



POLICY ROUNDTABLES

Competition and Sports

2010

Introduction

The OECD Competition Committee debated competition and sports in June 2010. This document includes an executive summary of that debate and the documents from the meeting: a background note and written submissions by Australia, Austria, Chile, Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, Mexico, Norway, Poland, Spain, Sweden, Turkey, United Kingdom, United States, European Union, Argentina, Bulgaria, Egypt and Chinese Taipei as well as an aide-memoire of the discussion.

Overview

The treatment of sports in competition law is complicated for a number of factors. First, the analysis of sport has a peculiar economic logic, based on sporting competition and a degree of economic co-operation, which potentially legitimises a range of cartel-like agreements. Second, sport has a special position in our society, and cannot be treated merely as a business, even if there are clear examples of business transactions. Third, there is a close linkage between professional sport and the development of sport at the "grassroots" level, and therefore there are grounds for cross subsidies from one to the other. Fourth, sport is frequently governed by independent associations which create their own private law which sit uneasily alongside civil law.

The Competition Committee discussed competition issues related to sport and especially in relation to two main areas, labour market restrictions and broadcasting of sport rights. It offered an opportunity to explore the limits that competition law may face and the experiences of Member and non-Member countries in this complex area. A consensus seems to be emerging that the activity of sport organisations are covered by the competition laws relating to agreements in restraint of trade, and that such agreements must be evaluated under rule of reason. A degree of latitude is granted to sport organisations in recognition of their special economics, but restraints must be demonstrated beneficial to consumers, proportionate and indispensable to meeting their stated goals.

Related Topics

Competition Issues related to Sports (1996)

Competition and Regulation in Broadcasting in the Light of Convergence (1998)

Competition Issues in Joint Ventures (2000)

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition and Sports held by the Competition Committee in June 2010.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence et le sport qui s'est tenue en juin 2010 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

A roundtable discussion on Competition and Sports was held at the June 2010 Competition Committee meeting. In light of this discussion, the Secretariat's background paper and the delegates' submissions, a number of key points regarding the topic emerge:

- (1) *There is a distinction between sporting rules and business decisions but it may be only a fine line that separates what is subject to competition law from what is not.*

Professional sports has some duality in that it can be considered both like any ordinary commercial activity but at the same time it should be treated differently than other businesses due to its particular economics, the relation between sport and culture, the professional amateur sport link and the special influence of the state and the law on the sports' governance. Competition law focusing on regulating economic activities, it is important in order to know whether competition law applies to a sports' activity if it is purely sportive or there is an economic element to it.

Both in the US and the EU that distinction has raised the attention of the. In the US, the Supreme Court made a distinction between on-field decisions and business-side decisions. The intention when referring to on-field conduct was to refer to the rules of play, which are rules that would not reasonably raise competition law concerns. In the EU, the European Court of Justice ruled that as long as the activity performed is an economic activity, which is undeniable for professional sports, it falls under the rules of the Treaty, so its various provisions - including on competition - need to be applied. The Court introduced a 2-step approach for sporting rules, looking at 1) the objective necessity of the rule, and 2) whether the restrictive effects resulting from such rule are inherent to the pursuit of that objective and are proportionate to its achievement.

Sports law cases tend to present unique issues and fact patterns because of the necessity for some cooperation among teams to structure the terms of on-field competition. This peculiar aspect of sports law cases should be borne in mind when relying on such cases in other issues such as joint ventures.

- (2) *The importance of broadcasting markets and the choice of what should be viewed free to air and what can be sold to private channels.*

Sports' rights represent highly valuable assets for the broadcasting markets and competition issues arise in the grant of exclusivities. Broadcasting rights' market is usually seen as a market of its own, where rights are sold for long periods and market shares tend to be fairly steady.

A question that has come up during the discussion is what type of sporting events should be kept under free-to-air television and what can go to pay TV. The answer is not unique as it can depend on political factors as much as economic ones.

The level of exclusivity a broadcaster could benefit from was also discussed and in particular the situation where it is at the same time an internet service provider, therefore having a "double

exclusivity". Here the danger is to create completely integrated blocks offering all the services and this is no justification to allow exclusivity rights to that "all- in- one provider", which could force customers willing to see all the football to subscribe to the different blocks. It is important to open the downstream market which could also have a positive impact on the upstream one. Consumer harm is an element to be taking into account in the assessment too.

(3) *Joint selling versus individual selling of broadcasting rights: the pros and cons*

A majority of countries permit the system of joint selling, although it could be seen as a hard core competition restriction between clubs and may have an impact on competition in the broadcasting markets by reducing the number of broadcasters being able to benefit from the rights to broadcast the sport events. Competition authorities have generally decided that the benefits of collective selling outweigh the concerns just described. However, most of the time agencies subject such arrangements to commitments from the broadcasters such as rights split in packages and length of contract limited in time.

Some of the most common benefits from collective and individual selling are described below.

Collective selling provides the capacity to sell a schedule for the entire league as a whole, which may be more valuable than the sum of the parts. It also provides the capacity to generate a higher income than would be possible individually and the capacity to redistribute income to the grass roots teams.

Individual selling involves actual competition between clubs. The rights can be shared between various broadcasters, but there is a need for cross viewings so that consumers do not have to subscribe to each of them. It also means increased competition in the broadcast markets.

However both of these imply strong concerns. *Collective selling* can restrict the output of professional sport leagues. The redistribution objective is not necessarily better met by collective selling. Besides it can be tempting for powerful broadcasters to buy as many rights as possible in order to maximise profits and create a dominant position.

As for *individual selling*, imbalances can arise between the bigger clubs and the smaller ones, the latter sometimes being unable to sell their rights profitably or even at all. Questions that may rise include: Who sells the rights? The home club only or both teams involved in a given contest? Finally, if clubs are owned by broadcasters this can lead to biased and interested sales giving excessive bargaining powers to these clubs at the time of selling the rights.

(4) *Exclusivity of the rights granted to broadcasters is positive within limits*

It is inherent with the grant of broadcasting rights that the broadcaster will seek some form of exclusivity. A good balance can be hard to strike between the claims of broadcasters and leagues that exclusivity is necessary to fund long-term investments in the product and the fact that exclusivity restricts competition between broadcasters. In most of the cases, competition authorities have concerns when the length of the exclusivity is over four years. As part of the roundtable discussion, an example of a successful solution in selling broadcasting rights on a non-exclusive basis after finding that the problem resulting from a long exclusivity period was to partly remove the exclusivity for some events in order to get more competition in broadcasting distribution. This led to good effects in terms of accessibility for consumers, prices for consumers and innovation and shows that it is possible to have successful programming even where some exclusivity has been removed at the level of the game itself, allowing the same game shown on two platforms at the same time.

This shows that it is possible to increase output, i.e. increasing number of games shown and increasing number of viewers watching the games, even if the same event is available across multiple channels. Technological barriers seem less and less significant as time goes by. Taking an evidence-based approach, there is reason to believe that exclusivity does not produce as many benefits as is often claimed and given the significant potential for anticompetitive harm associated with exclusivity, such arrangements should be examined very carefully before being allowed.

(5) *Is a league a joint venture or a single entity?*

This question was addressed by the US Supreme Court in the “American Needle” case where the issue was whether the National Football League (NFL) and its 32 separately owned teams functioned as a single entity when licensing trademarks and logos. The ruling did not recognise that a league, such as the NFL, could be considered a single entity in the context of an exclusive dealing arrangement with a licensed apparel maker. Therefore the teams were separate economic entities and could be liable for agreeing to restrain trade under the Sherman Act. Based on this, the Court decided that they also compete on the market for intellectual property because each team has its own valuable trademark. The Supreme Court did not close the case but sent it back to the appellate court to decide, based on the rule of reason, what the competitive impact of the teams’ actual conduct is.

During the roundtable discussion on this case, Prof. Szymansky stressed that this is a very important decision due to its consequences. Had the NFL won their argument and leagues were granted single entity status then clubs in the US would be able to enter almost any kind of agreement without the possibility of a competition law challenge. There would have been a number of significant changes in sport’s organisation, in particular on the broadcasting market. It would have allowed collective selling of broadcast rights to pay TV, which currently can be challenged under the Sherman Act, whereas games on free-to-air TV cannot, as sponsored telecasts benefit from an exemption. The case was also very important in terms of protecting American consumers’ interests by preventing a massive move to pay TV.

(6) *What are the players: an economic entity or an individual? Are they subject to competition law too?*

The rights of the players ought also to be considered although it is not always a competition law issue, as it revolves more around the free movement of workers and often a labour law issue. However players can be considered as an undertaking due to the economic value they attract. Nonetheless, movements of players from club to club are subject to some restrictions in order to maintain a balance between clubs by preserving a certain degree of equality and uncertainty as to results. Labour market issues have given rise to many decisions around the world. In the US, the non-statutory labour exemption rules out competition enforcement in this area. In the EU, the *Bosman Case* had an important impact on this question, as rules limiting the number of foreign players representing a club were struck down on the basis of the free movement rights in the EU.

BACKGROUND NOTE ¹

1. Introduction

The Committee has not held a roundtable on competition issues related to sports since 1996,² when it discussed the sale of exclusive broadcasting rights, competition between different leagues, sponsoring and exclusive supply arrangements between equipment manufacturers and clubs, and retention and transfer terms in players' contracts. Those issues remain important, but a great deal more has been written about them by academics and courts in the interim. Furthermore, professional sports have become increasingly commercialised and continue to generate substantial revenues, particularly from the sale of broadcasting rights. For example, in early 2009, the UK's Premier League earned nearly £1.8 billion by selling packages of rights to broadcast its football matches for the next three seasons. US professional teams collectively earn about US \$16 billion per year in revenue.

As the sector's economic value has grown, so has the importance of competition law in shaping the conduct of the participants. Indeed, high-profile cases are currently pending on both sides of the Atlantic, with *Football Association Premier League Ltd v QC Leisure* before the European Court of Justice (concerning the use of satellite television decoders outside territories authorised in contracts between leagues and broadcasters) and *American Needle, Inc. v. National Football League* (concerning whether teams in leagues are separate entities for the purpose of determining liability under s. 1 of the Sherman Act) before the US Supreme Court. It is therefore appropriate for the Committee to reconsider the competition issues raised by professional sports.

2. The treatment of professional sports

On the face of it professional sports appear like any ordinary commercial activity. Enterprises organised on business lines provide entertainment services, hire employees, generate revenues, incur costs and report profits and losses. According to this logic, these enterprises should also be subject to the competition law like any others- if they collude to fix prices, share markets, or impose restraints on trade they should be treated under the law as a cartel; if organisations dominate a particular branch of sport and therefore exercise market power then they should be restrained by competition law from abusing their dominance through exclusionary or predatory practices.

In practice, however, professional sports are usually treated as a special case on a number of different grounds. These can be summarised as follows:

- Peculiar economics: Sports competition represents a peculiar form of production, whereby the co-operation of sporting rivals is necessary to obtain the output- the game, the league competition, the championship. Thus some degree of co-operation among rivals is necessary for production to take place.

¹ This background paper was prepared by Professor Stefan Szymanski (City University, UK) for the OECD Secretariat.

² <http://www.oecd.org/dataoecd/34/49/1920279.pdf>.

- Sport and culture: Sports competition has a special place in society: sporting culture is intimately linked with national identity and has the capacity to promote social cohesion. Even if professional sports involves finance, it also reflects ethical values. Indeed, in most countries there are many people who believe that commercial values should be eliminated from or significantly curtailed in professional sports. All this means that politicians have a significant stake in orderly maintenance or in many cases the explicit regulation, of sporting competition.
- The professional amateur sport link: Professional sport is closely linked, formally or informally, to amateur sport. Amateur sport has the characteristics of a merit good: participation in amateur sport is desirable for reasons of physical and social wellbeing as well as being promoted on the grounds of its capacity to promote social cohesion.
- Governance, the state and the law: sports organisations are often fundamentally different from other forms of commercial organisations. In most countries not-for-profit national federations exercise control over the organisation of professional as well as amateur competition. Governance structures vary considerably, including direct state control through publicly appointed officials and private membership organisation where representatives are elected by members. The relationship between international governing bodies and national governments plays out in a number of different fields- in health policy, in education policy, in cultural policies as well as in competition policy. Political jurisdiction is often contested.

Before considering in detail these special features it is necessary to provide some examples of conduct that might give rise to concern to competition authorities.

3. Problems for consideration

3.1 *Cartel-like conduct*

Many of the competition law issues that arise in sports have to do with professional team sports. Generally clubs are incorporated either as member associations or limited liability companies, which then hire players to engage in competition on the club's behalf. Sporting competition between clubs therefore entails the possibility of competition to hire players, and the movement of players from one club to another. Sports organisations argue that some restrictions on mobility are necessary to maintain the integrity of competition (*e.g.* limiting the capacity of a club to buy extra players near the end of the playing season in order to win a championship). Thus clubs, leagues and sports federations have agreed rules restricting the labour market mobility of players. Players may believe that these rules are excessively restrictive and that collective agreements amount to a restraint of trade.

In most professional team sports it is typical for sports clubs to be organised in league competition, a format which produces a regular and attractive entertainment for fans and spectators. When clubs sell the rights to broadcast games in these competitions they often prefer to sell these rights collectively rather than individually. The clubs or league representatives will also typically argue that they can obtain a higher price in the market for these rights thanks to collective selling. For this reason competition authorities have frequently challenged collective selling agreements under cartel laws.

3.2 *Dominance/Monopolisation issues*

There are at least 170 international sports federations claiming jurisdiction over particular sports or sporting activities (*e.g.* Paralympics' sport).³ Affiliated to these are national federations, which in the case

³ http://en.wikipedia.org/wiki/List_of_international_sport_federations.

of the major sports represent almost every nation in the world (in fact FIFA and the IOC have more members than the United Nations). These organisations are concerned with setting the rules, licensing players, organisations and competitions, resolving disputes and promoting interest in their sport. In many cases they are also organisers of championships. The biggest of these are the FIFA World Cup and the Summer Olympic Games awarded by the IOC, but there are many others, including regional competitions. These competitions often amount to substantial economic activities commanding large audiences.

Competition authority concerns can arise when organisers use their dominance to restrict access of consumers in particular ways (*e.g.* discriminatory regulations relating to the sale of tickets), or by seeking to foreclose potential rivals from organising competing championships (*e.g.* by refusing to grant official recognition or imposing penalties on athletes who choose to participate in rival championships).

While sports organisations may defend themselves from antitrust challenges on the same kinds of grounds as any ordinary business or group of businesses might, they also tend to claim that they are entitled to special treatment/exemption from competition law because of the special nature of their activities described above (and in some cases government legislation has granted exemptions). Thus before examining specific cases, it is important to review in more detail the case for special treatment.

