licensing system. In this respect, only the UCI as the sport's governing body is in a position to implement these reforms.

The actions of the Grand Tour organisers may bring these reforms undone. If a ProTour team licence does not guarantee a team a start in the premier events owned by the Grand Tour organisers, what is the value to a team and its sponsors of a UCI ProTour licence? If entry to an event is solely dependent on the permission (whim or bias?) of the event owner regardless of sporting merit, how seriously can the sport be viewed by spectators and sponsors alike, particularly in comparison with other sports? This is not to say that the interests of the Grand Tour organisers ought to be ignored. Certainly they are legitimate and long-standing stakeholders in professional road cycling. But weighing this standing against the effects that their role in this dispute may have on the sport, how justified is the position of the Grand Tour organisers? These issues also play a role in the application of European competition law to various aspects of the dispute.

## **European competition law**

### *European Commission complaints*

As noted, both the Grand Tour organisers and the UCI have claimed support for their positions in the European Commission's ("EC") competition rules. Both have announced complaints to the EC alleging anti-competitive conduct. The Grand Tour organisers were first to threaten<sup>90</sup> and then announce this,<sup>91</sup> although the UCI had previously indicated that it was willing to have the matter referred to the CAS.<sup>92</sup>

As well as the unsuccessful Belgian court action by the UCI against ASO to enforce the compromise agreement, it appears that there may be at least four legal actions being pursued:

- *Unibet.com* has said that it is pursuing damages against ASO for refusing it entry to a number of events in apparent contravention of an order of the Belgian courts;<sup>93</sup>
- the AIOCC alleges that the ProTour breaches EC competition laws;
- ASO alleges that the UCI has harmed its trademarks; and

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<sup>90</sup> J Jones, G Johnson, H Kroner, "Clerc calls for allies in 'project which would work'", <<http://www.cyclingnews.com>> at 28 September 2006.

<sup>91</sup> Cyclingnews.com, "Race organizers take action against ProTour", <<http://www.cyclingnews.com>> at 25 November 2006.

<sup>92</sup> Ibid: ASO Director Patrice Clerc said that it was not for the CAS to rule on the subject.

<sup>93</sup> See above n 47 and n 48.

- the UCI is taking action against the Grand Tour organisers alleging that they are acting as a cartel in breach of the EC competition laws.<sup>94</sup>

In addition, the EC Commission has opened infringement proceedings against a number of member states including France, challenging restrictions in state laws on the cross-border provision and promotion of sports betting services.<sup>95</sup>

### *European Community Treaty competition provisions*

Most sport-related cases involving the *EC Treaty* rules have been based upon the provisions of the *Treaty* which guarantee freedom of movement of workers and services between member states.<sup>96</sup> The competition law provisions in Article 81, which prohibits anti-competitive agreements and practices, and Article 82, which prohibits abuse of a dominant market position, have been less frequently relied upon.<sup>97</sup> In the litigation surrounding the UCI / Grand Tour organisers dispute, there is scope for each one of these provisions to play a role. The dispute raises a number of issues as to how the current law would be applied.

### *Bosman*

An appropriate starting point to explore the current law on the application of the *EC Treaty* to the dispute is the *Bosman case*.<sup>98</sup> *Bosman* was a landmark case that confirmed the application of the *Treaty* provisions to sporting organisations and rejected arguments that rules laid down by sporting associations were immune from the application of European law. In this respect, *Bosman* could be seen to have followed the direction of two earlier cases: *Walrave*<sup>99</sup> and *Dona*.<sup>100</sup> Yet of *Bosman* it has been said that “Undoubtedly, the two most startling things about *Bosman* were that, first, it took so long for such a case to reach the ECJ and, secondly, that football could possibly have believe the suspect rules were immune from EU law”.<sup>101</sup> As a result of *Bosman*, football associations were prohibited from adopting rules that required transfer fees for out-of-contract

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<sup>94</sup> UCI, “UCI–ASO dispute: ASO is not exempt from the rules!”. <http://www.uci.ch> at 25 February 2007.

<sup>95</sup> See above n 49.

<sup>96</sup> Consolidated Version of the Treaty Establishing the European Community, art 39 and 49, 29 December 2006. L Lindstrom-Rossi, S De Waele, D Vaigauskaite, “Application of EC antitrust rules in the sport sector: an update”, (2005) 3 *Competition Policy Newsletter*.

<sup>97</sup> Although this may be expected to change following the decision in *Meca-Medina v Commission of the European Communities* [2006] All ER (EC) 1057, (Case C-519/04), 18 July 2006 (see below).

<sup>98</sup> *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-5040.

<sup>99</sup> *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

<sup>100</sup> *Dona v Mantero* [1976] ECR 1333.

<sup>101</sup> Darren Macauley, “They Think It’s All Over...It Might Just Be Now: Unravelling The Ramifications For The European Football Transfer System Post-Bosman”, (2002) 23(7) *European Competition Law Review* 331 at 333.

players to move between clubs in different countries<sup>102</sup> or which limited the number of foreign nationals playing for football clubs in competitions they organised.<sup>103</sup>

Significantly, while the court in *Bosman* applied the *Treaty* provisions, it did so taking into account the special characteristics of sport.<sup>104</sup> In particular, it was recognised that sport had a legitimate objective of maintaining a balance between clubs in a competition by preserving a level of equality and uncertainty as to results, and of encouraging the recruitment and training of young players.<sup>105</sup> These objectives are incompatible with a pure competition approach.

However, despite the recognition of these special sporting characteristics, the transfer and foreign player limitation rules were struck down, as they went beyond what was necessary to achieve those objectives. The sporting aims could have been achieved by other means that did not impede workers freedom of movement.<sup>106</sup> Having found that the rules breached the freedom of movement provisions of the *Treaty*, the court did not consider it necessary to rule on the competition law *Treaty* provisions equivalent to Articles 81 and 82.<sup>107</sup>

### *Meca-Medina*

This unresolved question as to the application of the EC competition laws to sporting disputes was answered in the recent case of *Meca-Medina v Commission of the European Communities*.<sup>108</sup> That case involved a challenge to anti-doping rules of the International Olympic Committee (IOC). The anti-doping rules were alleged to be anti-competitive by two long-distance swimmers found to have used a banned steroid and who were subsequently banned from competition for two years. The European Court of Justice in dismissing the challenge said:

*“[E]ven if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the applicant’s freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market,*

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<sup>102</sup> *Bosman*, above n 98, par 114.

<sup>103</sup> *Ibid*, par 137.

<sup>104</sup> Weatherill, above n 5, 49–50; Van Nuffel, *Bosman*, (1995–1996) 356–357.

<sup>105</sup> *Bosman*, above n 98, par 107–109.

<sup>106</sup> *Ibid*, par 109.

<sup>107</sup> *Ibid*, par 139. The reliance on the law of free movement rather than on the competition rules in *Bosman* has been described as anomalous and surprising: see Weatherill, above n 5, 64. See also S Camatsos, “European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?” (2005) 12 *Sports Law Journal* 155.

<sup>108</sup> *Meca-Medina v Commission of the European Communities* [2006] All ER (EC) 1057, (Case C-519/04), 18 July 2006.

*within the meaning of art 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.*<sup>109</sup>

*Meca-Medina* has established the general approach for the application of EC competition laws to sporting conflicts:

- Sporting rules that have an economic effect come under EC competition rules.<sup>110</sup>
- The previously accepted proposition that so-called “pure sporting rules” were outside the scope of EC competition rules has been rejected.
- A case-by-case assessment of each sporting rule is required to determine whether the rule infringes EC competition rules.
- Even in a case where a sporting rule is considered to restrict competition, it may not breach EC competition rules to the extent that the rule pursues a legitimate objective and its anti-competitive effects are inherent in the pursuit of those objectives and are proportionate to them.
- A rule imposing a competitive restriction must be limited to what is necessary to ensure the proper conduct of competitive sport.