4. Peculiar economics

4.1 Two peculiarities

The definition of sport is itself somewhat problematic, but for the purposes of this paper the Council of Europe's definition will suffice: "all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels". From an economic perspective the key element in this formulation is the notion of *sporting competition* as distinct from *economic competition*. Thus the first peculiarity of sport is that a sporting competition can only be produced if there are at least two rivals. This makes professional sport unique among commercial activities- no other business enterprise depends on joint production with one of its rivals.⁴ At one extreme this point has led some to conclude that sporting rivals, even if organised as formally independent undertakings, in reality form a single economic entity for the purposes of producing a contest or championship (this "single entity doctrine" is discussed in more detail below, along with alternative interpretations). At a minimum it is necessary for some agreement, explicit or tacit, to exist among competitors, if nothing more than an agreement to be bound by the rules of the sporting competition. The first peculiarity can be said to relate to all sporting competition, whether it entails a commercial dimension or not.

A second peculiarity is specific to the commercial exploitation of sporting events. The so-called "*uncertainty of outcome*" hypothesis contends that interest of spectators in a sporting contest will tend to increase the more uncertain the outcome of that contest is. Unfortunately this hypothesis is not terribly precise. At one extreme it can be acknowledged that if the outcome is known with certainty the appeal of the contest is limited, a fact demonstrated by the large difference in payments by broadcasters for the right to broadcast live events (whose outcome is unknown) compared to the willingness to pay for delayed broadcast rights (if a broadcaster is interested at all) where the viewer might know the outcome before watching the event. At the other extreme, it is not obvious that a race between two athletes where each has a 50% chance of winning will attract a larger viewing audience than a race where one athlete has a slightly better chance of winning than the other (say 55% against 45%). This is more than just a "*ceteris paribus*"

⁴ See *e.g.* Neale (1964). There may be other cases where joint production is feasible or even desirable, but none where it is *necessary*.

problem. In some cases consumers may prefer to see an uneven contest in which an established champion is pitted against a less successful challenger (*e.g.* David v Goliath) than an evenly matched contest.

If it is accepted that uncertainty of outcome at some level is desirable, then organisers of sporting competitions may have an economic incentive to establish rules and regulations intended to achieve a particular degree of uncertainty of outcome so as to maximise spectator interest. In particular, organisers may seek to create a degree of *competitive balance* among competitors in order to ensure that results fall within a desired range of uncertainty of outcome.

4.2 *Economic models of a sporting contest*

A sporting contest is a zero sum game in which rivals compete for a share of a fixed quantity of success. Contestants contribute effort, ability, and investment in playing talent in order to gain a share of success.⁵ Every contest has a *contest organiser* whose interest lies in the attractiveness of competition as a whole and *contestants* whose objectives are to win and to obtain the maximum possible return from their participation in the contest. In many cases the distinction between the contest organiser and contestants is clear- for example if we consider the organisation of athletic races (*e.g.* the New York Marathon), horse races (*e.g.* the Epsom Derby), or cycling (*e.g.* the Tour de France), then in these cases the organiser sets the rules of the contest, invites entrants, offers prizes and seeks to generate income to cover costs and generate a surplus. These sports are typically individualistic. In team sports, the organisers of professional leagues such as Major League Baseball in the US or the English Premier League (football) the teams themselves own and control the league, so that the contest organiser and the contestants are the same. By and large the separation of contest organiser and contestants tends to be observed in individualistic sports, whereas the functions tend to be integrated in team sports. However, this is not always true and there are some cases where team sports have contest organisers (for example, Formula One and NASCAR motor racing are both sports where the competitors are teams but the race organisation is controlled independently, while the Board of the ATP, which organises international tennis tournaments, includes representatives of the senior players).

We can hypothesise that there exists a demand function on the part of spectators/fans that is increasing depending on:

The quality/effort of the contestants (better players make more attractive contests) and

Outcome uncertainty.

With individualistic sports particular players may attract support, based on nationality, personality or longevity, and therefore there may also exist demand for “celebrity” players above and beyond the demand to watch the quality of their play, but in general such effects are quite limited and constrained by the relatively short careers of players. In professional team sports, however, teams tend to be identified with a particular location (generally a city) and fans tend to identify with their local team. In such cases consumer demand is also increasing with:

The probability that their preferred player/team wins.

⁵ At one extreme, the player/team with the highest contribution wins with probability one and at the other extreme the outcome is independent of ability/effort, generally contests somewhere in between. A convenient formulation of this problem is provided by the Tullock contest success function analysed in Szymanski, S. (2003) “The Economic Design of Sporting Contests” *Journal of Economic Literature*, XLI, 2003, 1137- 1187.

Note that (b) and (c) are to some extent in conflict with each other. However, since most leagues operate on a “home and away” basis, with teams alternating between games played at their home stadium and the stadium of a rival, a league championship can appear balanced if teams always win their home games.

4.2.1 *Design of an individualistic contest*

Given a contest success function, an organisational structure and a demand function we can now consider how a contest organiser would run a contest (*e.g.* a footrace). The organiser needs first to take into account the incentives of the contestants. It is possible that contestants are motivated simply by the desire to compete and to win, and will thus always supply maximum feasible effort. The organiser still has the problem of determining who to admit to the contest. Given the demand for uncertainty of outcome, the organiser wants to select entrants based on the distribution of talent. Talent is likely to be distributed according to a lognormal or pareto distribution, with small numbers of highly talented individuals at the top end of the distribution. As a result the organiser faces a trade-off between the quality of the race and outcome uncertainty. By including the most talented contestants the organiser might create a very unbalanced contest, while a group of contestants from the middle of the distribution might not offer the highest quality but produce a balanced contest.

The organiser’s problem is more complex when the contestants respond to incentives. In practice most entrants in professional contests are paid a fixed fee for participating and a prize depending on their success in the contest. Often the prize structure can be quite complex, offering not only a prize to the winner, but also a range of prizes depending on rank, and also possibly a prize based on absolute performance (*e.g.* a world record breaking time). Contestants are expected to supply more effort when prizes are larger, and so the greater the share of their reward that comes in the form of a fixed fee, the lower the incentive to supply effort. However, contestants can also generate income from their success through endorsements and sponsorships paid for by advertisers, providing additional incentives for the contestants to be successful. At the same time as responding to prize incentives, it can also be assumed that contestants dislike supplying effort. While many sport stars seem highly motivated to win at all times, regardless of the effort required, in practice athletes need to train consistently and often deny themselves the opportunity to participate in pleasurable activities, which may be considered part of their “effort”.

In the simplest case where the contestants have identical abilities and dislike supplying effort, it is straightforward to show that organiser can maximise demand by offering a single prize to the winner and the lowest feasible fixed fee.⁶ If abilities are heterogeneous then matters are more complex. First, if there is competition among contest organisers then it may be optimal to increase the size of the fixed fee and reduce the prize so as to attract higher ability entrants.⁷ Second, if outcome uncertainty is highly desirable then the organiser could prefer to exclude the highest ability contestants so as to have a more balanced contest. Third, if abilities are widely distributed multiple prizes (*e.g.* by rank) may elicit more effort in total, since lower ability contestants with little chance of winning the first prize will invest more effort if there are lesser prizes.⁸

⁶ Contestants expend effort in order to win a valuable prize; both aggregate and individual efforts are increasing and net returns are decreasing in the discriminatory power of the contest. If the discriminatory power is too high, a pure strategy equilibrium may not exist, although mixed strategy equilibria are possible.

⁷ For example, if entrants are risk averse and organisers are risk neutral then increasing the fixed fee provides insurance, even if it also reduces effort.

⁸ See *e.g.* Szymanski, S. and Valletti, T. (2005) "Incentive effects of second prizes," *European Journal of Political Economy*, 2005, 21, 2, 467-481.

A difficult choice for the organiser when abilities are heterogeneous is whether to maximise “winning effort” (e.g. breaking the world record) or “total effort” (so that all contestants try their hardest). This clearly depends on the nature of demand function. Heterogeneity also raises the issue of handicapping. Handicapping is common in horse racing (where presumably the horses themselves do not respond to financial incentives and always run as fast as the jockey can make them), since the organisers want evenly balanced contests so as to provide an attractive range of betting options (viewing for its own sake is far less important from a commercial standpoint). Handicapping is much less common in individual sports, presumably because individuals would respond negatively – what would be the incentive to train hard to win if you knew that this effort would then be cancelled out by a handicap? There is also a danger that handicapping leads to strategic behaviour, misrepresenting ability in smaller contests in order to obtain a more favourable handicap in bigger contests.⁹

4.2.2 *Design of a team sports contest and the competitive balance defence*

As mentioned above, in a team sports contest each team is usually organised as a club located in a city with its own stadium and plays home and away against other teams in the league. Professional clubs undertake commercial activities in the form of hiring players in the labour market while selling tickets, merchandising, sponsorship and broadcast rights to consumers. The club provides an identity with which fans can associate and forms the basis of long term support and to many supporters the club is more important than the individual players. Whereas for individual sports there is considerable attraction in the creation of a single contest (such as a race or tournament staged over a few days at most), maintaining the interest and support of local fans is better achieved by providing a regular sequence of games over time, generally in the form of a league championship. While a knock-out championship format such as the FIFA World Cup is the most exciting since the result is “all or nothing”, a league format offers an extra dimension to competition, by creating a narrative throughout the playing season. However, the league format extends the joint-production interdependence of contestants beyond a single event to an entire season. The capacity of teams to complete the entire sequence of scheduled games is essential to the financial stability of a league. Each away game that a club plays can be seen a form of “gift exchange” with rival teams, where the rivals then gift in return a visit to the club’s stadium. Each club faces a financial risk that one team may be unable to fulfil its undertakings to play at its stadium. There is a systemic risk not dissimilar to systemic risk in banking, where the failure of one threatens the failure of all.

From the point of view of contest design and incentives, prizes would seem just as appropriate a mechanism for rewarding effort as they are in individual contests, but in practice the use of explicit financial prizes is almost unknown in team sports. Instead the reward for success in team sports is typically an increase in attendance at games, the ability to raise ticket prices, increased advertising and merchandising opportunities and increased value of broadcasting rights.

In team sports the significance of the uncertainty of outcome hypothesis is as great, if not greater, when it comes to league competition than it is in relation to an individual game. As stated above, if clubs have local fans then they will be more interested in the home team winning with a probability, making an unbalanced contest. However, the league narrative will be more exciting if more teams stay in contention for the league title for a longer period of time. It has been argued that the need to maintain a competitive balance among teams through the season necessitates collective agreements between the teams to redistribute resources. This can be called “the competitive balance defence” of cartel-like restraints in sports leagues. The competitive balance defence can be said to have two legs:

- Fans prefer a more competitively balanced league championship than the one that results from unrestricted competition among the clubs (market failure);

⁹ This might be considered analogous to bluffing in poker.

- Restraints in the form of restrictions on the operation of the labour market or agreements to share income can achieve more attractive levels of competitive balance.

The first leg of the competitive balance defence is a statement about the nature of competitive equilibrium in a contest. There exists some distribution of success within the league that will maximise the interest of the fans. The precise form of this distribution will depend on the uncertainty of outcome hypothesis balance and the distribution of fans in the league. If each club has equal potential to draw fans from a given level of success, then the implication is that an equal distribution of success will maximise fan interest. However, given that cities or fan bases for teams tend to vary in size, the optimal degree of competitive balance is likely to reflect the inequalities in their drawing powers.¹⁰

Unrestricted competition will be efficient from the point of view of the teams collectively if the resulting distribution of success maximises the total support for the league. However, inefficient outcomes are possible if individual teams care only about their own returns, not the total returns to the league.¹¹ Increasing the efficiency of the equilibrium for the clubs is not the same as increasing social welfare. There is no guarantee that the distribution of success which maximises the returns to the clubs will maximise consumer surplus. In general the distribution of consumer surplus among the inframarginal fans will be key to this calculation, which is unlikely to be easily established. These issues arise whether clubs have purely commercial objectives (i.e. are profit maximisers) or embrace some other kinds of objective (e.g. win maximisation).

The second leg of the competitive balance defence rests on the capacity of clubs and leagues to design mechanisms which will achieve something closer to the ideal competitive balance for the league. It is in fact typical for clubs and leagues to claim that the unrestricted free market distribution will be too tilted in favour of large market teams at the expense of small market teams, and that therefore redistribution is required from the big to the small. Mechanisms that can be employed include measures to redistribute revenues such as gate sharing, or measures to control the allocation of playing talent (labour market restraints). These types of mechanisms are central to the analysis of professional sports and competition law. In order for social welfare to be increased, not only is it necessary to show that a particular restraint can achieve its stated aim of achieving a superior degree of competitive balance, but also that the restraint is necessary to the achievement of this end and does not at the same time generate new inefficiencies whose costs outweigh the benefits attributable to the restriction.

Despite the great weight placed on the desirability of uncertainty of outcome by sports organisations, there is surprisingly little systematic evidence to show that anything other than extreme imbalance is a problem. Even on a priori grounds there are some good reasons to think that competitive *imbalance* can be attractive. First, while balance can be exciting, so can the contest between a Goliath and a David. Even if David seldom wins, the realisation of the completely unexpected can generate enormous satisfaction. Second, the performance of a perpetually successful team can also provide extra interest, either among those who support the “dynasty”, or among those who are rooting for it to fail. For example, those who do

¹⁰ Suppose for example that attendance is an increasing concave function of success (i.e. there are some diminishing returns), then the maximum attendance at the league is achieved where the marginal returns from success are equalised. Typically one would expect this to mean that the big city teams should win more often than the small city teams, but strictly speaking what matters is the marginal returns and it is possible that the optimal distribution of wins could favour a small city team whose fans were highly sensitive to success over a large city teams whose fans remained loyal regardless of the level of success.

¹¹ Szymanski, S. (2004) “Professional team sports are only a game: The Walrasian fixed supply conjecture model, Contest-Nash equilibrium and the invariance principle” *Journal of Sports Economics*, 5, 2, 111-126 illustrates how this inefficiency may manifest itself in a distribution of wins that is *less* uneven than is optimal.

not support the New York Yankees love to hate them. Third, even if it were true that a completely predictable contest would be unattractive, it is hard to say what the effect of a small change in balance would be starting from a given distribution of wins. Few economists think that a perfectly balanced contest would be in the best interest of a league, given that in most leagues teams from larger cities have greater levels of support- at some level it is desirable that the strong teams are relatively successful in order to sustain the widest possible interest.

A test of the uncertainty of outcome hypothesis can be formulated in a number of ways. The most widely used approach has been to measure the uncertainty of outcome of an individual match in a league, and to test whether attendance at the match is significantly affected by the degree of uncertainty. Match uncertainty can in turn be measured in a number of ways. One approach is to use a measure of the relative quality of the two teams based on earlier results, weighted in favour of more recent games. The difficulty with this is that the researcher can have only limited confidence that past results will be a good guide to the future, and hence any estimate is likely to be imprecisely defined. The approach that has been adopted in most of the more recent literature is to use betting odds. If these odds are set by bookmakers in a competitive market then they should provide an unbiased expectation of the probability of each team winning (or a tie) and hence a basis for estimating the effect that the balance of probabilities will have on attendance. Some caution is required here, since in some countries and for some sports, such as soccer in the UK, betting is based on fixed odds set by the bookmaker a week in advance, which means that the published odds may not accurately reflect consumer expectations about the uncertainty of the game. Moreover, the relevant uncertainty for the consumer is more likely to be at the date the ticket was purchased, rather than at the date the odds were set, and the level of uncertainty may fluctuate between these two dates. This problem will be even more significant in relation to season ticket holders. Finally, when matches are sold out demand at published prices cannot be directly observed, which may require the use of estimation methods that can account for this truncation, such as the Tobit regression.

Empirical studies find remarkably weak evidence in support of the uncertainty of outcome hypothesis in relation to individual matches. For example, Borland and Macdonald (2003) surveyed 18 studies across a variety of countries and sports and found that “only about three provide strong evidence of an effect on attendance...Other studies provide mixed evidence that suggest a negative effect on attendance of increasing home-win probability only when that win probability is above about two thirds” (p486).¹² In other words, home team fans are not interested in a well balanced contest: they want their team to win, and are more likely to attend when the probability of that event is large. The evidence that demand may decline at very high home win probabilities also needs to be interpreted cautiously, since there are very few games that are this unbalanced, and hence the estimates are based on a very small number of observations. The result that attendance at a match is almost everywhere increasing in the success of the home team is not very surprising, since most popular clubs grow by being successful, but it does suggest that some caution is required in the use of the uncertainty of outcome hypothesis. The evidence does not suggest that the hypothesis is false, but it does suggest that its importance is not as great as is often suggested.

As TV rights are an increasingly important share of total income attention has started to turn to the effect of uncertainty of outcome on TV viewership. Forrest et al (2005)¹³ find modest effects of uncertainty of outcome. Alavy et al, (2010)¹⁴ using minute by minute viewership data find that while uncertainty in the

¹² Borland, Jeff and Macdonald, Robert, 2003, “The Demand for Sports” *Oxford Review Of Economic Policy*, Vol. 19, No. 4, Pp. 478-502.

¹³ Forrest, D., Simmons, R., & Buraimo, T. (2005). Outcome uncertainty and the couch potato audience. *Scottish Journal of Political Economy*, 52(21), 641-661.

¹⁴ Kevin Alavy, Alison Gaskell, Stephanie Leach, and Stefan Szymanski (2010) “On the Edge of Your Seat: Demand for Football on Television and the Uncertainty of Outcome Hypothesis”, *International Journal of Sport Finance*, forthcoming.

sense that final outcome will be predictable diminishes viewership (people tend to switch channels if the score in a game becomes highly uneven), viewership also falls as people expect the outcome to end in tie, suggesting that “stalemate” where each team cancels the other out is as unattractive as excessive imbalance.

Championship uncertainty may be considered to be the likelihood that one or a small number of teams dominate the championship, either within a single season or between seasons. Given that the large number of games played in a league championship implies that the ranking of teams is likely to accurately reflect their relative strengths, we no longer need an independent measure of outcome uncertainty, instead we argue that the actual distribution of wins was an accurate reflection of the expected distribution, and hence the uncertainty of the outcome.

Even if match uncertainty added nothing to demand (i.e. attendance was everywhere increasing in the home team win probability) it might still be argued that a more uncertain championship increased demand, as long as there were decreasing returns to winning. This is perhaps the most important question in relation to the uncertainty of outcome hypothesis: what is the distribution of wins that would maximise league-wide attendance? It has been the perennial claim of teams and league organisers that unrestrained competition will lead to excessive dominance by teams with greater resources (*e.g.* big city teams). This is, in principle, a testable hypothesis. If we can estimate the relationship between attendance and wins for each team in a league, we can in principle compare the outcome when there is unrestrained competition to an estimate of the distribution of wins that would maximise attendance (or revenue, or some other stated objective).

One possible outcome of such an exercise would be to find that every team in the league exhibited the same sensitivity to wins as every other team, and from this we could conclude that the optimal distribution of wins would require a perfectly balanced championship. Few observers, however, believe that all teams have the same sensitivity to wins. In practice, large city teams are likely to have a larger sensitivity, simply because they draw on a larger population. However, it is possible to imagine counterexamples: for instance, small city fans might have taste for success while large city teams might be able to fill the stadium whatever level of success it enjoys. If there is asymmetry in the sensitivity of wins, then a strategy of maximising league wide attendance would involve biasing wins toward the strong drawing teams. Since these teams also tend to be the ones that win more it could be that the competitive distribution of wins is also the profit maximising distribution. This proposition, known as the invariance principle, was advanced by Rottenberg (1956) in relation to the trading of players and extended by El-Hodiri and Quirk (1974) to the impact of gate-revenue sharing.¹⁵ These results rely on the assumption that firms exist in a Coasian world, where all potential gains from trade are exploited and all externalities are internalised.

Competitive markets seldom conform to the Coasian ideal, largely because firms are unable to write complete contracts with each other, most obviously because antitrust law prohibits such agreements. Other reasons may be lack of adequate information or information asymmetries that lead to market failure. Szymanski (2004)¹⁶ compares the attendance maximising distribution of results for league to the competitive outcome and shows that in a world of asymmetric teams the competitive outcome is in fact *more* balanced than the planner’s optimum. He also provides empirical estimates for Major League Baseball to support this argument.

¹⁵ Rottenberg, Simon. 1956. “The baseball player’s labor market” *Journal of Political Economy*, 64, 242-258, Quirk, James and Mohamed El Hodiri. 1974. “The economic theory of a professional sports league” in *Government and the Sports Business*, Roger Noll, ed. Washington: Brookings Institution.

¹⁶ Stefan Szymanski, 2004. “Tilting the Playing Field: Why a sports league planner would choose *less*, not more, competitive balance.” <http://www3.imperial.ac.uk/pls/portallive/docs/1/43004.PDF>.

There have been surprisingly few other papers that have examined empirically the effect of championship uncertainty, either within or between seasons. Two of the best studies of recent years are Schmidt and Berri (2001) and Humphreys (2002).¹⁷ Their estimates lend some support to the uncertainty of outcome hypothesis, but that support is quite weak.

Specific restrictions and their consequences will be discussed in further detail below.

5. Sport and culture

5.1 *Television and sport*

In the second half of the twentieth century sport was revolutionised by the medium of television. Television made it possible for millions of people to share the experience live sport simultaneously. Events such as the FIFA World Cup Final or the opening ceremony of the Summer Olympic Games attract a significant fraction of TV audiences on a global basis. Within nations the success of individual athletes or the national team can become the focus of national interest, even to the point where national elections can be won or lost on the basis of the success or failure of the national team. Television also extended the reach of individual sports and sport stars who became national and international celebrities, in the same way that the spread of sound recording created pop stars, or the cinema created film stars. The commercial potential of television also significantly increased the amount of money in sport.

5.2 *National identity and the culture of sport*

Because sport has become so embedded in national cultures its social significance has been impossible to ignore. It is a commonplace for people to compare the way that sport is played in a particular country to the national identity. Sport is also held to embody certain healthy ideals- characterised by the use of word such as “fairplay” and “sportsmanship”, and as reflected in the aspirations of the Olympic Charter. Many people feel that they “own” the sport which they follow, and have a right to have a say in how it is run, in the same way as voters have a right to say in how the government is run. This issue sits uneasily with the fact that most sports organisations are private associations, often run by a very small group of administrators who are only occasionally answerable to their members, and often under quite restricted conditions.

These observations have some practical implications about the way the sport is organised.

First, as far as television is concerned, many national governments consider it essential that important sports events are able to reach the largest possible audience and therefore reserve some events for broadcasting on terrestrial channels – most notably in the European Union each member state is permitted to select its own “listed events”. This means that the rights owners are not permitted to sell these rights for broadcast on subscription services (although they may be allowed to under certain conditions).

Second, politicians are often under pressure to intervene in one way or another if the sports administrators are unpopular or seen to be failing in their job. In some cases governments may have explicit powers to do so, in other cases they have limited standing to intervene in the running of a private association.

¹⁷ Humphreys, Brad. 2002. “Alternative measures of competitive balance in sports leagues” *Journal of Sports Economics*, 3, 2, 133-148. Schmidt, Martin and David Berri. 2001. “Competitive Balance and Attendance: the Case of Major League Baseball”, *Journal of Sports Economics*, 2, 2, 145-167.

5.3 *Sport, commercialism and ethics*

There is little doubt that there is a lot more money in sport than there was in the past. In 1950 the combined income of the sixteen Major League Baseball teams was \$25.5 million, equivalent to \$228 million dollars in today's money; by 2008 the thirty teams were estimated to generate an income of \$5819 million – a 26-fold increase after allowing for inflation.¹⁸ As recently as 1980 the twenty two clubs in the top division of English had a combined revenue in the region of £38 million, equivalent to £120 million in today's money; in 2008 the combined income of the twenty English Premier League clubs was £1932 million, a sixteen-fold increase after allowing for inflation.¹⁹ Sport may not be a very big business (the annual sales of the New York Yankees or Manchester United is small compared the constituents of the Dow Jones or the FTSE100), but increasing income has required a more commercial approach to management. In some countries this is not considered problematic. In the USA, for example, professional sport has always been considered a business and the validity of a commercial approach to professional sport is not challenged.²⁰ However, in other countries, notably in Europe, it is argued that commercialism in general is harmful to sport and that the influx of money has encouraged commercialism at the expense of the sporting ethic. It is argued that a number of problems can be traced back to commercialism such as the declining standard of fairplay (cheating and the “win at all costs” mentality), social exclusion (due to rising ticket prices), doping, gambling and corruption, and the possibility of financial failure due to poor financial management.

This has led to calls for greater regulation of sport in order to preserve national traditions and the values of sport. To the extent that this involves restricting commercial freedoms that would be protected under competition law, conflicts may arise.

5.4 *Different models of sporting competition*

The oldest surviving professional sports league in the world is baseball National League (one half of MLB), founded in 1876. The business model of the founder, William Hulbert, was a system of exclusive franchises, each representing a city in whose market they would be the sole representatives (and to this day even the largest metropolitan districts have only two franchises in a given major league sport²¹). Each member owned a share in the league, and decisions were made by a committee of the clubs. New franchises could be added, but each application would be voted on, and a significant payment made by the expansion team for the right to join. The American “closed” model has been followed in relatively few other countries: Japanese baseball follows the model quite closely, and Australian sports have evolved in this direction.

In Europe a different model emerged. After the successful creation of the English Football League in 1888, it was decided to create a second division in 1892, and the question arose as to the relationship between the teams in the two divisions. It was decided that teams in the lower division should have the opportunity to move from one to another, and after a few different systems had been tried, the promotion and relegation system was introduced in 1897. This involves the automatic demotion of the lowest ranked

¹⁸ Source: <http://www.rodnefort.com/SportsData/BizFrame.htm>. In 1950 the US CPI stood at 24.1, and by 2008 reached 215.3, a nine fold increase.

¹⁹ Source: *Winners and Losers, the Business Strategy of Football*, Stefan Szymanski and Tim Kuypers, 1999 London: Viking and Deloitte Annual Review of Football Finance, 2009. In July 1980 the Retail Price Index was 67.9, and by July 2008 had reached 216.5.

²⁰ Although the NCAA has fought to keep professionalism out of college athletics despite the large revenues generated by men's football and basketball.

²¹ Until the Dodgers moved to Los Angeles, New York had three franchises.

teams and their replacement with the top ranked teams from the next division down, a system thus based on sporting merit.²² This “open” system has been adopted widely. As more divisions are added the hierarchy can be extended, and in England the “pyramid” extends right down to the amateur level (there are at least nine tiers), and not only is it used by football league systems in almost every country (Major League Soccer in the US is a notable exception), but it is commonly used in many other sports.²³

The economic implications of the closed and open systems are profoundly different. In the closed system clubs have significant incentives to invest in the long term development of their local market. However, so long as franchises remain scarce, clubs also enjoy significant bargaining power, and can threaten to relocate if a more attractive offer to host the team is made by another city (*e.g.* to build the team a better stadium at taxpayer expense). Since the clubs control entry, scarcity can be maintained, subject to ensuring that it is not profitable for a rival league to set up. Rivalry between clubs is much more intense in an open system because entry cannot be restricted. Moreover, the absence of exclusive territories means that a club is more interested in short term playing success, and less concerned about long term investments. Profitability also tends to be much lower in an open system, with teams spending all they can afford on playing talent in order to avoid relegation. Even if teams near the top of the league do not face such a threat, their spending is influenced by the level of spending of rivals immediately below them, who may face pressures from below in their turn.²⁴ The incidence of financial distress is also much higher than in the American major leagues, an event that is often triggered by relegation. However, the teams themselves seldom fold, because they are rooted in local communities (and relocation is not an option). Closed systems promote a more egalitarian approach to economic issues; clubs can recognise shared interests in limiting economic competition while maintaining sporting competition- hence the array of restraints entered into by American leagues concerning the sharing of revenues and the hiring of players. As a result the economic differences between teams are much smaller than in Europe. While there is little evidence that competitive balance within a season is any greater in the US than in Europe, the same clubs tend to dominate in Europe over time while in US success over time is more evenly distributed.²⁵

Because of the strong cultural dimension in sport, the fans tend to declare that their system is best, and to view with disdain the idea of copying from the others. In reality many leagues around the world have looked at the American system in recent years and adopted some elements of it. It can be argued that the open system conforms more closely to a competitive market system, implying all the consumer welfare benefits normally associated with competition.²⁶

²² In some leagues conditions may be imposed relating to stadium capacity. In Spain, where a club’s second team is permitted to play in lower divisions, the second team cannot be promoted to play in the same division as the first team.

²³ The origins and implications of the two different systems are discussed at length in Szymanski, S. (2009) *Playbooks and Checkbooks: An Introduction to the Economics of Modern Sport*. Princeton University Press.