### *Valid sporting rules*

While sporting rules are not immune from the EC competition laws, matters such as the setting of deadlines for transfers of basketball players have been found to meet the legitimate sporting objective of ensuring the regularity of sporting competitions and not breach the freedom of movement provisions of the *EC Treaty*. Such rules, which may have an anti-competitive effect or restriction, must not go beyond what is necessary to achieve the legitimate aim pursued.<sup>111</sup>

It has also been confirmed that:

- a selection rule applied by a federation that had the effect of inevitably limiting the number of participants in a competition does not in itself restrict the freedom to provide services if the rule derived from an inherent need in the organisation of the event; and

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<sup>109</sup> *Ibid*, par 45.

<sup>110</sup> *Bosman*, above n 98.

<sup>111</sup> *Lehtonen et al v FRSB* [2000] ECR I-2681.

- the adoption in an international sporting event of one selection system over another was based on a large number of considerations unrelated to the personal circumstances of any individual athlete. While one system may prove more favourable to a category of athlete, that fact alone does not justify an inference that the system constitutes a restriction on the freedom to provide services.<sup>112</sup>

*The UCI and the Grand Tour organisers – a different approach?*

There is reason to doubt that the court would apply the same approach to the application of the EC *Treaty* competition rules when assessing the conduct of the UCI as it would when considering the conduct of the Grand Tour organisers.

The European Commission recognises the special role of sporting federations:<sup>113</sup>

*“The Commission acknowledges the autonomy of sporting organisations and representative structures (such as leagues). Furthermore, it recognises that governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners.”*<sup>114</sup>

The representative structure has been outlined above. This special role is not enjoyed by the Grand Tour organisers.

Furthermore, in finding the doping rules of the IOC justified by a legitimate purpose associated with the proper organisation and conduct of a sport, the Court in *Meca-Medina*<sup>115</sup> was applying the principle developed in *Wouters*.<sup>116</sup> *Wouters* considered the power of the regulator of the Bar of the Netherlands:

*“However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85 (now 81) of the Treaty. For the*

<sup>112</sup> *Deliege v Ligue de Judo* [2000] ECR I-2549, Case C-51/96 and C-191/97

<sup>113</sup> See for example: European Commission, *Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport within the Community Framework, The Helsinki Report on Sport*, (1999), par 4.2.3; European Council, *Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*, European Commission, (2000), par 7–10, European Commission, *White Paper on Sport*, (2007), par 4.

<sup>114</sup> European Commission, *White Paper on Sport*, above n 113, par 4.

<sup>115</sup> *Meca-Medina*, above n 108, par 41–45.

<sup>116</sup> *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C309/99) [2002] E.C.R. I-1577.

*purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reiseburo Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”<sup>117</sup>*

It would appear that the principle underpinning the legitimate objective justification recognised in *Wouters* and *Meca-Medina* is based in the public or social role performed by regulatory bodies.<sup>118</sup> There is no case in which the court has equated the position of a commercial event organiser with the position of a sporting federation.<sup>119</sup> Accordingly, while it is clear on the basis of *Meca-Medina* that it would be open to the UCI as a sporting federation to seek to justify rules which have an anti-competitive effect by reference to a legitimate objective of the sporting organisation, it is not clear that such a “defence” would be open to the Grand Tour organisers. They are corporations who run events for profit. They are not charged with the governance of a sport. Their conduct as commercial organisations would simply fall to be judged according to whether or not it is anti-competitive.

It now appropriate to consider these two aspects of the application of the EC *Treaty* rules to the UCI/Grand Tour organisers dispute: first, how the laws relate to the UCI; and second, how they impact on the Grand Tour organisers.

### *UCI ProTour licence system*

It is difficult to see how it would be open to the Grand Tour organisers to claim that the ProTour rules restrict freedom of movement of workers (riders) or services (ProTour teams) in contravention of Articles 39 or 49 of the EC *Treaty*. There is no limitation in the ProTour rules on freedom of movement. Could it instead be argued that the ProTour rules are anti-competitive in breach of Article 81 of the *Treaty* by effectively restricting entry to ProTour events to only UCI licensed ProTour teams or that the UCI abusing a dominant market

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<sup>117</sup> Ibid. Having established this legitimate purpose on the part of the professional regulator, the court then considered whether the consequential restrictive effects on competition of the relevant professional rules were inherent in the pursuit of the legitimate objective: par 97.

<sup>118</sup> Erika Szyszczak, *Competition and Sport* (2007) at 106–107.

<sup>119</sup> Each of the cases involving a challenge to a sporting rule in which the justification defence has been considered have involved rules set by sporting federations.

position by restricting entry to events that it sanctions in contravention of Article 82?

When considering the validity of the UCI's ProTour rules against the EC competition rules, it must be accepted that the rules have an economic effect and are not pure sporting rules. If nothing else, they regulate access to the ProTour by teams and event organisers. Indeed, economic considerations are internal to the rules themselves in the form of the financial requirements such as bank guarantees required of licensees – the “rules of the game” are commercial rules. Consequently, the key considerations are:

- Do the rules pursue legitimate objectives?
- Are the rules' anti-competitive effects inherent in the pursuit of those objectives and proportionate to them?
- In imposing a competitive restriction, are the rules limited to what is necessary to ensure the proper conduct of competitive sport?

Of course, any competition that has a limit on the number of competitors or teams who can compete is “closed” to the extent of the qualifying or admission rules applying to that competition. For an event organiser, the limitations on the number of teams able to compete in a ProTour race are produced by the requirement to allow every ProTour team to compete, the number of ProTour teams and by provisions of the UCI regulations that regulate:

- the maximum number of riders that can compete (200);<sup>120</sup> and
- the number of riders allowed in each of the teams: nine riders for the Grand Tours and eight for other races, with provision for seven rider teams where an event obtains the prior approval of the UCI.<sup>121</sup>

No party appears to take issue with these maximum rider number limitations.<sup>122</sup> However, the effect of these limitations combined with the number of licensed ProTour teams (20) mean that for Grand Tours where teams are of nine riders, the ProTour teams consume 180 places of the 200 available, leaving room for

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<sup>120</sup> UCI Cycling Regulation 2.2.002.

<sup>121</sup> UCI Cycling Regulation 2.2.003.

<sup>122</sup> It is assumed that the maximum rider limitation is based on the maximum number of riders who can be safely accommodated and logistically catered for in a race. It is likely that the number per team limitation is also based on sporting considerations as to the number of riders required for a team to compete meaningfully as a unit. It is possible that the number of riders per team could be adjusted without any significant sporting or safety impacts. A reduction in the number of riders per team may allow additional teams into an event. This has been suggested but not taken up. See Cyclingnews.com, “ProTour proposes eight-man grand tour teams”, <<http://www.cyclingnews.com>> at 6 January 2007.



only two wild card teams selected by the race organisers. For one day races or “classics”, teams are of eight riders, leaving room for five other teams.<sup>123</sup>

Is the ProTour licence regime that limits the number of team licences to a maximum of 20 and prescribes conditions that must be satisfied before a licence will be issued vulnerable to challenge under the *Treaty*?<sup>124</sup>

Prior to *Meca-Medina*, it was suggested that, while “elusive distinctions” may arise”:

*“Rules that limit the number of clubs in a league to, say, 18 would not be open to challenge on the basis that 20 would allow wider access. These are ‘the rules of the game’ and they lie within the autonomous decision-making competence of sport’s governing bodies.”*<sup>125</sup>

Such an outcome would be consistent with *Deliege*.<sup>126</sup> However, as the UCI’s licence regime has an economic effect, the rules are not immune from the *Treaty* provisions as purely sporting rules. They must be justifiable in their anti-competitive effect as proportionate measures in support of legitimate objectives.<sup>127</sup>

Reflecting the importance of the cultural and social role of sport, the European Commission has acknowledged the validity of licensing systems in the organisation of sports:

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<sup>123</sup> It is not clear whether the number of ProTour team licences issued could be reduced from 20 and, if so, how this determination would be made. Under the UCI Regulations, a maximum of 20 licences may be issued but the basis of the determination of the number of licences to be issued is not clear: UCI Cycling Regulation 2.15.009. If the number of applicants exceeds the number of licences available, the Licence Commission determines between applicants on the basis of criteria set out in the regulations. These criteria go to matters such as financial soundness and stability of the team for the next four years, the quality of the team’s riders, compliance with UCI regulations, contractual and legal obligations and with sporting ethics: reg 2.15.011. It appears that either there are to be 20 licences or the Licence Commission may be able to determine a lesser number of licences to be made available. Supporting this view, responding to calls by the International Professional Cycling Teams (IPCT) for a reduction in the number of ProTour team licences to 18, ProTour manager Alain Rumpf noted that the number of licences awarded was the decision of the Licence Commission and that the maximum number of teams was 20 but there was no obligation on the Commission to award all 20 licences: S Stokes, “Rumpf: UCI to discuss reducing ProTour teams”, <<http://www.cyclingnews.com>> at 10 December 2006. A proposal to reduce the number of teams to 18 appears to have been advanced by the IPCT. The IPCT is a company set up by only 17 of the 20 ProTour teams to represent their interests and it has no official or regulatory relationship with the ProTour. The reduction of teams to 18 was a major request from the three Grand Tours and, together with a condition that licences would be for three years rather than four, appears to have been the basis of a compromise proposal that had been advanced to resolve the dispute. With only 17 members, the IPCT would have found such a compromise relatively easy to agree to: Cyclingnews.com, “Clerc: ‘Negotiations over ProTour dead’”, <<http://www.cyclingnews.com>> at 9 July 2006.

<sup>124</sup> UCI Cycling Regulations, reg 2.15.009.

<sup>125</sup> Weatherill, above n 5, 66. If correct, the same principle would apply in the converse situation where the UCI sets the number of teams at 20 instead of 18 and where wider access would be provided by licensing 18 teams.

<sup>126</sup> *Deliege v Ligue de Judo*, above n 112.

<sup>127</sup> *Meca-Medina* above, n 108.

*“The Commission acknowledges the usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport. Licensing systems generally aim to ensure that all clubs respect the same basic rules on financial management and transparency, but could also include provisions regarding discrimination, violence, protection of minors and training. Such systems must be compatible with competition and Internal Market provisions and may not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organisation and conduct of sport.”<sup>128</sup>*

Does the UCI licence system pursue a legitimate objective? As a sporting competition, it is obvious that events cannot be staged with an unlimited number of riders. There is an inherent requirement to limit the number of teams that can enter cycling events, including ProTour events. It follows that some selection process must be undertaken. Under the ProTour rules, the selection of teams could be justified as involving universally and independently criteria applied by the independent Licences Commission.<sup>129</sup> As well as providing an inherently necessary process to limit the number of competitors, these rules are designed to achieve legitimate objectives related to the sport including increasing the stability of the sport, promoting the welfare of the participants in it by ensuring financial stability amongst teams, promoting a high level of sporting competition and promoting compliance with legal and ethical standards.<sup>130</sup>

It is significant that the ProTour rules involve qualitative criteria. In *Piau*<sup>131</sup> it was alleged that conditions set by FIFA for licensed player agents were not proportionate. The Court of First Instance considered that the regulations did not eliminate competition because they applied qualitative not quantitative selection criteria. Although the ProTour regulations apply both qualitative and quantitative restrictions, the quantitative restriction of the number of teams is inherent in the competition structure. It is therefore suggested that it is reasonable to conclude that the licensing requirements are proportionate to the achievement of these objectives. Unlike in *Bosman*, it is difficult to conceive of alternative ways for the UCI to achieve its objectives.

The legitimacy of the ProTour system is further supported by the UCI's wild card system. In September 2006, the UPTC approved the recommendations of a working group to introduce from 2008 a selection of Professional Continental

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<sup>128</sup> European Commission, *White Paper on Sport*, 2007.

<sup>129</sup> UCI Cycling regulation 2.15.011.

<sup>130</sup> In response to the position now taken by the Grand Tour organisers, the UPTC has raised a number of these points: UCI, “Participation conditions to Paris–Nice: UCI declaration” (Press Release, 2 February 2007).

<sup>131</sup> [2005] ECR II-209. An appeal from this decision was dismissed: [2006] ECR I-37.

teams wanting to obtain wild cards. The criteria for selection of wild cards are to be similar to the criteria applied by the UCI Licence Commission to the selection of ProTour teams. The number of places to be awarded is not to be fixed and will depend on the number of teams meeting the criteria.<sup>132</sup> This process of wild card selection provides access to ProTour events on an objective basis, which can be contrasted with the unilateral discretion proposed by the Grand Tour organisers.

On the issue of whether the ProTour licensing rules represent an abuse of market power in contravention of Article 82, it is suggested that it would be a curious result for the rules to be found to have a legitimate purpose and to be proportionate for the purposes of Article 81, but then fall as an abuse of market power under Article 82. There is no reason to suggest that the general approach in *Meca-Medina*<sup>133</sup> and *Wouters*,<sup>134</sup> which involves what is fundamentally a public interest test, would not also be applied to Article 82. Further clarification may follow the pending *Oulmers* litigation.<sup>135</sup>

#### *UCI 2008 ProTour calendar*

At the end of September 2007, the UCI determined a new calendar of events for 2008. That calendar granted the requests of the Grand Tour organisers not to be part of the ProTour. Under the arrangements for 2008, the ProTour would form part of a "World Calendar" that would also include the Tour de France, the Olympic Games and the World Championships: "The 18 UCI ProTeams will have the right to participate (in the Tour de France), following a request from the teams."<sup>136</sup> The Grand Tour organisers' other races would form part of the "UCI Europe Tour" calendar, with unrestricted team participation, although the ProTour teams would not be obliged or automatically entitled to compete in those events.

Despite succeeding in its desire for the removal of its events from the ProTour, ASO has criticised the proposed calendar for 2008. It objects to the fact that other than the Tour de France, its events will no longer be part of the World Calendar.<sup>137</sup> The AIOCC has also labelled the calendar "unacceptable":

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<sup>132</sup> UCI Press Service, "Press Release: UCI ProTour Council meeting", (Press Release, 21 September 2006). It is unclear whether these measures will in fact be adopted for 2008 by the UCI: see <<http://www.cyclingnews.com>>, "UCI unveils ProTour calendar", at 28 September 2007.

<sup>133</sup> *Meca-Medina*, above n 108.

<sup>134</sup> *Wouters*, above n 116.

<sup>135</sup> The *Oulmers* litigation concerns allegations that FIFA rules are an abuse of FIFA's dominant market position in stipulating mandatory releases from clubs of players called up for international duties without compensation to the players' clubs, which are thereby deprived of the players' services and where the players are liable to be injured: Case C-243/06, SA Sporting du Pays de Charleroi and Groupement des Clubs de Football Europeens.

<sup>136</sup> UCI Press Service, "Press Release: UCI ProTour Council Meeting", (27 September 2007).

<sup>137</sup> Cyclingnews.com, "ASO lashes out at UCI", [www.cyclingnews.com](http://www.cyclingnews.com) at 7 September 2007.