²⁴ It is sometimes argued that clubs in Europe are win maximisers, not motivated by profits in the way that American team owners seem to be (see *e.g.* Késenne, S. (1996). *League Management in Professional Team Sports with Win Maximizing Clubs*. *European Journal for Sport Management*, 2/ 2, 14-22); this may be so, but since the open system mitigates against profit making the question is moot.

²⁵ For an economic analysis of the promotion and relegation systems see Szymanski, S. and Valletti, T. (2005) “Promotion and relegation in sporting contests,” *Rivista di Politica Economica*, vol. 95, 3-39, and Buzzachi, L., Szymanski, S. and Valletti, T. (2003) “Equality of opportunity and equality of outcome: open leagues, closed leagues and Competitive Balance”, *Journal of Industry, Competition and Trade*, 3, 3, 167-86.

²⁶ For a welfare perspective on the closed system see Ross, S. and Szymanski, S. (2008) *Fans of the World Unite: A (Capitalist) Manifesto for Sports Consumers*. Stanford University Press.

6. The professional amateur sport link

The players hired by professional teams are themselves drawn from amateur teams. In general there is no reason to expect that a professional club would compensate the amateur team for a player, any more than one business compensates a worker's previous employers when hiring. However, it is often argued that there exists a degree of reciprocity between the amateur clubs at the "grassroots" and the professional clubs which operate on commercial lines. The integration of professional sports within a governance structure that includes amateur sport enables that reciprocity to be made concrete. Governing bodies can effectively "tax" professional sport in order to fund development activities at the grassroots level- a practice which in Europe has come to be known as "solidarity".²⁷ Taxation may take the form of specific levies, but may also operate indirectly. For example, National federations generally require professional clubs to release players for participation in international representative competition and retain the revenue generated from ticket sales and broadcast rights. While in some cases the revenues generated are substantial (notably the case of football), the clubs as employers receive little or no compensation and have no choice about whether or not to release players.

The issue of solidarity payments from professional clubs to the grassroots has arisen in the competition law cases concerning restraints agreed among professional clubs (*e.g.* collective selling of broadcast rights). In the *Bosman* case,²⁸ which concerned free movement of labour within the EU rather than competition law, it was accepted that restraints on player mobility could in principle be justified if they served the purpose of maintaining solidarity, although in this case the court rejected the claim that solidarity was in practice promoted by the challenged restraints. Governing bodies and leagues often claim that restraints are justified because they benefit not only professional sports organisations, but also the grassroots.

7. Governance, the State and the Law

In countries such as the US the state does not assume any specific responsibility for sport, but may intervene on individual issues. In practice little is done at the federal level but local government plays a significant role in sport, especially in funding school sports and national parks. At the other extreme, in some countries such as France, sport is the responsibility of the state which then delegates authority to local government and to national federations.²⁹ These different approaches potentially have quite radical implications for the application of competition law. For example, the issue of collective selling of broadcast rights by a league raises a competition law issue if member clubs are seen as independent entities but not if the league is licensed by the national federation which is in turn licensed by the state (although market dominance might still be an issue). In many countries the role of the state is limited largely to funding of sport, *e.g.* in Germany, where authority is decentralised and the autonomy of sports federations is guaranteed. The UK model was in many ways similar to the US model until the 1960s, when the state had no formal engagement in sport, but since then government involvement has increased thanks to the creation of a minister for sport, government funding bodies for sport and the allocation of a share of national lottery profits to sport.

²⁷ The term itself is drawn from the Treaty on the Functioning of the European Union (TFEU) which refers to solidarity and the spirit of solidarity between member states, although its precise meaning is never fully defined. In general it is taken to mean the obligation of members to support each other.

²⁸ Case C-415/93 *Bosman* ECR1995 I-4921.

²⁹ « L'Etat est responsable de la conduite des politiques sportives en France. Il délègue aux fédérations sportives le pouvoir d'organiser et de promouvoir la pratique de leurs disciplines et les soutient par le biais des conventions d'objectif et de la mise à disposition des cadres techniques. » <http://www.sports.gouv.fr/francais/acteurs-du-sport/role-du-ministere/>

In much of the world sport has developed as private associations governed by their own private law, and organisations such as the IOC and FIFA reflect this (although the relationship between national Olympic committees and government is often close). Like any organisations they must comply with the law of the state within which they reside. As a result it is possible for sporting rules to come under the scrutiny of the courts, a situation which many sports bodies find problematic. From the point of view of the law, it is often argued that there is no such thing as “sports law”, simply there exists the law as applied to contractual relationships in a sporting context. However, sports organisations have been vocal in demanding that the courts should recognise the special nature or “specificity” of sport.

In the USA, which has had the longest experience of litigation in sport, Congress has granted a specific exemption to professional sports leagues in the form of the Sports Broadcasting Act. In the European Union intense pressure from sports organisations has led to the inclusion of a specific reference to the role of sport in the TFEU. In both cases the pressure has arisen from litigation where competition authorities have investigated commercial contracts entered into by sports leagues.

In general sports organisations have tried to resist the involvement of the courts in settling disputes. For example, FIFA does not permit any member organisation to instigate legal proceedings without permission. This has led to development of alternative dispute resolution mechanisms approved by sports organisations, most notably the Court of Arbitration for Sport.

8. The status of leagues in competition law cases

Section 3 described some general circumstances in which competition law concerns might arise. In practice investigations have tended to focus on the conduct of team sports leagues, mostly in relation to the imposition of restraints on player contracts and on the sale of broadcast rights. Before looking at individual cases a key issue of principle concerns the way in which a league is to be viewed as an economic entity. Some have called professional sports leagues “classic, even textbook, examples of business cartels”.³⁰ However, as was discussed in section 4, the peculiarities of sport require some co-operation among members of a league in order to produce the competition.

If agreements among participants in a sporting competition are not an automatic breach of competition law then each challenged restraint must be judged on its merits. This approach was explained by the US Supreme Court in *NCAA v Board of Regents* (1984): “Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an ‘illegal *per se*’ approach because the probability that these practices are anticompetitive is so high... Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case... what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all... What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.”³¹

Thus the real question is the scope granted to league members when reaching agreements. There are essentially two perspectives on this issue:

8.1 The joint venture approach

This approach is well explained by Flynn and Gilbert (2001). A joint venture is an agreement between potentially competing firms to share assets and capabilities in order to produce a product that its members

³⁰ Fort and Quirk (1995).

³¹ *NCAA v. Board of Regents*, 468 U.S. 85, 100-101 (1984).

would not be able to produce as efficiently if they were to act independently. Joint ventures are therefore desirable insofar as they meet consumer needs more effectively than the alternatives. A professional league fits naturally with this characterisation, since the individual clubs cannot produce a competition without some agreement to produce jointly with other members. The question then arises as to whether there are any anti-competitive implications of the joint venture agreement. The joint venture theory requires a case by case analysis of individual restraints. These have to be tested to establish (a) whether they produce any benefits for consumers (*e.g.* by creating a more attractive competition) and (b) whether they restrict competition in any way that is harmful to consumers. If on balance the challenged restraints are beneficial then it is still required to establish whether the same ends could be achieved through a less restrictive agreement.

Thus for example in *Smith v Pro Football*³² the US Court of Appeals examined the draft system, which allocates bargaining rights over new players entering the league to a specific team, with the weakest teams getting first pick of the new players. It was accepted that the draft may in theory be pro-competitive in a sporting sense (since it would help the weaker teams to compete), but not in an economic sense because clubs are not economic competitors on the field, so from a competition law perspective there was no pro-competitive benefit; against this the court held that the draft was plainly a significant restriction of the market of player services and thus on balance the draft was an unreasonable restraint of trade. Clearly the implication is that the clubs could make arrangements to achieve the pro-competitive benefits of the draft (in a sporting sense) without having to restrict the labour market (for example, by the adoption of a handicapping system which penalised teams that were successful and rewarded teams which were less successful).

8.2 *The single entity doctrine*

An agreement that exclusively concerns relationships among subsidiaries of the same corporation cannot be challenged under cartel laws- it is meaningless to talk of a company colluding with itself. However, a corporation may for its own purposes encourage competition among subsidiaries – for example General Motors has long sustained a degree of competition among divisions such as Cadillac and Buick. Proponents of the single entity doctrine suggest that a professional sports' league should be viewed in the same way.³³ Advocates do not deny that member clubs are independent legal entities (unlike in the GM example) but argue that it is the economic logic rather than the legal formalism which is paramount in antitrust. The claim is that, because sporting rivals cannot produce sports competition without each other's co-operation, this means that they should be treated as a single entity for the purposes of antitrust scrutiny.

The single entity doctrine clearly gives very significant leeway to a league to enter into restrictive agreements, but its defenders argue that a league would still be subject to competition laws on monopolisation/dominance. In essence, this approach relies on the forces of competition at the level of the league to discipline any monopolistic behaviour (or, if there is monopolistic behaviour that is exclusionary, by anti-monopoly laws). Thus if a league is able to generate monopoly profits, then a rival league may set itself up and compete by offering lower prices, better access to broadcasters and so on.

One problem with this approach is that most of the major leagues in the US (Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA) and the National Hockey League (NHL)) have not had to deal with a successful entrant since they became major leagues, which for most of them dates back to before the second world war. One reason for this is the logic of sporting competition itself, which generally involves the desire to see the best play against the best (the demand for quality), which makes it difficult for two leagues to compete side by side in the same market.

³² *Smith v. Pro Football*, 593 F.2d 1173. (D.C. Cir., 1978).

³³ See *e.g.* Roberts G. (1984) "Sports Leagues and the Sherman Act: the Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry," *U.C.L.A. Law Review*, 32, 219, 286-87.

Thus competition by entry at the league level is unlikely to pose much of a threat in the US context. One reason for the appeal of the single entity doctrine in the US context is that teams agree to restrict themselves to sporting competition in only one league or championship. Thus it is argued that the clubs will produce nothing at all if they do not make the league product. Outside of the US the single entity doctrine is a less plausible argument, given that clubs often participate in different championships at the same time (*e.g.* the domestic league and the UEFA Champions League in European football), meaning that clubs are not totally dependent on competitors in any one league to produce their product. Indeed, it is widely perceived that the difference in the level of competition between the Champions League and domestic league has created problems of competitive imbalance in domestic leagues.

The single entity doctrine has recently been reviewed by the US Supreme Court in the case of *American Needle vs. National Football League (NFL)*.³⁴ The case concerns the manufacture of licensed apparel, which the NFL, representing 32 member clubs, had decided should be managed through a single exclusive contract with Reebok. Prior to this American Needle had manufactured for the NFL and individual teams on a non-exclusive basis. American Needle sued NFL under section 1 of the Sherman Act but lost in the district court and the court of appeals, which accepted that for the purposes of licensing their intellectual property, the NFL should be considered a single entity. The NFL then supported American Needle's request for an appeal, with a view to getting a general ruling that the league is a single entity. The Supreme Court rejected the NFL's request for broad antitrust law protection on 24 May 2010, saying that it must be considered 32 separate teams – not one single entity– when selling branded items like jerseys and caps.

The argument in the case rests on whether section 1 is applicable to a sports' league such as the NFL. The *Copperweld* case³⁵ established that subsidiaries of a parent company could not be sued under section 1 since ultimately it was impossible for a conspiracy in restraint of trade to exist among entities under a single source of control. The petitioner argues that the NFL is not a single entity because the clubs are independently owned. Thus while they may enter agreements with each other these are subject to scrutiny under section 1, which has been the approach adopted by US courts and of Congress³⁶ hitherto. Restraints have not been considered *per se* illegal under section 1, but have been subjected to a rule of reason analysis. The *amicus curiae* brief written by economists in support of the petitioner drew the distinction between agreements among the teams which enhanced the quality of competition and therefore advanced the interests of consumers and agreements which were not necessary for the improvement of the league but which restricted economic competition. Distinguishing these two cases requires the continued application of a rule of reason analysis under section 1 (the joint venture approach). The respondents argued that the NFL is not a collaboration among independent sources of *economic* power. Since the NFL competition is "the product" and this cannot be produced absent the collaboration of the teams, the NFL and its member clubs should be treated as a single economic entity. Interestingly, the economists' *amicus curiae* brief for the respondents rejected the relevance of international experience, which is raised by the petitioners' *amicus curiae* brief to illustrate the full scope of independent action which is possible among clubs belonging to the same league, on the grounds that the sporting structures are culturally specific or not economically successful. The *amicus curiae* brief for the US government took an intermediate stance, arguing that while section 1 may not be applicable under all circumstances, if clubs choose to formally merge activities and no anticompetitive harm is implied in any other market, then section 1 need not apply. Outside of this fairly limited context, it is argued that the section 1 rule of reason should continue to apply.

³⁴ Case 08-661. The author of this Background Note is one of several economists who jointly filed an *amicus curiae* brief in support of the petitioner with the Supreme Court.

³⁵ *Copperweld V. Independence Tube*, 467 U. S. 752 (1984).

³⁶ In granting the exemption for collective selling of broadcast rights from antitrust, Congress assumed that without it collective selling could be challenged under section 1.

The decision has important consequences. If leagues were granted single entity status then clubs in the US would then be able to enter almost any kind of agreement without the possibility of a competition law challenge. Important examples of restrictive agreements currently entered into by US leagues include revenue sharing, collective selling of broadcast rights, salary caps, roster limits and draft rules. However, most of these are already free from competition law challenge either because they are written into collective bargaining agreements (discussed below) or enjoy legislative exemption.

The court decided that the NFL's licensing arrangements represent concerted action that joins together separate decision makers and deprives the marketplace of independent centres of decision making. Each of the teams is a substantial, independently owned, and independently managed business and their general corporate actions are guided by separate corporate consciousnesses. The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximising entities.

The court dismissed the NFL's argument that the league constitutes a single entity because without the co-operation of the clubs, there would be no NFL football:

“The justification for co-operation is not relevant to whether that co-operation is concerted or independent action...Any joint venture involves multiple sources of economic power co-operating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of co-operation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to §1 analysis.”

The court ruled that “in any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague co-operation are necessary to produce a game. Moreover, even if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.”

However, this did not render all agreements between members of a league illegal: “Football teams that need to co-operate are not trapped by antitrust law. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must co-operate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to §1 analysis. When “restraints on competition are essential if the product is to be available at all,” *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason.”

9. Legislation relating to sports

As mentioned above, in some countries there is no general legislation relating to sport, while in others the law gives the state an explicit role in the organisation of sport. Legislation certainly impacts sports in a number of areas:

- Employment contracts
- Protection of intellectual property
- Resolution of disputes
- Enforcement of rules related to doping

- Rules on cheating and corruption
- Discrimination
- Violence on and off the field
- Safety at stadiums

These issues have the potential to interact with competition law to one degree or another, and obviously labour laws are likely to have the greatest impact.