*“This calendar denies the historical rights of the ‘monuments’ of cycling and does not bring any solution to the difficulties of the other races which as a result are devalued.”*<sup>138</sup>

As with many of the developments that have occurred over the life of this dispute, the 2008 UCI calendar raises more questions than it answers. In brief, some of the issues that may fall for consideration include:

- On what basis can the UCI purport to guarantee ProTour teams an entitlement to participate in the Tour de France as part of its World Calendar for 2008? An answer to this question may be that it would be open to the UCI to make a rule for its competition that event organisers must allow ProTour teams entry to their events as a condition of being on the World Calendar. It may be that such a rule would be justifiable under the test in *Meca-Medina*. On the other hand, it is unlikely that the UCI would be able to require this condition of ASO in respect of the Tour de France in the absence of agreement of ASO to that condition. In the absence of such an agreement, the UCI’s remedy would be to remove the Tour de France from the World Calendar. It would lack the right to compel ASO to comply with this condition.
- If ASO denies a ProTour team entry to the 2008 Tour de France, would the UCI or the team be entitled to any remedy? The answer to this question would depend on the agreement or otherwise of ASO to the conditions of the World Calendar and any contractual obligations that may arise from such agreement. ASO would also need to ensure that any exclusion of teams was justifiable, not discriminatory or an abuse of market power.
- Is the removal of all of the Grand Tour organisers’ events from the ProTour or World Calendars a decision with an economic effect that can be justified under the test applied under *Meca-Medina*<sup>139</sup> or is it challengeable as an abuse of market power under Article 82? The President of the UCI has indicated that “if they (the Grand Tour organisers) wish for us to include one or two of their events in the ProTour then we would certainly consider it”.<sup>140</sup> It is suggested that the UCI would need to ensure that it acted objectively in considering any request from the Grand Tour organisers for their events to be included in the ProTour when those events would otherwise meet all of the necessary

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<sup>138</sup> Cyclingnews.com, “AIOCC: UCI’s 2008 calendar ‘unacceptable’”, <[www.cyclingnews.com](http://www.cyclingnews.com)> at 1 October 2007.

<sup>139</sup> *Meca-Medina* above, n 108.

<sup>140</sup> Pat McQuaid quoted on cyclingnews.com, “Reinventing the ProTour: the calm after the storm?”, <[www.cyclingnews.com](http://www.cyclingnews.com)> at 22 September 2007.

sporting criteria. To fail to do so would raise the prospect that the UCI was abusing its position by excluding players from the market without an objective reason.<sup>141</sup> In the absence of objective reasons and surely to its chagrin, the UCI could find itself compelled to accept some of the Grand Tour organisers' events in its calendar.

- What liability would the UCI have to compensate ProTour teams who have acquired licences on the understanding that they would be entitled to participate in events that have now been removed from the ProTour calendar? This issue would likely turn on the terms of the agreements between the UCI and the ProTour teams and the contents of any promises embodied in those contracts. The prospect of such a claim may be causing some nervousness on the part of the UCI.

That challenges along these lines have yet to be advanced in the dispute may be a case of “watch this space”.

#### *A UCI boycott?*

Could the UCI enforce a ban on riders of ProTour teams participating in the Grand Tour organisers' events? Such a ban has been proposed as a response to the refusal of the Grand Tour organisers to comply with the rules of the ProTour.<sup>142</sup> There are obvious practical difficulties that follow from the removal of Grand Tour organisers' events from the ProTour. Riders generally want to compete in the best races. The ProTour teams exist to compete in them and to garner exposure for their sponsors. While there have been expressions of support for the UCI's position,<sup>143</sup> it would be no easy task to require a mass boycott of the Grand Tour organisers' events.

If this practical obstacle could be overcome, there is ample apparent power under the UCI's regulations for the organisation to prohibit the participation, subject to disciplinary action, of ProTour riders and teams in Grand Tour organisers' events that do not meet the requirements of the regulations.<sup>144</sup> Yet while these “sporting rules” may appear to lie at the disposal of the UCI, under the EC competition laws, the exclusion from the market by the UCI for no objective reason of market players (the Grand Tour organisers) which meet

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<sup>141</sup> Weatherill above n 5, 57, 63; *The Helsinki Report* above n 113, at par 4.2.

<sup>142</sup> See above, n 38, n 44.

<sup>143</sup> See above, n 44: S Westemeyer and Cyclingnews staff, “Cycling team managers committed to Paris–Nice”; H Kroner, “ToC: Team directors shocked over Paris–Nice”.

<sup>144</sup> Under the UCI's Regulations, riders are prohibited from participating in events not recognised by the UCI: reg 1.2.019. A ProTour team, by applying for a licence, undertakes not to participate in cycle sport competitions, formulas or organisations other than those governed by the UCI's regulations and authorities: reg 2.15.006. The application for a licence implies the applicant's acceptance of the rules and conditions governing the UCI ProTour and the UCI's regulations in general: reg 2.15.007. ProTeams are not allowed to participate in national calendar events: reg 2.15.009.

justified quality or safety standards would be impermissible as a matter of principle.<sup>145</sup>

*The Grand Tour organisers as a cartel*

Treaty law issues as they impact on the Grand Tour organisers include:

- Have the Grand Tour organisers acted as a cartel and if so, is this conduct justifiable?
- Does the Grand Tour organisers' complaint about the ProTour being a "closed competition" raise competition law issues for the Grand Tour organisers?

On 9 January 2007, the UCI announced a formal complaint to the European Commission:

*"...concerning the anti-competitive conduct of the organizers of the Grand Tours. The organizers of the Grand Tours have acted as a cartel in order to protect their own dominant position in the field of professional road cycling. In particular the organizers of the Grand Tours have deliberately tried to undermine the development of the UCI ProTour. This conduct is detrimental to the interest of teams, riders and the wider development of cycling in Europe and in the world as a whole.*

*"The UCI has repeatedly tried to engage the organizers of the Grand Tours in a constructive dialogue; however they have refused to cooperate in any meaningful way leaving the UCI with no alternative other than to seek intervention by the European Commission in this matter."*<sup>146</sup>

The UCI's case may rely upon both Article 82 of the EC Treaty prohibiting abuse of a dominant market position, particularly in relation to ASO with its

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<sup>145</sup> Weatherill above n 5, 57, 63; *The Helsinki Report* above n 113, at par 4.2. Rather than a boycott, the UCI may, in the pursuit of legitimate objectives, seek to require ProTour teams to compete in a UCI-organised ProTour event that was held at the same time as a non-ProTour event organised by the ASO. The defensibility of the UCI's actions in those circumstances may be very different from a situation where the UCI merely sought to enforce a boycott of a non-ProTour event and take disciplinary action against a ProTour team or rider who participated in the non-ProTour event. From the perspective of the structure of the sport, one would think that in fact the UCI has an obligation to act to protect its model for the sport as well as the interests of its licensees. Similarly, the longer-term interests of both the riders and the teams would appear to lie in acting to support the ProTour. It is hard to see how the ProTour and its objectives for the stability and development of cycling could survive in a regime where race organisers were entirely free to select which teams were entitled to compete in events.

<sup>146</sup> UCI Press Service, "Press Release: Formal Complaint by the UCI to the European Commission against the Grands Tours", <<http://www.cyclingnews.com>> at 9 January 2007.

66% share of broadcast revenues from the sport (see below), and Article 81 prohibiting anti-competitive agreements and practices.

There appear to be good grounds for an argument that the Grand Tour organisers have acted in concert to pursue a common strategy against the ProTour. In particular, they have combined to agree upon and establish uniform conditions of entry to their events. They have almost uniformly excluded the new ProTour team *Unibet.com* from their races in circumstances where the Grand Tour organisers have not developed or applied an objective selection criteria. This exclusion could be argued to be unjustified by sporting or other relevant objective factors, particularly having regard to other teams selected.

Further, there seems little to explain this conduct other than the anti-competitive objective of causing economic damage to a competing product, the ProTour, and to a ProTour team (*Unibet.com*).<sup>147</sup> It may be but a small step for a court to find an anti-competitive agreement or practice within the meaning of Article 81 of the EC *Treaty*.<sup>148</sup>

Whether these actions would ultimately be construed as being an abuse of a dominant market position or as having an anti-competitive effect would depend on how the court determines questions such as the identity of the relevant market in which the conduct is occurring. It is to be noted that in sporting cases, where there is little substitutability of sports media content, the EC has defined distinct relevant product markets narrowly, for example, the media rights to premium football events played regularly throughout the season.<sup>149</sup> A narrow definition such as “the market of professional road cycling events” would increase the likelihood of the conduct being found to be anti-competitive and prohibited by Article 82.