There is in addition some legislation that relates directly to competition law. In the US the Sports Broadcasting Act of 1961 exempted “sponsored telecasts” from competition law. This was as a result of lobbying of Congress by the NFL following the 1953 Supreme Court ruling that collective was anticompetitive. A similar sequence of events transpired in Germany: in 1994 the Bundeskartellamt declared collective selling of broadcast rights by the Deutscher Fussball-Bund illegal, only for the German parliament to pass an antitrust exemption.

The most significant legislation of recent times that may impact on the practice of sport and competition law is in the TFEU (as introduced in the Treaty of Lisbon ratified in 2009). Article 165 of the TFEU gives an explicit competence to the European Union in the field of sport:

“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function...Union action shall be aimed at...developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen...The Union and the Member States shall foster co-operation with third countries and the competent international organisations in the field of education and sport.”

This legislation was the outcome of more than a decade of debate on the place of sport in Europe. The case of Walrave and Koch in 1974 had established that “the practice of sport is subject to Community Law only as far as it constitutes an economic activity”, but the economic dimension of European sport was quite limited even in the 1980s and therefore there had been little intervention. The advent of subscription TV services mainly via satellite and the deregulation of television markets increased the value of broadcast rights significantly and at the same time raised player salaries to levels that started to become comparable to player salaries in the US. During the 1990s a number of high profile cases, notably the Bosman case in the European Court of Justice and investigations into collective selling of broadcast rights, both at EU and national level, caused many sports administrators to believe that the special status of sport in European society was not being respected. In particular this was confirmed in the ECJ’s ruling in the *Meca Medina* case³⁷ where it was held that a purely sporting rule (concerning anti-doping rules), should be assessed in the light of Articles 101 and/or 102 of the TFEU. The ECJ reached the same conclusion as the Court of First Instance, as the limitations of action imposed on the athletes by the anti-doping rules were considered to be “inherent in the organisation and proper conduct of competition sport”. Notwithstanding the value of this case for its methodological approach in order to assess whether a rule adopted by a sports’ association relating to the organisation of sport infringes Articles 101 and/or 102 of the TFEU, it also introduces a potential cause of action for the athletes to challenge sporting rules and at the same time reduces the

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Case C-519/04 P, David Meca-Medina and Igor Majcen v. Commission ECR 2006 p. I-6991.

leeway of sporting associations to fulfil their social, educative and cultural roles.³⁸ Thus many sport administrators argued that Community Law was allowing sport to be treated as a business, while the social dimension was being neglected.

The Nice Declaration of the member states in 2000 expressly recognised the “specificity” of sport, while the EU White Paper on Sport published in 2007 laid out a programme of action, covering issues such as promoting health enhancing physical activity and the social role of sport. The white paper also confirmed that competition law would continue to apply to sport, and explained what “specificity” meant, inter alia, acknowledging the role that competitive balance might play in making sport attractive to spectators and respecting the autonomy of governing bodies. However, the white paper also added that existing cases already respected the specificity of sport in these terms, and hence there was no fundamental change in policy. In this context article 165 may be seen as part of an evolving approach to sport which builds on existing legal treatment, especially in relation to competition law. However, it also gives the EU a new role as a player in the management and regulation of sport in the EU. No specific “European Model” of sport has been laid down, but the traditions of European sport as practised in the member states has to be respected. Given the general level of these observations it is not yet clear what the practical consequences of this will be.

In an annex to the White Paper on Sport published in 2007³⁹ the Commission laid down its approach to sport and EU competition rules. The annex divided the subject into two topics:

- a) The treatment of sporting organisations. While recognising the special nature of sport, the Commission explained that a rule would not be exempt from challenge under Articles 81 and 82 (now Articles 101 and 102 of the TFEU) merely because it had been specified as a purely sporting rule. Rather, challenged rules would be examined taking into consideration the context and objectives of the rule, whether the rule was inherent to achieving a sporting objective and whether the rule was proportionate. The Commission outlined the kinds of rules that would be likely to be accepted (*e.g.* rules of selection on the basis of nationality, rules prohibiting multiple ownership of clubs competing in the same competition, rules prohibiting doping, and rules to promote financial stability), and those that would not (*e.g.* rules which give rise to conflict of interest for a governing body as regulator of a sport and promoter of a particular competition to the detriment of other competition organisers, or rules of arbitration which forced participants to waive legal rights to challenge decision in court). It also indicated some areas where issues remained unresolved- the terms for the release of players by clubs to play for national teams, rules on home grown players and salary caps.
- b) Revenue generating activities (primarily the sale of broadcast rights). The Commission’s position is discussed below.

10. Cases

Most of the competition law cases involving sport have concerned either player contracts, or broadcasting rights. In these cases the issue has been whether clubs, leagues or federations have engaged in collective agreements which are anticompetitive.

³⁸ J. Zylberstein, «Collision entre idéaux sportifs et contingences économiques dans l’arrêt Meca-Medina», *Cahiers de droit européen*, Vol. 43, n°1-2, 2007, p. 213.

³⁹ http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm.

10.1 *Market definition*

Major sports competitions tend to have few close competitors. In any sport there is usually only a handful of competing leagues and championships at the highest level generating large commercial incomes. This is an example of the “winner-take-all” phenomenon, whereby even if the difference in quality between the best and the second best is very small, the difference in demand is very large. For example, average attendance at English Premier League games is more than double that in the Football League Championship (the second tier), five times larger than in the third tier and more than eight times larger than in the fourth tier, despite the fact that ticket prices are substantially higher than in the lower divisions. There is limited substitutability either between levels of a given sport or indeed between sports; for example Winfree (2009) provides evidence that during the NHL lockout of 2004-05 which resulted in the cancellation of the entire season, attendance increased negligibly at MLB and NBA games and in some cases broadcast viewing figures fell.⁴⁰ There is also limited substitutability between teams in the same league for fans attending games, particularly in the US where franchises are usually at some distance apart. Fans typically complain that clubs exploit market power by raising ticket prices, and evidence suggests that prices are set close to the point of unit elasticity (optimal for a monopolist with zero marginal cost),⁴¹ but there have been no antitrust cases related to ticket prices at an individual club, which is not surprising since there is no provision against excessive pricing in US antitrust law.

Also, in 2003 the OFT imposed fines on a collection of sports shirts retailers for fixing the prices of replica shirts for the England national team and Manchester United. For the purpose of assessing the fines the relevant market was narrowly defined as market for the replica shirt of an individual club or team, on the grounds that fans of one team were unlikely to see the replica shirt of a rival team as an acceptable substitute.⁴²

Prices for corporate hospitality have also been examined in the UK. The case concerned hospitality tickets for the Wimbledon Tennis Championship whose sale was licensed to two distributors. The OFT rejected the claim that this represented a restriction of competition on the ground that buyers of corporate hospitality could select from a variety of alternative prestigious events (*e.g.* in football, cricket, horseracing and so on).⁴³ Thus there is not a unanimous view on intersport competition/substitutability.

As far as disputes over player contracts are concerned, the market can be defined as “the market for player services”. In general the market definition issue is not controversial, since professional sport stars typically have a limited number of options and there is no question that the intention of the league or clubs is to restrict competition. Thus in the US it is clear that the draft system or the rules on player trading will concern employment in the major league in question, and that players have limited equivalent alternatives. In *Mackey v NFL*,⁴⁴ the respondent argued that the player’s market lay outside the scope of the Sherman Act, which refers to product markets rather than restriction in labour or input markets, but the court “held that businessmen may not act in concert to eliminate competition in the procurement of commodities essential to the operation of their businesses”.⁴⁵ In Europe the *Bosman* case has clearly been the most

⁴⁰ Winfree, J. (2009) “Fan substitution and market definition in professional sports leagues”, *The Antitrust Bulletin*, 54, 4, 801-822.

⁴¹ Rodney Fort, *Inelastic Sports Pricing*, 25 *MANAGERIAL & DECISION ECON.*87 (2004).

⁴² OFT Case No. CA98/06/2003.

⁴³ Reviewed in Lewis, A. and Taylor, J. (2003) *Sport: Law and Practice*. London: Butterworths, p395.

⁴⁴ 543 F.2d 606 (8th Cir.1976).

⁴⁵ *Ibid* para 61.

important, but this concerned the issue of freedom of movement rather than competition law, and therefore market definition did not arise as an issue.

In broadcasting cases the market definition issue has been addressed in more detail. Where sale of television rights is concerned, the buyers are typically broadcasters that use the content to fill programme schedules. Acquiring content that is attractive to viewers enables the broadcaster to sell advertising space, and where the signal is encrypted, to market pay TV services. Thus it is possible to talk of separate markets for viewers, advertisers and broadcasters (which in turn can be divided to channel providers (*e.g.* ESPN) and broadcast platforms (most platforms are also channel providers- *e.g.* a satellite subscription service may offer its own channels, while carrying independently produced channels at the same time). The market definition question typically focuses on the degree to which substitutes exist for particular sports' content. Thus in the NCAA broadcasting case⁴⁶ the Supreme Court stated that

“There can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.”

The distinction between pay TV markets and free-to-air broadcast markets is significant. This is apparent in the wording of the Sports Broadcasting Act mentioned above, which granted an antitrust exemption only to “sponsored telecasts”, which is typically taken to mean free-to-air broadcasts. This may help in part to explain the striking difference between the US, where the majority of rights are sold collectively to free-to-air (or basic cable) channels, rather than migrating to pay TV, which has happened to a significant fraction of live football rights in Europe. If US clubs sell their live rights to pay TV on a collective basis they are not protected by the exemption, and so they may prefer to sell collectively to free-to-air channels.⁴⁷

There have been several cases in Europe concerning the migration of rights to pay TV, mostly relating to live football. In these cases the market definition issue revolves around whether (a) forms of content other than the sport in question are substitutes and (b) whether platforms other than pay TV offer substitutable programming. The competition authorities have consistently adopted a narrow definition on both aspects.⁴⁸ Given the onerous data requirements for implementing a SSNIP test empirically, the justification has mostly taken the form of arguments based on the large difference between prices for premium sports content and premium sports channels and any alternatives.

For example, live Serie A football in Italy might face some competition from UEFA Champions League football, but is unlikely to face competition from Italian basketball, or from game shows on free-to-air TV. This is apparent from the fact that pay TV broadcasters tend to view premium sports (which in Europe means largely football) as a key driver for subscription services. Thus even content shown on the subscription channels may not be a close substitute. In a recent investigation into the pricing of Sky pay

⁴⁶ *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984).

⁴⁷ For a discussion see Szymanski, S. (2006) “Why have premium sports rights migrated to Pay-TV in Europe but not in the US?” in: Jeanrenaud, C & Kesenne, S, editor, *The Economics of Sport and Media*. Cheltenham: Edward Elgar.

⁴⁸ For example, Commission decision COMP C.2-37.398 Joint selling of commercial rights of the UEFA Champions League; Commission decision COMP/C.2/37.217 Joint selling of media rights of the German Bundesliga; Commission decisions, Case No COMP/M.3595 - Sony / MGM (2005), *Case No* COMP/M.2050 – Vivendi / Canal+ / Seagram (2000), or COMP/M.2876, *Newscorp/Telepiù* (2003). An investigation in relation to a merger between News Corp and Premiere: COMP/M.5121/*Newscorp/Premiere*. Investigation into the joint selling of media rights to the FAPL, Case COMP/C-2/38.173.

TV services in the UK, OFCOM surveyed consumers asking why they subscribed to the Sky Sports channel, and around a third indicated that access to the Premier League football was the reason, while three quarters said the availability of Premier League football was very important to them. While respondents also indicated that other forms of football were important to them (*e.g.* Champions League, FA Cup, national team games) no other sporting content was close in terms of interest.⁴⁹

However, on at least one occasion a court has favoured a broad market definition. The case concerned the establishment by News Corporation of a new Rugby League championship in competition with the existing dominant New South Wales Rugby League (NSWRL), which belonged to the national governing body, the Australian Rugby League. When the existing league and governing body obtained commitments from the clubs not to join to the new league, these commitments were challenged by News Corporation on the grounds that they represented an attempt to exclude competition from the market. In considering the market within which NSWRL operated, the plaintiffs sought to characterise the market as a narrow one, and among other things, referred to US decisions to support this case. The judge held that while a narrow market definition might be applicable in the US, this was no authority in Australia where it was necessary to take into account the actual market conditions. The judge found that rugby league competitions were significantly constrained by alternative sports such as Australian Football Rules and therefore suggested that the market should be defined more broadly.⁵⁰

10.2 Labour market issues

The most famous US legal decision in sport is *Federal Baseball v. National League*, (259, U.S. 200 (1922)) that reached the conclusion that baseball was exempt from the federal antitrust laws since it did not in fact involve interstate commerce.⁵¹ This litigation arose out of the attempt of the Federal League to establish itself in competition with the dominant National and American leagues (which came to be known as Major League Baseball), only to find that it had difficulty hiring players from the rival leagues because they were threatened with lifetime bans if they joined. Since then the courts have set out to interpret this exemption for sporting leagues as narrowly as possible, affirming in the *Radovich* case (which involved similar arguments)⁵² that the exemption did not extend to other sports.

Another example of the use of restraints in the labour market to create a barrier to entry concerned World Series Cricket (WSC) in Australia in 1977, a commercial competition which signed up many of the world's leading cricket players to play in competition rivalling existing international test matches organised by national governing bodies of cricket.⁵³ In response the international governing body (the ICC) revised its rules to prohibit players from participating in unauthorised competitions, declared that WSC was unauthorised. Players contracted to WSC were banned from representing their countries in test matches, and the English governing body (then called the TCCB) disqualified three of these cricketers from playing professional cricket in the domestic league, which was then their major source of employment. The judge in the case expressed some sympathy for the banning of players from international competition since these might directly rival games organised by the governing bodies (*i.e.* WSC competitions would rival TCCB test matches and therefore players could be made to choose between playing for one or the other), but held that the domestic ban was a restraint of trade, since the WSC

⁴⁹ OFCOM (2010) Sports and general market definition and market power, Annex 4 to Pay TV Statement. http://www.ofcom.org.uk/consult/condocs/third_paytv/statement/annex4_statement.pdf.

⁵⁰ Pike, A. (1996) *News Limited v Australian Rugby League*, *UNSW Law Journal*, 19, 2, 490-99.

⁵¹ The exemption is analysed in some detail in Zimbalist A. (2003) *May the best team win: Baseball economics and public policy*. Brookings Institute.