Sporting bodies “have largely been able to rely on the relatively short span of a player’s career and the regularity of annual competition contrasted with the stately progress of legal proceedings to scare off most would-be litigants”.<sup>150</sup> In addition to the commercial sensitivity of a ProTour team not wanting to upset the good will of race organisers in order to be allowed to compete, it may be

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<sup>147</sup> Following its inability to secure positions in major races, Unibet announced its withdrawal from sponsorship of a ProTour team at the end of the 2007 season.

<sup>148</sup> The term “discrimination” has begun to be used, perhaps accurately, in the cycling press to describe the blackballing of *Unibet.com*. See for example S Stokes, “RCS selections ‘unacceptable to McQuaid’”, 18 February 2007.

<sup>149</sup> T Toft, “Developments in European Law” (Paper presented at the Congress Sports & Law, Berlin, 28 April 2006) at 4. As with football clubs, there would be little doubt that ProTour teams would be undertakings within Article 81. In addition, national football associations have been found to be undertakings within the meaning of Article 81. It is suggested that national cycling federations would have similar status. In addition, the UCI would be regarded as an undertaking itself or as a grouping and emanation of undertakings as FIFA has been regarded in the sport of football: see *Piau v Commission*, Case T-193/02, judgment of 26 January 2005 at par 72; Lindstrom-Rossi et al, above, n 96 at 72–73.

<sup>150</sup> Weatherill, above n 5, 72.

that the Grand Tour organisers have relied upon this factor to shrug off any concern about a legal challenge by Unibet. In respect of *Meca-Medina* it has been noted that “using Community law is a protracted (and expensive) process and may not necessarily provide an alternative avenue for review of decisions taken by autonomous sporting regulator bodies”.<sup>151</sup> This observation would equally apply to challenges to decisions of event organisers such as ASO.

### *Grand Tour organisers’ race entry rules*

In lieu of the ProTour rules, and presumably to allegedly “open up” their races, the Grand Tour organisers proposed their own qualifying system.<sup>152</sup> On 12 December 2006, they announced a new method of selecting teams to compete in their events. Instead of the ProTour system in which all 20 ProTeams automatically qualify, with two wild cards for the grand tours and five for the classics, the Grand Tour organisers proposed:

- Starting in 2008, only 16 teams qualify automatically under conditions yet to be announced.
- For 2007, the 18 ProTour Teams that held licences at that time would qualify automatically (which would exclude the two teams who have subsequently been awarded a licence by the UCI).
- None of the ProTour Teams would be obliged to start in any of the 11 races.
- Race organisers reserve the right to refuse participation to any rider or member of team staff whose presence could threaten the reputation of the event.
- Race organisers could invite wild cards with the number of teams limited to 20 from 2008 (22 in 2007).<sup>153</sup>

The Grand Tour organisers’ justification of this system on the grounds of achieving an open competition has some weaknesses. First, their position does not provide for an open competition. They propose that 16 teams rather than 20 will automatically qualify for their events from 2008. This position only provides for marginally more (four) wild card entries than the ProTour system.

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<sup>151</sup> Erica Szyszczak, *Competition and Sport* (2007), 96.

<sup>152</sup> This is not the first time that the Grand Tour organisers have proposed their own qualifying system for their races. There have been at least two other similar proposals: see above n 29 and J Stevenson, “UCI: ASO in ‘serious attempt to make ProTour fail’”, <<http://www.cyclingnews.com>> at 7 December 2004.

<sup>153</sup> J Wilcockson, “Grand Tours propose splitting with ProTour ... again”, <http://www.velonews.com> at 12 December 2006. Following the announcement of the new calendar for 2008 by the UCI, it is not clear whether the Grand Tour organisers intend to continue with this proposal.



Second, the automatic qualification criteria have yet to be determined and are therefore impossible to judge. However, selections of teams by the Grand Tour organisers to events in 2007 do not appear to have been based on sporting or ethical criteria. For example, ASO has selected French continental team *Agritubel* over the better-performed *Unibet.com* ProTour team.<sup>154</sup> RCS Sports has refused to select *Unibet.com* for its races in favour of smaller continental teams. It has also selected a team with two riders under doping investigation clouds and refused to select the well-performed Pro Continental team *Serramenti PVC Diquigiovanni-Selle Italia*.<sup>155</sup> Practice in past years also provides no confidence that objective sporting or ethical criteria will be applied by the Grand Tour organisers. Prior to the ProTour, the history of the Tour de France at least was littered with disputes and controversy over the event organiser's selection of competing teams. Historically, the French organisers have been perceived to have selected French teams over better-credentialed teams from other countries:

*“From what I can see in the past, they like to invite the French teams, even if they do virtually nothing the whole year. They just rely on getting selected for the Tour and then they get one good result in the Tour and, obviously being a French team, everyone is happy and they get another five years of sponsorship. The way the Tour helps out their own basically rubs me up the wrong way.*

*“After all, I thought the idea of the Tour was to have the best teams in the world? Okay, the teams are at a slightly higher level now but in the past they have invited teams like Chazal or whoever, teams who can't even get out of their own way.”<sup>156</sup>*

Third, the selection of wild cards would appear to be totally at the discretion of the event organiser and not achieved through any qualifying event or objective criteria. In this respect, the Grand Tour organisers' position could be argued to involve a more “closed” system than the ProTour. This aspect of the dispute is given practical perspective by the attitudes of the riders and teams. On 29 January 2007, the CPA Riders' Council stated its opposition to selection of

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<sup>154</sup> It may be significant that *Unibet.com* is involved in a dispute with the French government which is preventing the team from advertising in France as it is a betting agency and prohibited under French law. *Unibet.com* is alleging that this prohibition contravenes EC competition law. Interestingly, no issue is taken by the French authorities with the French *Francaise des Jeux* team sponsored by the French lottery system or the involvement of the French gambling firm *PMU* in sponsorship of the Tour de France. See H Kroner, “Unibet gets official prohibition” <<http://www.cyclingnews.com>> at 10 February 2007. See also above n 49 and n 50 re position of the EC Commission.

<sup>155</sup> S Stokes, “Selle Italia deplore RCS decision”, <<http://www.cyclingnews.com>> at 18 February 2007; S Stokes, “RCS selections ‘unacceptable to McQuaid’” <<http://www.cyclingnews.com>> at 18 February 2007.

<sup>156</sup> Sean Yates, Discovery Channel Director Sportif, quoted in G Brown, “Teams speak about Unibet.com and ProTour”, <<http://www.cyclingnews.com>> at 16 February 2007.

riders at races being unilaterally determined by race organisers,<sup>157</sup> the representative nature of the UCI clearly a powerful and accepted basis of the UCI's legitimacy in the eyes of the riders' organisation. In addition to the riders, the support of the ProTour by the ProTour teams is a practical and political necessity for the survival of the competition. So far, the ProTour teams have generally stood behind the UCI:

*"It is a mess. What I can gather from my attendance of the meetings with the teams association [AIGCP], which includes ProTour teams and others but which is mainly attended by the ProTour teams, is they all stand by the ProTour system. In my mind, that should say that if they [the Grand Tour organisers] are going to exclude Unibet from Paris–Nice, that means everybody should stick together. Otherwise, what is the point in having a union? ... Unless they all decide to blow the ProTour, it should mean that the teams should say, 'we are not going to go to Paris–Nice, ... until the thing is sorted'. Either that, or they say that we scrap the ProTour system. This is all a mess to me. There is no point saying in the meetings that we are going to stick together, that we are not going to reduce the ProTour teams to 18, we are not going to let them boss us around [unless they do that]. It has long been a problem in cycling that the teams and the riders are just bossed around by the organisers. It is very antiquated in that respect. So they should say, 'sod it, we are not going to come'."*<sup>158</sup>

Fourth, the system proposed by the Grand Tour organisers does not appear to contemplate any promotion or relegation.<sup>159</sup>

Finally, the motivation from a sporting view for this system of entry criteria is not apparent. It simply was not the case before the ProTour that any cycling team could turn up to an event with an entitlement to compete. There has always been a team selection process for races. Significantly, prior to the ProTour, it was the race organisers who held more power over team selection.

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<sup>157</sup> "The Riders' Council wishes to stress that it is totally unacceptable for riders that participation to their races by unilaterally determined by organizers. Riders and teams, but definitely also organizers, will have to respect the UCI rules and these rules can only be changed by a democratic procedure as foreseen in the UCI statutes, and certainly not in a one-sided manner by one of the parties": L Weislo, B Abrahams "UCI threatens to pull Paris–Nice ProTour status", <<http://www.cyclingnews.com>> at 2 February 2007.

<sup>158</sup> S Yates quoted in G Brown above, n 44; S Stokes, "ProTour teams back UCI", <<http://www.cyclingnews.com>> at 8 January 2006. However, there has been some disunity amongst the teams and it would be dangerous to rate the strength or unity of the support of the teams too highly, as dependent as they are commercially on the need to expose their sponsors to the public in events.

<sup>159</sup> According to former UCI President Hein Verbruggen, at the beginning of 2005, only ASO was concerned about the four-year terms, without promotion or relegation, of the then 19 ProTour teams, but he was unaware why. "Our sport is above all an individual sport. A system of relegation at the end of the season does not serve to do anything because as soon as a team is relegated, its riders leave for a UCI ProTour team": Hein Verbruggen quoted in J Jones, "Verbruggen keeps pushing the ProTour", <<http://www.cyclingnews.com>> at 1 February 2005.

This power in the hands of privately owned, profit-making enterprises can lead to a perception that there are commercial interests rather than sporting criteria influencing decisions on race entries. Event organisers may be perceived to be open to influence by teams seeking to buy their way into events or to favour less credentialed teams for nationalistic considerations.

It is suggested that the effect of these factors is that the selection of teams to the Grand Tour organisers' events under this system is likely to be susceptible to controversy and challenge. Any team aggrieved by its exclusion from the Grand Tour organisers' events could seek to challenge their exclusion. While a defence to that exclusion would not necessarily be impossible, it would be far more difficult for the Grand Tour organisers to justify than would be the case for the UCI under the ProTour rules. In the absence of an entitlement to special consideration as a sporting federation or governing body, any lack of objective criteria in the selection process would render the Grand Tour organisers vulnerable. The case of Unibet may prove to be such an example.

#### *Grand Tour organisers' closed competition complaint*

The Grand Tour organisers complain that the ProTour is a "closed" competition<sup>160</sup> and that there is no promotion and relegation.<sup>161</sup> In raising this complaint, the Grand Tour organisers may be holding a double-edged sword. There is only a small difference in the openness between the ProTour and the system proposed by them. If their argument was successful against the ProTour would this difference be enough to distinguish their qualifying system?

In addition, in the face of a complaint that the Grand Tour organisers also employed a closed system, both the level of unilateral determination that the Grand Tour organisers reserve for themselves on entries to their events and any lack of independent, objective criteria in the selection of "automatically qualifying" teams and in the selection of wild cards would count against a defence of the Grand Tour organisers' system.

Any national bias in team entry decisions may also prove fatal to a legitimate purpose defence. If selection of teams for the Tour de France by ASO, for example, is based on the nationality of the team being selected, there are a

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<sup>160</sup> See above n 31. In December 2005, a group statement issued by ASO, RCS Sport and Unipublic stated: "selection must be based on both performance and ethical criteria: taking part in an event cannot be the result of negotiations. Team selection must ensure open access to the events; to this effect organizers must retain a sufficient number of wild card entries, enabling them notably to take into account good results obtained by 'professional' teams on the various continental circuits. Teams should have the option whether to take part in an event, with incentives to do so rather than mandatory measures": Cyclingnews.com, "UCI versus Grand Tour organisers: The gloves are off", <<http://www.cyclingnews.com>> at 10 December 2005.

<sup>161</sup> See for example, Cyclingnews.com, "ProTour can go it alone, says McQuaid", <<http://www.cyclingnews.com>> at 26 November 2005.

number of factors that would differentiate this from the circumstances of the successful defence in *Deliege*:<sup>162</sup>

- The rules applying to the selection of wild cards are uncertain and are at the discretion of the event organiser. They are not subject to objective criteria or predetermined rules.
- A nationality-based criterion could not be said to be inherent in the conduct of the event, particularly when other better-credentialed teams of different nationality seek to compete.
- The selection of teams is not by a national federation or international federation but by a commercial event owner whose economic interests may conflict with the principles of freedom of movement.

### **The Americanisation of procycling?**

A system of promotion and relegation has been identified as a feature of European sport.<sup>163</sup> “Closed competitions” are associated with the American sporting model.<sup>164</sup> This factor has been raised in the UCI / Grand Tour organisers dispute, most notably by ASO as a criticism of the UCI’s ProTour.<sup>165</sup> “Americanization”, a term not used flatteringly, has been described as “the lurking desire to eliminate those traditional rules of the games (such as promotion and relegation) that inhibit wealth maximization on a North American scale”.<sup>166</sup> On close analysis, this accusation against the UCI has little substance.

A reason that neither side in the dispute advocates an open model of competition is probably due to the structure of the sport itself. The total reliance of procycling teams on the support of the team’s sponsors creates a competition structure that is inconsistent with a wholly open competition. A procycling team takes the identity and in most cases is effectively owned or controlled by its principal sponsor. It has little or no independent existence. The withdrawal of a principal sponsor generally means the end of the team. This characteristic means that it is almost impossible to establish an open competition with

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<sup>162</sup> Ibid.

<sup>163</sup> *The Helsinki Report*, above n 113, par 5: “This system gives small or medium-sized clubs a better chance and rewards sporting merit.” See also Weatherill, above n 5, 58 quoting *Conclusions of the First European Union Conference on Sport*, [www.europa.eu.int/comm/sport/doc/ecom/assises-conclusions-en.pdf](http://www.europa.eu.int/comm/sport/doc/ecom/assises-conclusions-en.pdf). The recent European Commission *White Paper on Sport* considered that “certain values and traditions of European sport should be promoted” but that it is “unrealistic to define a unified model of organisation of sport in Europe”, above n 113, 12.

<sup>164</sup> Weatherill, above n 5, 59.

<sup>165</sup> There is some irony in the criticism that the UCI is promoting an American sporting model given the constitutional gerrymander enjoyed by the European cycling federations within the structure of the UCI.

<sup>166</sup> Weatherill, above n 5, 75.

qualification or participation rules that are independent of the continuing support of team sponsors and therefore the continuing existence of the team. In cycling, relegation of a team would be likely to lead to the withdrawal of the sponsor and the collapse of the relegated team. Difficulties also would exist in the case of a promoted team. In that case, there would be no guarantee that the promoted team's sponsors would be willing to keep the team alive by providing the substantial extra funding required to support a team at the ProTour level as compared with the resource requirements of teams at the lower levels of competition. Nor was this dependence of procycling on team sponsors a model imported to Europe from the United States. The sport was born and developed in Europe.

As with the application of competition law to the closed competition criticism, the Americanisation model criticism is another double-edged sword. The Grand Tour organisers are private corporations seeking to protect their capacity to select the participants to their events. They do not apply any independent or objectively determined selection criteria and oppose the criteria determined by the sport's governing body. Rather than supporting the European model of sport, the conduct of the Grand Tour organisers could be seen to be an example of a detrimental effect of Americanisation of European sport: "the temptation for certain sporting operators ... to leave the federations in order to derive the maximum benefit from the economic potential of sport for themselves alone."<sup>167</sup>

### **UCI's flight to globalisation**

An unintended consequence of the Grand Tour organisers' opposition to the ProTour may be to drive the UCI to further develop events outside of Europe:

*"If cycling just remains within the four countries of Western Europe, which is what the Grand Tours want us to do, the sport will never develop. All we will be doing is continuing to look after the financial interests of ASO. They are the only company in cycling making large sums of money."*<sup>168</sup>

The 2008 ProTour calendar includes for the first time an event outside Europe: the Tour Down Under in South Australia. Further expansion is contemplated, including to the United States, China and Malaysia as is the licensing of teams from outside Europe. There are also prospects of an Australian ProTour team

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<sup>167</sup> Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport within the Community Framework, *The Helsinki Report on Sport* (1999) 644, para 2. See also Weatherill, above n 5, 75–76

<sup>168</sup> Pat McQuaid quoted in [www.cyclingnews.com](http://www.cyclingnews.com), "Reinventing the ProTour: the calm after the storm?", [www.cyclingnews.com](http://www.cyclingnews.com) at 22 September 2007.

for the first time.<sup>169</sup> While this globalisation has been an objective of the ProTour,<sup>170</sup> there can be little doubt that the UCI has sought to expand the ProTour beyond its traditional European home earlier than it may have originally intended. The dispute with the Grand Tour organisers has provided the impetus for this expansion. The risk for the Grand Tour organisers is that major new cycling events that are part of the ProTour outside Europe may prove to be popular and erode the status and revenues of their events. This may happen sooner and the erosion may be greater because the Grand Tour operators are not part of the ProTour.