⁵² *Radovich v. National Football League*, 352 U.S. 445 (1957).

⁵³ *Greig v Insole; World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449; [1978] 1 WLR 10.

competition being played in Australia during the southern hemisphere summer was not competing for players or audiences with domestic cricket player in the northern hemisphere summer.

Most competition law cases relating to labour market rules have not been motivated by the issue of entry barriers to rival leagues and competitions, but have concerned the rights of players in the face of concerted practices by the leagues and competition organisers. North American major leagues have engaged in a wider variety of labour market restraints than any other leagues in the world, and therefore it is not surprising that a good deal of the competition law analysis has come from the US. Typical labour market restraints include the reserve clause⁵⁴ (tying a player to his club), the draft system,⁵⁵ salary caps,⁵⁶ roster limits and restrictions on player trading.⁵⁷ The US courts have typically adopted a “rule of reason” approach to challenged restraints, weighing up the benefits in terms of advantages for competitive balance against the harm to employees.

On balance the courts have demonstrated some scepticism about competitive balance justification for restraints, although they have accepted them as possible justifications under a rule of reason. However, this state of affairs has been complicated by the non-statutory exemption for collective bargaining agreements. Until the 1960s it was possible to argue that professional athletes were underpaid. Salary levels in the team sports were maybe higher than those of many workingmen, but compared to many professions they were low. Moreover, although one can argue that it is the performances of the stars that people go to watch, the players’ share of the revenue generated was relatively low.⁵⁸ Movie stars or pop stars in this period tended to be much wealthier. What changed in the 1960s was the power of the player unions. As players became increasingly unhappy with their terms and conditions they showed increasing willingness to enter into disputes with the employers and to go on strike.

The National Labour Relations Act gives a union that commands the support of a majority of employees the right to enter collective bargaining agreements with the employers on an exclusive basis. Collective bargaining agreements enjoy an antitrust exemption (the non statutory labour exemption). This has allowed employers in the major leagues to achieve through negotiation with unions what might be unsustainable in the courts. Unions have accepted restraints such as salary caps in exchange for concessions on issues such as minimum wages.

In Europe most of the cases relating to sport have involved football and have arisen recently as the economic significance of professional football has grown. Traditionally there existed a system of player contracts not dissimilar from the reserve clause in baseball (called the “retain and transfer” system in the UK) which gave rather one-sided bargaining power to the clubs. In particular a player at the end of his contract had limited rights to move to another club without the permission of his current employer who was able to extract a transfer fee from prospective employers. The development of the transfer system led to increasingly large payments being paid for the acquisition of players, even when the wages of the players remained relatively low. In the US payments to clubs acquiring the services of players were never

⁵⁴ Considered in *Flood v. Kuhn* (107, U.S. 258 (1972)).

⁵⁵ *Smith v Pro Football* op. cit.

⁵⁶ *Bridgeman v. NBA* (re: Chris Dudley), 838 F. Supp. 172 (D.N.J. 1993).

⁵⁷ *Mackey v. NFL*, 543 F.2d 606 (8th Cir.1976) rejected the “Rozelle Rule” that required teams signing a free agent in the NFL to compensate the player’s previous team with a draft pick and *McNeil et al v. NFL* (70, F. Supp. 871 8th Circ. 1992) rejected the NFL’s subsequent plan (Plan B) to allow teams to protect up to thirty seven players on their roster. *Finley v. Kuhn* (569, F. 2d 1193, 6th Circuit 1978) upheld the right of the Commissioner of baseball to penalise teams selling players for cash on the grounds that it might weaken the selling team and reduce competitive balance.

⁵⁸ In baseball the share of wages was around 35-40% in the 1950s, while by 1990 it had risen to about 60%.

significant, and the more likely case in recent years has been that a club no longer willing to pay the salary of a star player will trade him to another club while continuing to make a contribution to the salary payments. In Europe the transfer system was seen as a means to redistribute income from the larger clubs to the smaller ones (solidarity), especially from the clubs in the higher divisions to the lower divisions, although in reality the flow of funds was negligible.⁵⁹

This system was challenged as a restraint of trade in the UK courts in 1963,⁶⁰ so that out-of-contract players became free agents, although the former employer was still able to demand a transfer fee. Unlike the US, Europe has many competing national leagues of roughly equivalent standards and player mobility across national borders has always been significant. The restrictive transfer systems of Europe thus collided with the European Union laws on free movement of labour in the Bosman case.⁶¹ While not a competition law case, the court weighed up the pros and cons of the system, recognising the special features of sporting competition:

“Thus the need to promote competitive balance was accepted but in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate. As regards the first of those aims, Mr Bosman has rightly pointed out that the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.”⁶²

The Bosman case also struck down rules which limited the number of foreign players representing a club. Thus the main economic consequences were that clubs would no longer be able to demand transfer fees for out of contract players (while being able to set fees for transfer fees players within contract) and that the mobility of players within the European Union would be unrestrained. The Bosman case represented something of a crisis for football administrators who believed that the special status of sport was being ignored, and that sport was being treated purely as a business. The governing bodies have looked to create a new transfer system, and this was agreed between FIFA, UEFA and the European Commission in 2001. The rules specified contract lengths of between one and five years, with transfers permitted only out of season or during a brief period in the middle of the season. For players under the age of 23 a compensation payment will be paid if the player is transferred to the clubs where his training took place. Players also acquired the right to terminate their contracts unilaterally if they were not playing regularly (sporting just cause).

These rules, while applied globally, were essentially intended to harmonise transfer rules with EU law. Under the new rules transfer activity has continued, without any apparent harm to the system. Financial inequalities have grown, in particular the increasing dominance of teams from the largest countries. However, this seems to have more to do with the growing inequality of revenues deriving from the UEFA Champions League, where payments to clubs are based on broadcast market size as well as

⁵⁹ See for example Szymanski, s. and Kuypers, T. (1999) *Winners and Losers: The Business Strategy of Football*. London: Viking, p pp110-117.

⁶⁰ *Eastham v Newcastle United* [1964] 3 All ER 139.

⁶¹ European Court of Justice, Case C-415/93 (1995).

⁶² *Ibid* paras 106-7.

sporting success. Since 1996 a team from outside the big five TV markets (England, France, Germany, Italy and Spain) has reached the final of the Champions League only once.⁶³

Many people believed that the Bosman case would herald the end of the transfer fee, but in fact transfer activity has continued to grow. Prior to Bosman the world record stood at £12 million, by the summer of 2009 it had risen to £80 million paid by Real Madrid to Manchester United for Cristiano Ronaldo.⁶⁴ The fact that such large fees can be paid remains something of a puzzle. Does the fee represent compensation for terminating the contract? If player wages are close to compensating the player for the services provided it is surprising that such a large fee is needed. Moreover, what if a rival club offered to pay Ronaldo a higher wage and reduce the transfer fee paid to the club? Clearly the club would like to sell, and insist on its rights as laid down in the FIFA regulations. While the fee reduces the earnings capacity of the player in question, it remains unclear what economic purpose such large transfer fees serve.

A growing trend in recent years has been increased use of arbitration services in Europe.⁶⁵ The most prominent of these has been the Court of Arbitration for Sport (CAS), whose decisions are binding on the parties and can be enforced according to the rules of private international law. A recent CAS arbitration award related to a decision concerning the transfer of Andrew Webster, a player for the Scottish club Hearts who decided to terminate his contract about 18 months early, which he can do “without just cause” under article 17 of the FIFA transfer rules, subject to payment of compensation.⁶⁶ The question in the case surrounded the appropriate level of compensation. The club argued that compensation should be fixed in relation to cost of buying in the transfer market a player of similar quality, while the panel decided to set the fee at only £150,000, which was agreed by the parties to be the terminal value of the contract. This raised concerns that players might be free to move at their discretion while paying minimal compensation to clubs. A subsequent decision in 2008⁶⁷ concerned the player Matuzalem who left his club (Shakhtar Donetsk in the Ukraine) to join the Spanish club Real Zaragoza, a unilateral breach of contract without just cause. The player appeared and his new club argued that compensation should be set at €2.4 million, roughly the wages outstanding on his old contract, while Shakhtar claimed €25 million, which was written into his contract as a minimum transfer fee. The panel decided on compensation of €11.9 million, a decision that has been interpreted as sending a signal that players cannot simply breach their contracts and pay only their foregone wages in compensation.

10.3 Broadcasting

10.3.1 Collective selling

The main issue in broadcasting has been the collective selling of media rights, by leagues or governing bodies on behalf of their member clubs. Collective selling means central marketing of the rights by an agency representing the clubs. A prior question that arises is “who owns the rights?”, a question that is answered differently in different jurisdictions. Most frequently it is the home team or the owner of the home team stadium, although it has been argued that the visiting team has part ownership (as a necessary supplier of inputs to the product) or that the league/governing body, as organiser of the competition owns the rights. However, as was shown in the challenge to the Premier League’s collective sale of broadcast

⁶³ Between 1986 and 1996 the feat was achieved nine times.

⁶⁴ http://en.wikipedia.org/wiki/World_football_transfer_record.

⁶⁵ In the US final salary arbitration had been established in baseball during the early 1970s.

⁶⁶ CAS/2007/A/1298/1299/1300.

⁶⁷ CAS/2008/A/1519/1520.

rights in the UK courts in 1999,⁶⁸ the issue of collective selling can be settled without making any statement about who owns the rights.

A number of potential benefits from collective selling can be considered:

- The capacity to sell a schedule for the entire league as a whole, which may be more valuable than the sum of the parts (for example, a broadcaster buying the rights to an entire league competition may be willing to invest in promoting the league as a whole, rather than just individual games)
- The capacity to generate a higher income than would be possible individually, that income being reinvested in players and facilities and therefore benefiting the public
- The capacity to share revenues and therefore enhance competitive balance (clubs usually argue in these cases that alternative distribution mechanisms are not feasible or as efficient, although given the breadth of revenue sharing arrangements in US sports this argument seems hard to justify)
- The capacity to redistribute income to the grass roots (solidarity- this may mean investing in development and expansion of the game, training for young players, community action schemes)
- Encouraging competition among broadcasters if exclusive rights make for a more attractive programme schedule (it has been argued that by creating an attractive package for auction broadcasters have incentives to develop their own services in order to win the auction)

Against this, a number of potential costs can be identified, as collective selling may:

- Restrict the supply of broadcast matches (in many cases the collective selling agreement includes an agreement not to sell all of the matches, thus restricting access to consumers, for example, in England only 138 of the Premier League's games are shown in the UK, out of 380 played in the season, even though all the games can be viewed outside the UK)
- Limit competition in broadcast markets (collective selling is likely to lead to the rights being concentrated in the hands of only a few broadcasters, who might use premium sports rights as a means of foreclosing the broadcast market)
- Limit innovation in broadcasting (if rights end up in the hands of one or a few broadcasters then incentives to develop innovative programming may be limited).

Moreover, even if the benefits of collective selling are deemed to outweigh the costs, it is also possible that the outcome could be achieved by less restrictive means (*e.g.* teams could agree to share income as a means for achieving competitive balance, even if rights were individually sold).

The relationship between collective selling of TV rights, competitive balance and revenue sharing was considered in *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953) and *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) and in both cases competitive balance justifications were considered potentially valid reasons for the maintenance of the challenged restraints (on individual selling) and so were not *per se* illegal, but in both cases on a *rule of reason* basis the restraints were deemed either excessive or not tailored to achieve the stated aim.⁶⁹ The Sports Broadcasting Act enabled the major leagues to engage in

⁶⁸ Re an agreement between the Premier League and BSkyB [2000] EMLR 78, [1999] UKCLR 258.

⁶⁹ The NCAA case also considered in detail the effect on live gate.

collective selling of “sponsored telecasts”. Not all rights are sold collectively in the US. In baseball, for instance, clubs sell their rights for broadcast in the local market, and while there are collectively national TV deals, they bring in less revenue. On the other hand the NFL sells all its broadcasting rights collectively.

In Europe collective selling became an important issue in the 1990s as live rights increasingly migrated from free-to-air to pay TV. As well as the challenge in the UK’s Restrictive Practices Court, collective selling was challenged in Germany, Italy, Spain and the Netherlands. As mentioned above, in Germany it was ruled illegal by the court but then reprieved by an antitrust exemption.

In Europe different national courts have reached different decisions:

- **UK** – collective selling upheld. In this case the court was concerned about whether *any* agreement among the clubs in relation to broadcasting would be permissible under the law if they ruled against the existing Premier League arrangements. Thus the court did not consider itself able to consider less restrictive agreements. This was a peculiar case in that it was based on the old Restrictive Trade Practices Act, which was soon after replaced with Competition Act that harmonised UK law with EU law.
- **Italy** – collective selling of live rights prohibited. The competition authority ruled that collective selling of live rights by the national federation (Lega Calcio) should not be permitted on the grounds that the rights did not belong to the governing body and that the legitimate aims of redistribution and solidarity could be achieved through less restrictive agreements (in the event the clubs agreed to share 30% of the gate money). However, collective selling of highlight rights and right to the Italian Cup should be permitted on the grounds that individual selling was impractical. As in Germany, the government has since passed a law (the “Melandri” law, no. 106, 19th July 2007) permitting collective selling to resume while mandating minimum solidarity payments from Serie A to Serie B and the grassroots. However, the Serie A clubs have since threatened to organise their competition independently.
- **The Netherlands** – collective selling of live rights prohibited. The league authority (Eredivisie) applied to the competition court for an exemption for collective selling of live rights and highlights. The first application was denied on the grounds that joint sale led to a restriction of output (only the games of the top teams were shown) and the restriction was not necessary for valid redistributive aims which could be achieved by less restrictive means. Joint sale of highlight rights was accepted on the grounds that collective arrangements were necessary to create the product (contrary to the European Commission which has argued that they might be more efficient, but not necessary).
- **France** – collective selling is legal. The national federation is granted by law the right to exploit all broadcasting rights (Art. 17/18 of the Law No. 84-610 of 16 July 1984).
- **Spain** – has a mixed system. Some rights are sold individually (*e.g.* the live rights to the larger clubs) but some collective selling has been permitted (*e.g.* for smaller clubs).⁷⁰

⁷⁰ See Szymanski, S. (2002) “Collective selling of broadcast rights to sporting events”, *International Sports Law Review*, 2, 1, for details.