### Media rights

Central to the dispute with the Grand Tour organisers is the objective of the UCI for the media rights of all ProTour events and the UCI World Road Cycling Championships to be jointly sold, that is, sold as a single package. Opposed to this objective, the Grand Tour organisers want to maintain the ownership and control of their events.

#### *The UCI and the ProTour's commercial rights*

Under Article 3 of the *UCI Constitution*, the activities of the UCI are to be carried out in compliance with the principle of “the non-profit-making purpose: the financial resources shall be used only to pursue the purposes set forth in (the) *Constitution*. UCI members have no rights thereto”. Consistent with this, the UCI has claimed not to have any direct economic interests in professional cycling.<sup>171</sup> In fact, the current UCI regulations reserve the ownership of the commercial exploitation rights of events to the event organisers. While “the UCI is the exclusive owner of the UCI ProTour concept and trademark”, this is “without prejudice to the exclusive ownership rights of the organisers”.<sup>172</sup> A similar provision applying to unlicensed ProTour events reserves the exploitation rights of those events to the event owner.<sup>173</sup>

Despite its disavowal of a direct economic interest in the commercial exploitation of the ProTour, the UCI does have the objective of maximising the value of the rights attaching to the ProTour. Rather than have *no financial interests to promote or to defend*, it is suggested that what the UCI is claiming when it says this is that its commercial interest is of a different character to that

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<sup>169</sup> Ibid.

<sup>170</sup> See above, n 17. The lack of globalisation was identified as a structural weakness of cycling that the ProTour was to address.

<sup>171</sup> See, for example, UCI Press Service, “2005 UCI ProTour: a promising first season” (Press Release, 18 October 2005) at 3.

<sup>172</sup> UCI Cycling Regulations, reg 2.15.002.

<sup>173</sup> Ibid, reg 2.15.265. This provision appears to have been inserted to protect the position of the Grand Tour organisers whose events were included in the ProTour pursuant to compromise arrangements in circumstances where those event organisers were not required to hold ProTour event licences.

of parties such as the Grand Tour organisers. In accordance with its constitution, any profits accruing to the UCI from the exploitation of commercial rights attaching to the ProTour can only be used for the benefit of cycling. Profits will not be diverted to a commercial profit-making enterprise for private benefit.

With this objective in mind, it is interesting to look at how the commercial activities of the UCI and the ProTour are organised and structured. Does this structure lend itself to the benefit of the sport of cycling rather than to the benefit of the UCI as a commercial entity?

The UCI says that it “respects the separation of executive, legislative and judicial powers”.<sup>174</sup> Further, that:

*“As there is sometimes conflict between sporting and commercial interests, the UCI guarantees a clear distinction between the bodies responsible for the management, development and promotion of the sport of cycling and its commercial activities.*

*“The UCI guarantees transparency in its commercial activities, by limiting them exclusively to its events department. A separate commercial section within this department ensures that there are no conflicts of interest. Activities involving sponsorship, marketing and the sale of TV rights are made separate from the selection of organising cities for major events, as they are dealt with by separate divisions within the department.”<sup>175</sup>*

It is not clear whether it would be the UCI or the UPTC (if the UPTC is separate from the UCI) who would receive the income from the joint selling of the ProTour media rights. Even if these arrangements were clear, the viability of mere Chinese walls, internal administrative separations, to “guarantee” a distinction between its commercial activities and its role as a governing body of the sport is open to question. This may be a product of the historical role and structure of the international federation at a time when it is now trying to deal with the nature of modern sport and safeguard the development of cycling. Nevertheless, it is suggested that in the interests of good governance, more stringent provisions could be established and legislated within the regulations to clarify the bodies responsible for these separate functions and to establish clear separation in roles and responsibilities.

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<sup>174</sup> UCI, “UCI Rules of good governance”, <<http://www.uci.ch>> at 19 February 2007 at 6.

<sup>175</sup> Ibid, 7.

*Media rights and the Grand Tour organisers' events*

The opposition of the Grand Tour organisers is an obstacle in the way of the UCI achieving its objective of joint selling the media rights to the ProTour. As ASO Director Patrice Clerc has pointed out, the ProTour could not sell rights that it does not own.<sup>176</sup> The omission of the Tour de France, the most popular race in the world with 66% of ProTour event revenues, from the media package would seriously reduce the value of the package, perhaps to the extent of making the packaging of the remaining events unviable.

It is unlikely that the UCI could gain access to the commercial rights belonging to the Grand Tour organisers in the absence of agreement. Apart from any applicable domestic competition laws, it is likely that Articles 81 and 82 of the EC *Treaty* would prohibit this being made a condition of a ProTour licence or a condition on the participation in events of ProTour teams or UCI-licensed riders. An advantage that UEFA in respect of the Champions League and the Federation International de l'Automobile (FIA) in relation to Formula 1 have over the UCI is that those organising bodies own the rights to their events. They have not had to rely on the agreement of individual event owners to jointly sell media rights. So what is the UCI trying to achieve?

*UCI's media rights objectives*

UCI President Pat McQuaid has recently clarified the UCI's objectives concerning the media rights to the ProTour.<sup>177</sup> The UCI considers that revenue for cycling events from such sources as television and sponsorship is divided amongst the various events. The organisation wants to approach the ProTour in the same way as the UEFA Champions League football competition and motor racing's Formula 1 operate with joint selling of media rights to increase the value of the whole beyond the sum of its parts. It hopes that the ProTour media rights increase in value by being jointly sold.<sup>178</sup>

While ASO, through the Tour de France, has 66% of the revenue "cake" that is currently divided amongst the 27 ProTour events, the UCI is willing to agree that ASO could retain its 66% share but proposes that this could be 66% of a bigger cake. More than this, the UCI says that it has no interest in running negotiations for television rights and would be happy for ASO to do this on

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<sup>176</sup> Above, n 28. See also "Patrice Clerc: The ProTour has nothing to do with magic"; <<http://www.cyclingnews.com>> at 25 March 2005.

<sup>177</sup> L Clarke, "Seat of Power", *RIDE Cycling Review*, Issue 35, Summer 2007 at 46–48.

<sup>178</sup> For example, the bundling of broadcast rights by the National Association for Stock Car Auto Racing (NASCAR) increased their overall value to \$400 million, from \$100 million: *McKinsey Quarterly* July 2004. The UCI has also received reports from the sports marketing company T.E.A.M., who market the media rights on behalf of the UEFA Champions League: G Knapp, "ProTour versus GT organizers stoush: round 2, March 6", <<http://www.cyclingnews.com>> at 3 March 2006.



behalf of ProTour.<sup>179</sup> On this issue then, the UCI's role as the governing body of the sport acting in the interests of the sport appear to be wholly legitimate. The UCI is not seeking to take for itself the media rights for the ProTour events but is seeking to leverage these events for the benefit of the sport.

### *Validity of Grand Tour organisers' position on media rights*

In light of the clear provisions of the UCI Regulations and of this position of the UCI, an observer may wonder what the Grand Tour organisers are concerned about. The UCI's view is that ASO is fearful of being affected commercially but is unsure why the company holds this concern. It has been suggested that ASO may be concerned that revenues from cycling are going to decline and it may wish to be insulated from declines that may affect other events.<sup>180</sup> Another UCI representative has suggested that ASO is taking the commercial position of wanting to maintain the Tour de France's dominant position in the market. It does not want to see other events grow as this may ultimately dilute revenue for the Tour de France.<sup>181</sup> Supporting the view that ASO at least is adopting a commercial approach has been its unwillingness to agree with the UCI to any cross-promotion of the ProTour.<sup>182</sup> It would be to the detriment of the sport if this commercial interest was to prevail over the objectives of the ProTour.

In the event that the UCI did get agreement to jointly sell the ProTour media rights of all ProTour events or if it decided to proceed without the Grand Tour organisers events, how would the UCI deal with those rights? How would the European Commission view this process?

### *Approach of the European Commission to joint sale of media rights*

In the event that the UCI could overcome the objections of the Grand Tour organisers and it was able, either directly or through an agent, to jointly sell the media rights to the ProTour, what would be the approach of the European Commission?<sup>183</sup>

The Directorate-General of the EC's competition body has said:

*"A joint selling arrangement is a horizontal agreement. It is caught by the prohibition in Article 81(1) of the EC Treaty, as the agreement*

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<sup>179</sup> L Clarke above, n 177.

<sup>180</sup> Ibid at 48 per UCI President Pat McQuaid.

<sup>181</sup> Ibid at 49 per UCI spokesperson Enrico Carpani.

<sup>182</sup> S Stokes, "UCI in contact with ASO", <<http://www.cyclingnews.com>> at 17 February 2007.

<sup>183</sup> Macauley has likened the issues concerning the joint selling of media rights to the situation that lead to the *Bosman* case: "For even though the playing field has switched from player transfers to television rights, there is an unmistakable feeling of déjà vu.": Macauley, D, "Exclusively For All and Collectively For None: Refereeing Broadcasting Rights Between the Premier League, European Commission and BSKYB" (2004) 25(6) *European Competition Law Review* 370.

*prevents the individual clubs each having a relatively small market share from individually competing in the sale of media rights. Instead we have a joint sales organisation with a significant market power. Markets that would be demand-led thus become supply driven.*<sup>184</sup>

Despite this, the European Commission considers that joint selling arrangements do create efficiencies within the meaning of Article 81(3) and that they can be carefully balanced so that the pro-competitive effects outweigh the negative effects. A joint selling arrangement has the potential of improving the media product and its distribution to the advantage of the sport, broadcasters and viewers.

In the *Champions League case*,<sup>185</sup> the Commission noted unique characteristics of the sporting product that affected its assessment of the effects on competition of joint selling arrangements. These factors also apply to cycling events:

- The product is ephemeral as viewers are often only interested in live broadcasts.
- Substitution is very limited, because viewers who want to see a given sporting event are unlikely to be satisfied with the coverage of another event.<sup>186</sup>

Counterbalancing the anti-competitive effects of joint selling, three specific benefits have been identified:<sup>187</sup>

- Creation of a single point of sale provides efficiencies by reducing transaction costs for clubs and media operators. Clubs do not have to establish their own commercial departments capable of dealing with large and complex media deals in a large number of countries.
- Branding of the media output by a single entity creates efficiencies by assisting the media products gain wider recognition and distribution.
- Creation of a league product, a product focused on the league as a whole rather than the individual football clubs participating in the competition, an attraction for viewers. This allows media operators to provide coverage to consumers of the league as a whole and over the course of an entire season. No individual football club could enter into a commercial agreement, which would give a broadcaster any guarantee of being able

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<sup>184</sup> T Toft above, n 149 at 6.

<sup>185</sup> IP/03/1105.

<sup>186</sup> T Toft, "Football: joint selling of media rights", (2003) 3 *Competition Policy Newsletter* at 47.

<sup>187</sup> T Toft "Developments in European Law", above, n 149 at 7.

to plan its program schedule for the whole UEFA Champions League season right to the final round.<sup>188</sup>

A number of standard remedies to mitigate against the anti-competitive effects of joint selling were developed by the EC Commission out of *UEFA Champions League case*,<sup>189</sup> Before it will authorise joint selling of media rights, the EC will:

- require competitive tendering under a fair, reasonable, non-discriminatory and transparent terms at regular and frequent intervals;
- limit the duration of exclusive rights to no more than three seasons;
- oblige the joint selling entity to unbundle the media rights into separate packages; and
- require that where the joint selling entity has not managed to sell particular rights by a certain cut-off date, the entitlement to sell the rights falls back on the individual clubs. The club is free to sell the rights in competition with the joint selling body.<sup>190</sup>

Where there is particular risk that competition may be compromised, the Commission may adopt a more intensive approach in which it may:

- impose a requirement that no single buyer be allowed, for example where there is already a dominant undertaking that is likely to gain all rights, securing its dominant position;
- limit the medium by which the rights may be exploited by a particular undertaking;
- require that the tender process be overseen by an independent trustee that reports back to the Commission;
- require sub-licensing to third parties.<sup>191</sup>

If it ever does get to a position of being able to jointly sell the media rights to the ProTour, the UCI would need to ensure that its joint selling arrangement complied with these EC requirements. In its favour is that financial solidarity between the different levels of the sport and the objectives of training young sportspeople and of promoting sporting activities among the population have been identified as factors supporting the allowance of joint selling of media

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<sup>188</sup> T Toft "Football: joint selling of media rights", above n 186 at 51.

<sup>189</sup> *Joint selling of the commercial rights of the UEFA Champions League*, (OJ 2003 L 291/25) 2003/778/EC: Commission Decision of 23 July 2003

<sup>190</sup> *Ibid.*

<sup>191</sup> T Toft "Developments in European Law", above, n 149 at 9–10.

rights by sporting bodies.<sup>192</sup> These are all factors within the control and influence of the UCI as the sport's governing body.

## Conclusion

To return to the question posed in the title to this essay, is the ProTour an imminent train wreck or is it an enduring reform? It is unfortunate that some of the colourful exchanges that have characterised this dispute have obscured the fundamental issues that underlie the positions of the parties.

Of those positions, certainly the representative nature of the UCI has some shortcomings. Nevertheless, the UCI is the governing body of the sport, it is representative and it has implemented a competition model for the sport of professional road cycling that is designed to promote and develop the sport. Crucial elements of its competition model such as the operation of the Licence Commission can properly be considered to be profound reforms. The financial strength and stability inherent in the ProTour system is of invaluable benefit to the teams, their sponsors and the riders. It is a reform that should not be conceded lightly.

In contrast to some of the language it has used,<sup>193</sup> the position of the UCI regarding the commercial rights attaching to ProTour events is measured and reasonable. Under the UCI's model, event owners will remain entitled to the commercial profits of their events. The UCI is merely seeking to leverage the commercial rights of cycling for the benefit of the sport, as has been achieved in other sports. Opposing this, and at the heart of the position of the Grand Tour organisers, is their commercial interests. Arguments about a "closed" sporting model and a lack of promotion and relegation system may be convenient but are lacking in cogency. There is little to commend in the position of the Grand Tour organisers when viewed from the perspective of the interests of the sport.

While it may not be a "train wreck waiting to happen", it is possible that the question of whether the ProTour reforms will survive will be determined by one of the current court cases. Alternatively, the question may be answered by the strength of the solidarity of the teams and the riders. Ultimately, all of the parties involved—the UCI, the teams, the sponsors, the riders and the event organisers—are dependent upon each other for the success of the sport. For a compromise to be possible, it may require a show of solidarity on the part of the teams to engender the solidarity that is required on the part of the UCI and the Grand Tour organisers.

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<sup>192</sup> *The Helsinki Report*, above n 113, par 4.2.1.3. See also Weatherill, above n 5, 70.

<sup>193</sup> See above n 3, 35.