The European Commission has also been closely involved with a number of collective selling cases.⁷¹ It has intervened in the collective selling of Champions League Rights, the collective selling of English Premier League rights and of German Bundesliga rights. In each case the Commission has not objected to collective selling specifically, but was concerned about the issue of the basis on which rights have been sold. Notably in the case of the Premier League the final agreement required the rights to be broken up into packages, for auction to broadcasters, with the proviso that of the six packages the Premier League decided to sell, no more than five could be purchased by any one broadcaster.⁷² This decision indicated quite clearly that the major concern of the Commission was competition at the level of broadcasting, rather than competition at the level of the league. Thus arguments about the need to redistribute income among the teams and the necessity of collective selling to achieve this were accepted. Concentration in the European pay TV industry has seemed to be a bigger issue for the Commission, which is thought to be sustained by the control of premium content (see the annex to the Commission's White Paper discussed above). Recent competition cases in Italy and Germany have also raised issues about the way in which rights are sold and the capacity of smaller broadcasters to acquire content.

Collective selling cases in Europe seem therefore to have focused on two issues- first the necessity of joint selling to the promotion of the league, and secondly the impact of joint selling on downstream broadcast markets. On the first issue, the necessity of collective selling to achieving legitimate sporting ends, such as solidarity, seem dubious. Acceptance that other redistribution mechanisms are infeasible seems tantamount to suggesting that the clubs will refuse to recognise their shared interests whom they themselves claim are so important. Given that the single entity doctrine has not been upheld in European law, arguments that collaboration is necessary to achieve an attractive schedule of games are also dubious. Even with individual selling, a broadcaster would be capable of buying collections of rights that would make attractive packages. The danger that collective will lead to a restriction of output (the refusal or the failure to market all games that viewers might want to see if offered at competitive prices) is also significant.⁷³

10.3.2 *Exclusive marketing*

The question of broadcast exclusivity has also been the subject of a good deal of attention in European competition law. Major leagues in the US tend to divide their collectively sold rights among competing terrestrial broadcasters, while in Europe there has been a tendency for rights to be sold on an exclusive basis. In a 1998 paper the Commission set out its policy, explaining that while exclusivity could bring benefits by giving broadcasters incentives to invest in delivering a high quality product, it was concerned that exclusivity over too long a period might limit competition in broadcast markets.⁷⁴ The Commission has stated that exclusivity for a period of up to one year raises no issues, while periods of longer than this may be scrutinised; in practice the Commission seems to be comfortable with deals offering exclusivity for no more than three years.⁷⁵

⁷¹ The European Commission's approach to EU competition law and sport in general is set out in an annex to the white paper on sport 2007, COM(2007) 391, http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm.

⁷² <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356&guiLanguage=de>.

⁷³ See e.g. Forrest, D. Simmons, R. and Szymanski, S. (2004) "Broadcasting, attendance and the inefficiency of cartels", *Review of Industrial Organization*, 24, 243-265.

⁷⁴ http://ec.europa.eu/competition/speeches/text/sp1998_037_en.html.

⁷⁵ For a discussion that relates exclusivity in broadcasting to collective selling see Harbord, D and Szymanski, S. (2004) "Football Trials" *European Competition Law Review*, February 2, 114-119.

11. Conclusions

The treatment of sports in competition law is complicated for a numbers of factors. First, the analysis of sport has a peculiar economic logic, based on sporting competition and a degree of economic co-operation, which potentially legitimises a range of cartel-like agreements. Second, sport has a special position in our society, and cannot be treated merely as a business, even if there are clear examples of business transactions. Third, there is a close linkage between professional sport and the development of sport at the “grassroots” level, and therefore there are grounds for cross subsidies from one to the other. Fourth, sport is frequently governed by independent associations which create their own private law which sit uneasily alongside civil law.

As a result, perhaps, there has been a good deal of litigation in relation to sports and fair amount of legislation, often granting antitrust exemption. This paper has reviewed some of the main cases in relation to two main areas, labour market restrictions and broadcasting of sport rights. Following the judgment of the US Supreme Court in the American Needle case it is possible to say that a consensus is emerging, at least between the US and Europe. This consensus can be characterised by an agreement that the activity of sport organisations are covered by the competition laws relating to agreements in restraint of trade, and that such agreement must be evaluated by the rule of reason. A degree of latitude is granted to sport organisations in recognition of their special economics, but restraints must be demonstrated beneficial to consumers, proportionate and indispensable to meeting their stated goals.

NOTE DE RÉFÉRENCE ¹

1. Introduction

Le Comité n'a pas examiné les questions de concurrence dans le domaine des sports depuis la Table ronde de 1996², alors consacrée à la vente des droits exclusifs de retransmission, à la concurrence entre les différentes ligues, aux accords de parrainage et de fourniture exclusive entre les fabricants d'articles de sport et les clubs ainsi qu'aux clauses de maintien et de transfert contenues dans les contrats des joueurs. Ces questions restent importantes, même si elles ont fait l'objet dans l'intervalle de nombreux commentaires de la part des universitaires et des juges. La commercialisation du sport professionnel s'est en outre fortement intensifiée et génère toujours d'importantes recettes, notamment tirées de la vente des droits de retransmission. Par exemple, début 2009, le championnat d'Angleterre de football, la *Premier League*, a dégagé à peu près 1.8 milliard GBP de la vente de différents lots de droits de retransmission des matches des trois prochaines saisons et, aux États-Unis, les recettes collectives annuelles des équipes professionnelles représentent 16 milliards USD.

À mesure que l'intérêt économique que représente le secteur s'est développé, le droit de la concurrence a pris une place de plus en plus déterminante dans la conduite des participants, comme l'illustrent des affaires très médiatisées actuellement en instance des deux côtés de l'Atlantique, comme l'affaire *Football Association Premier League Ltd c. QC Leisure* devant la Cour de justice de l'Union européenne (relative à l'utilisation de décodeurs de télévision satellite en dehors des territoires autorisés par les contrats conclus entre les ligues et les diffuseurs) et l'affaire *American Needle, Inc. c. National Football League* (concernant la question de savoir si les équipes de ligues sont ou non des entités distinctes aux fins de déterminer leur responsabilité sur la base de l'article premier du *Sherman Act*) pendante devant la Cour suprême des États-Unis. Il est dès lors opportun que le Comité se penche à nouveau sur les questions de concurrence soulevées par le sport professionnel.

2. Le régime du sport professionnel

À première vue, le sport professionnel ressemble à n'importe quelle autre activité commerciale : des entreprises organisées en domaines d'activité offrent des services de loisirs, embauchent des salariés, génèrent des recettes, encourrent des dépenses et enregistrent des pertes et des bénéfices. Selon cette logique, ces entreprises devraient être soumises au droit commun de la concurrence : si elles s'entendent pour fixer les prix, se partager le marché, ou imposer des restrictions commerciales, elles devraient être considérées en droit comme parties à une entente ; si ces organisations dominent une branche particulière du sport et y exercent de ce fait une puissance commerciale, le droit de la concurrence devrait alors les empêcher d'abuser de leur position dominante par des pratiques d'exclusion ou de prédation.

En pratique cependant, le sport professionnel est généralement considéré comme un cas particulier pour un certain nombre de raisons qui peuvent être résumées comme suit :

¹ Le présent document d'information a été préparé par le Professeur Stefan Szymanski (City University, Royaume-Uni) pour le Secrétariat de l'OCDE.

² <http://www.oecd.org/dataoecd/34/49/1920279.pdf>.

- Des spécificités économiques : la compétition sportive représente une forme particulière de production, qui suppose la coopération des participants pour obtenir le résultat attendu – gagner le match, remporter la compétition de la ligue, le championnat. Une certaine coopération entre les concurrents est donc nécessaire à cette production.
- Sport et culture : la compétition sportive occupe une place particulière dans la société. La culture sportive est intimement liée à l'identité nationale et peut être un facteur de cohésion sociale. Même si le sport professionnel implique un financement, il est également l'expression de valeurs éthiques. Ainsi, dans la plupart des pays, nombreux sont ceux qui estiment que les intérêts commerciaux dans le sport professionnel devraient être supprimés ou sensiblement réduits. En d'autres termes, les autorités ont un rôle important à jouer dans le bon déroulement ou, dans bon nombre de cas, dans la réglementation explicite des compétitions sportives.
- Le lien entre sport professionnel et sport amateur : le sport professionnel est étroitement lié au sport amateur, que ce soit de manière formelle ou informelle. Le sport amateur a les caractéristiques d'un bien d'intérêt social : la pratique d'un sport amateur est propice au bien-être physique et social et sa capacité à promouvoir la cohésion sociale est également salutaire.
- La gouvernance, l'État et le droit : les organisations sportives sont souvent fondamentalement différentes des autres formes d'organisations commerciales. Dans la plupart des pays, l'organisation des compétitions professionnelles et amateurs est contrôlée par des fédérations nationales à but non lucratif. Les structures de gouvernance varient beaucoup, allant du contrôle direct exercé par l'État par le biais de fonctionnaires officiellement nommés à l'organisme privé dont les représentants sont élus par les membres. La relation entre les organismes de tutelle internationaux et les gouvernements nationaux touche à différents domaines – politique de la santé, de l'éducation, de la culture et la politique de la concurrence. La compétence politique est toutefois souvent contestée.

Avant d'examiner en détail ces spécificités, il est important de donner quelques exemples de conduite qui peuvent préoccuper les autorités de la concurrence.

3. Problèmes à examiner

3.1 Comportement apparenté à une entente

Bon nombre des questions de droit de la concurrence qui se posent dans le domaine sportif sont liées au sport collectif professionnel. D'une manière générale, les clubs sont constitués soit en associations de membres, soit en sociétés à responsabilité limitée, qui engagent alors des joueurs pour participer à des compétitions pour le compte du club. La compétition sportive entre clubs implique donc qu'une concurrence soit possible dans le recrutement des joueurs, et dans les transferts des joueurs d'un club à un autre. Les organisations sportives affirment que certaines restrictions à la mobilité sont nécessaires pour maintenir l'intégrité des compétitions (en limitant par exemple la possibilité pour un club d'acheter des joueurs supplémentaires en fin de saison en vue de gagner un championnat). Ainsi, les clubs, ligues et fédérations sportives sont convenus de règles qui restreignent la mobilité des joueurs sur le marché du travail. Les joueurs peuvent penser que ces règles sont trop restrictives et que les accords collectifs se traduisent par des restrictions commerciales.

Dans la plupart des sports collectifs professionnels, les clubs sont généralement organisés en compétitions de ligue, forme qui offre un divertissement régulier et attrayant aux supporters et aux spectateurs. Lorsque les clubs vendent les droits de retransmission des matches dans ces compétitions, ils préfèrent le plus souvent les vendre collectivement plutôt qu'à titre individuel. De la même façon, les

représentants des clubs ou des ligues feront valoir que la vente collective de ces droits leur permet d'en obtenir un prix plus élevé sur le marché. Pour cette raison, les autorités de la concurrence ont plusieurs fois contesté la validité de ces accords de vente collective sur la base du droit des ententes.

3.2 *Position dominante/monopolisation*

Il n'existe pas moins de 170 fédérations sportives internationales, régissant des sports ou des activités sportives spécifiques (par exemple les sports paralympiques)³. Des fédérations nationales leur sont affiliées qui, dans le cas des sports les plus importants, représentent presque chaque nation du monde (en fait, la FIFA et le CIO comptent plus de membres que les Nations Unies). Ces organismes sont chargés de fixer les règles, d'appliquer les prescriptions en matière de licences tant pour les joueurs que pour les organisations et les compétitions, de résoudre les différends et d'assurer la promotion de leur sport. Dans bon nombre de cas, ils organisent aussi les compétitions. Les plus importantes d'entre elles sont la Coupe du Monde de la FIFA et les Jeux olympiques d'été organisés par le CIO, mais il en existe beaucoup d'autres, y compris au niveau régional. Ces compétitions se traduisent souvent par une importante activité économique qui mobilise un large public.

Les autorités de la concurrence peuvent s'inquiéter de voir les organisateurs utiliser leur position dominante pour limiter l'accès des consommateurs et ce, de diverses manières (par exemple par le biais de règlements discriminatoires en matière de vente de billets), ou chercher à empêcher de possibles concurrents d'organiser des championnats (en leur refusant par exemple la reconnaissance officielle ou en infligeant des pénalités à des athlètes qui choisissent de participer à des championnats concurrents).

S'il est vrai que les organisations sportives peuvent se défendre contre les comportements anticoncurrentiels en invoquant les mêmes types de motifs que toute entreprise ordinaire ou tout groupe d'entreprises, elles ont aussi tendance à prétendre que le droit de la concurrence leur ménage un régime spécial ou des exemptions spécifiques en raison de la nature particulière des activités décrites ci-dessus (et dans certains cas, la législation leur a accordé des exemptions). Il importe donc d'examiner plus en détail l'argument du régime spécial, avant d'étudier les cas spécifiques.

4. *Spécificités économiques*

4.1 *Deux spécificités*

Le sport est en soi assez difficile à définir mais pour les besoins du présent document, la définition du Conseil de l'Europe sera suffisante : « toutes formes d'activités physiques qui, à travers une participation organisée ou non, ont pour objectif l'expression ou l'amélioration de la condition physique et psychique, le développement des relations sociales ou l'obtention de résultats en compétition de tous niveaux ». D'un point de vue économique, l'élément clé de cette formulation réside dans la notion de « compétition sportive » qui se distingue de la « compétition économique ». Ainsi, la première spécificité du sport tient à ce qu'une compétition sportive ne peut se produire que si deux concurrents au moins sont présents. C'est ce qui rend le sport professionnel unique dans les activités commerciales : aucune autre entreprise ne dépend d'une production conjointe avec l'un de ses concurrents⁴. En poussant les choses à l'extrême, ce point a conduit certains à conclure que les concurrents sportifs, même organisés en entreprises strictement indépendantes, forment en réalité une entité économique unique en vue de produire une compétition ou un championnat (cette « théorie de l'entité unique » est examinée plus en détail ci-après, en même temps que d'autres interprétations). Au minimum, il faut qu'un accord, exprès ou tacite, existe entre les concurrents, à

³ http://en.wikipedia.org/wiki/List_of_international_sport_federations.

⁴ Voir par exemple l'affaire Neale (1964). Il peut exister d'autres cas dans lesquels une production conjointe est faisable ou même souhaitable, mais aucun dans lequel elle est *nécessaire*.

défaut d'être autrement tenus par les règles de la compétition sportive. On peut dire de cette première spécificité qu'elle concerne toutes les compétitions sportives, indépendamment de leur dimension commerciale.

La deuxième spécificité est propre à l'exploitation commerciale des manifestations sportives. Selon l'hypothèse dite de « l'incertitude de l'issue », plus l'issue d'une compétition sportive est incertaine, plus elle intéressera les spectateurs. Malheureusement cette hypothèse manque de précision. On peut certes admettre que si l'issue est connue avec certitude, l'attrait de la compétition en soit affaibli, ce que démontre la grande disparité des sommes versées par les diffuseurs pour les droits de retransmission en direct des événements (dont l'issue est inconnue) par rapport à leur volonté de payer pour des droits de retransmission en différé (si tant est qu'un diffuseur soit intéressé) quand le téléspectateur est susceptible de connaître l'issue de l'événement avant de le suivre. Néanmoins, il n'est pas sûr qu'une course entre deux athlètes ayant chacun 50 % de chances de gagner attire plus de téléspectateurs qu'une course dans laquelle un athlète a légèrement plus de chances de gagner que l'autre (par exemple 55 % contre 45 %). Ce n'est pas un simple problème où « toutes les autres choses sont égales par ailleurs ». Dans certains cas, les consommateurs peuvent préférer voir une compétition inégale dans laquelle un champion reconnu est opposé à un challenger moins populaire (à l'exemple de David contre Goliath) à une compétition entre deux champions de force égale.

Si l'on admet qu'une certaine incertitude de l'issue est souhaitable, les organisateurs de compétitions sportives peuvent alors être économiquement incités à établir des règles et règlements visant à atteindre une incertitude déterminée, de manière à maximiser l'intérêt des spectateurs. En particulier, les organisateurs peuvent chercher à créer un « équilibre compétitif » entre les concurrents pour que les résultats soient conformes à l'incertitude désirée de l'issue.

4.2 Modèles économiques d'une compétition sportive

Une compétition sportive est un jeu à somme nulle dans lequel les concurrents rivalisent pour obtenir leur part d'un succès quantifié. Les compétiteurs font preuve dans leur jeu des efforts, des capacités, et de l'investissement nécessaires pour obtenir une part de succès⁵. Chaque compétition réunit un « organisateur de compétitions » dont l'intérêt tient à l'attrait de la compétition dans son ensemble et des « compétiteurs » qui ont cherché à gagner et à tirer le plus de profits possibles de leur participation à la compétition. Dans bon nombre de cas, la distinction entre l'organisateur de compétitions et les compétiteurs est évidente, comme dans l'organisation de courses d'athlétisme (comme le Marathon de New York), de courses hippiques (comme le Derby d'Epsom) ou de courses cyclistes (comme le Tour de France), auxquels cas l'organisateur fixe les règles de la compétition, invite les participants, décerne les prix et cherche à générer des revenus pour couvrir ses frais et dégager un excédent. Ces sports sont généralement individuels. Dans les sports collectifs, les organisateurs de ligues professionnelles comme la Major League Baseball aux États-Unis ou la *Premier League* en Angleterre (football) sont les équipes elles-mêmes, lesquelles possèdent et contrôlent la ligue, de sorte que l'organisateur de compétition et les compétiteurs se confondent. Dans l'ensemble, la ligne de démarcation entre organisateur de compétition et compétiteurs est nette dans les sports individuels, alors que les fonctions sont souvent réunies dans les sports collectifs. Cela étant, ce n'est pas toujours vrai et il existe des cas où le sport collectif connaît des organisateurs de compétition (par exemple, les courses automobiles de Formule Un et de NASCAR sont deux sports dans lesquels les concurrents sont des équipes mais où l'organisation de la course est contrôlée séparément, et le

⁵ La compétition se situe d'une manière générale quelque part entre les deux extrêmes où dans un cas, le joueur/l'équipe qui a fourni le plus d'effort gagne avec une probabilité un et où dans l'autre, l'issue est indépendante de la capacité/de l'effort. Une bonne formulation de ce problème est offerte par la fonction de succès dans les compétitions de Tullock, analysée en 2003 par S. Szymanski dans « The Economic Design of Sporting Contests » *Journal of Economic Literature*, XLI, 2003, pp. 1137- 1187.

conseil d'administration de l'ATP, organisateur de tournois de tennis internationaux, est composé de représentants des joueurs).

Nous pouvons supposer qu'il existe une « fonction de la demande » sur la part des spectateurs/supporteurs, qui est croissante en fonction :

- de la qualité/des efforts des compétiteurs (plus les joueurs sont bons, plus la rencontre est intéressante) et

de l'incertitude de l'issue.

Dans les sports individuels, des joueurs en particulier peuvent s'attirer le soutien du public, en fonction de leur nationalité, de leur personnalité ou de leur longévité et une demande de joueurs « vedettes » peut donc venir s'ajouter à la demande de qualité du jeu, mais de tels effets sont en général assez limités et contraints par la durée de carrière relativement courte des joueurs. Cela étant, dans le sport collectif professionnel, les équipes sont souvent assimilées à un lieu particulier (généralement une ville) et les supporters ont tendance à s'identifier à leur équipe locale. En pareil cas, la demande des consommateurs augmente aussi avec :

la probabilité que leur joueur/équipe préféré(e) gagne.

Notons que les points b) et c) sont dans une certaine mesure contradictoires. Cela étant, dans la mesure où la plupart des ligues pratiquent des matches « à domicile et à l'extérieur », les équipes alternant les rencontres dans leur propre stade et dans le stade de leur adversaire, un championnat de ligue peut paraître équilibré si les équipes gagnent toujours à domicile.

4.2.1 *Caractéristiques d'une compétition individuelle*

Avec une fonction de succès dans les compétitions, une structure organisationnelle et une fonction de la demande, nous pouvons maintenant examiner la manière dont un organisateur de compétition gèrerait une compétition (une course à pied, par exemple). L'organisateur doit avant tout tenir compte des motivations des compétiteurs. Il se peut que ceux-ci soient simplement motivés par le désir de concourir et de gagner, et qu'ils fournissent toujours ainsi le maximum d'efforts. Il reste toujours à l'organisateur le problème de déterminer qui admettre dans la compétition. Compte tenu de la demande relative à l'incertitude de l'issue, l'organisateur souhaitera sélectionner les participants sur la base d'une répartition des talents. Le talent peut se répartir selon une distribution log-normale ou de Pareto, situant un petit nombre d'individus très talentueux à l'extrémité supérieure de la courbe de distribution. L'organisateur se retrouve à devoir concilier la qualité de la course et l'incertitude de l'issue. En invitant les compétiteurs les plus talentueux, l'organisateur pourrait produire une compétition très déséquilibrée, alors qu'un groupe de compétiteurs qui se situeraient au milieu de la courbe de distribution pourrait ne pas offrir la plus grande des qualités mais donnerait une compétition équilibrée.

Le problème de l'organisateur se complique lorsque les compétiteurs réagissent aux incitations. En pratique, la plupart des participants aux compétitions professionnelles reçoivent une prime d'engagement fixe pour leur participation ainsi qu'un prix en fonction de leur succès dans la compétition. La structure du prix peut parfois être assez complexe, prévoyant non seulement un prix pour le gagnant, mais également toute une série de prix selon le classement, et aussi le cas échéant un prix basé sur la performance absolue (par exemple en cas de nouveau record du monde). Les compétiteurs sont censés fournir plus d'efforts lorsque les prix sont importants, de sorte que plus la part de leur récompense constituée par la prime fixe est grande, moins ils sont incités à fournir ces efforts. Cela étant, le succès des compétiteurs peut aussi leur procurer des revenus grâce aux appuis et aux parrainages des annonceurs, qui incitent davantage les

compétiteurs à réussir. Tout en réagissant aux récompenses, on peut aussi supposer que les compétiteurs n'aiment pas fournir d'efforts. S'il est vrai que de nombreuses stars du sport semblent très motivées pour toujours gagner, quels que soient les efforts requis, en pratique les athlètes ont besoin de s'entraîner en permanence et se refusent souvent à eux-mêmes des occasions de prendre part à des activités agréables, ce qui peut être considéré comme une part de leurs « efforts ».

Dans le cas le plus simple où les compétiteurs ont les mêmes aptitudes et n'aiment pas fournir d'efforts, il est facile de démontrer qu'un organisateur peut maximiser la demande en offrant un prix unique au gagnant avec la prime d'engagement fixe la plus basse possible⁶. L'hétérogénéité des aptitudes rend par contre les choses plus complexes. En premier lieu, s'il y a concurrence entre des organisateurs de compétition, augmenter la prime d'engagement fixe et réduire la valeur du prix peut alors s'avérer la meilleure décision possible pour attirer des participants ayant de meilleures aptitudes⁷. En deuxième lieu, si l'incertitude de l'issue est hautement souhaitable, l'organisateur pourrait alors préférer exclure les compétiteurs ayant les meilleures aptitudes pour avoir une compétition plus équilibrée. En troisième lieu, si les aptitudes sont largement réparties, la multiplicité des prix (selon le classement par exemple) peut inciter les compétiteurs à déployer plus d'efforts au total, dans la mesure où ceux qui ont moins d'aptitudes et peu de chances de gagner le premier prix déploieront plus d'efforts s'il y a moins de prix décernés⁸.

Lorsque les aptitudes sont hétérogènes, il est délicat pour l'organisateur de savoir s'il doit maximiser « l'effort pour triompher » (par exemple pour battre le record du monde) ou « l'effort total » (pour que tous les compétiteurs donnent le meilleur d'eux-mêmes). Cela dépend à l'évidence de la nature de la fonction de la demande. L'hétérogénéité soulève également la question du handicap. Le handicap est fréquent dans les courses hippiques (où l'on peut supposer que les chevaux ne sont pas sensibles aux incitations financières et courent toujours à la vitesse à laquelle les jockeys les poussent), les organisateurs voulant des compétitions équilibrées de manière à offrir une gamme intéressante d'options de paris (suivre la course pour la course présente beaucoup moins d'intérêt d'un point de vue commercial). Le handicap est bien moins fréquent dans les sports individuels, sans doute parce que les sportifs y répondraient de manière négative – quel serait l'intérêt de s'entraîner dur pour gagner si ces efforts sont ensuite annihilés par un handicap ? Le handicap risquerait en outre d'être à l'origine de comportements stratégiques de la part des sportifs, qui pourraient donner une image fautive de leurs aptitudes dans les compétitions de moindre importance pour avoir un handicap plus favorable dans les grandes compétitions⁹.

4.2.2 *Caractéristiques d'une compétition collective et protection de l'équilibre compétitif*

Comme on l'a vu, dans une compétition collective, chaque équipe est généralement organisée dans le cadre d'un club, attaché à une ville, disposant de son propre stade et jouant à domicile et à l'extérieur contre d'autres équipes de la ligue. Les clubs professionnels mènent des activités commerciales : recrutement de joueurs sur le marché du travail, la vente de billets, promotion commerciale, parrainage et droits de retransmission. Le club offre une identité dans laquelle les supporters peuvent se reconnaître et

⁶ Les compétiteurs déploient des efforts pour gagner un prix de valeur ; les efforts globaux et individuels augmentent et les rendements nets diminuent avec le pouvoir discriminant de la compétition. Si le pouvoir discriminant est trop élevé, une véritable stratégie d'équilibre peut ne pas être possible, bien que des stratégies d'équilibre mixtes le soient.

⁷ Par exemple, si les participants sont peu disposés à prendre des risques et si les organisateurs ont une attitude neutre à cet égard, alors l'augmentation de la prime d'engagement fixe donne de l'assurance, même si elle limite aussi les efforts.

⁸ Voir par exemple S. Szymanski et T. Valletti (2005) « Incentive effects of second prizes », *European Journal of Political Economy*, 2005, 21, 2, pp. 467-481.

⁹ Ce qui pourrait s'apparenter au bluff du poker.

sur laquelle se bâtit un soutien durable, sachant que pour de nombreux supporters, le club est plus important que les joueurs considérés individuellement. Bien que les compétitions uniques dans les sports individuels jouissent d'un grand intérêt (comme une course ou un tournoi organisés sur quelques jours au plus), on parvient mieux à maintenir l'intérêt et le soutien des supporters locaux en organisant des séries régulières de matches réparties dans le temps, dans la plupart des cas sous la forme d'un championnat. S'il est vrai qu'un tournoi éliminatoire comme la Coupe du Monde de la FIFA est d'autant plus palpitant que les résultats se résument à un « tout ou rien », un championnat donne une dimension supplémentaire à la compétition, où l'histoire s'écrit tout au long de la saison. Cela étant, en raison de la production conjointe, le format du championnat étend l'interdépendance des compétiteurs à l'ensemble de la saison, au-delà d'un événement unique. La capacité des équipes à mener tous les matches programmés est indispensable à l'équilibre financier d'une ligue. Chaque match d'un club joué à l'extérieur peut être considéré comme un « échange de don » avec l'adversaire, lequel en retour fait don du match joué au stade du club. Chaque club est confronté au risque financier qu'une équipe extérieure ne puisse pas remplir ses engagements de venir jouer dans son stade. Il existe un risque systémique, semblable au risque systémique du secteur bancaire, de voir la défaillance d'un élément entraîner la défaillance de l'ensemble.

Du point de vue des caractéristiques et des motivations d'une compétition collective, les prix semblent constituer un mécanisme aussi approprié pour récompenser l'effort que dans une compétition individuelle, mais en pratique le recours à des prix de nature expressément financière est presque inconnu dans les sports collectifs. En revanche, le succès dans les sports collectifs est généralement récompensé par un afflux de spectateurs aux matches, la capacité d'augmenter le prix des billets, l'accroissement des opportunités publicitaires et d'exploitation de produits dérivés et le renchérissement des droits de retransmission.

Dans les sports collectifs, l'hypothèse de l'incertitude de l'issue est aussi importante, si ce n'est plus, lorsqu'il s'agit d'un championnat que dans le cas d'un match particulier. Comme il a été indiqué précédemment, si les clubs ont des supporters locaux, ils seront alors probablement plus intéressés par la victoire de l'équipe locale, déséquilibrant ainsi la compétition. Mais, le championnat sera d'autant plus palpitant que les équipes resteront longtemps nombreuses à concourir pour le titre de champion. On a parfois affirmé que le maintien d'un équilibre compétitif entre les équipes tout au long de la saison nécessitait la signature d'accords collectifs entre les équipes pour redistribuer les ressources. C'est ce que l'on peut appeler « la protection de l'équilibre compétitif » des restrictions à la concurrence apparentées à une entente dans les ligues sportives. La protection de l'équilibre compétitif repose sur deux éléments :

- Les supporters préfèrent un championnat plus équilibré en termes de concurrence à un championnat qui procéderait d'une concurrence illimitée entre les clubs (défaillance du marché) ;
- Des restrictions sous la forme de limitations relatives au fonctionnement du marché du travail ou d'accords de partage des revenus peuvent permettre d'atteindre un équilibre compétitif plus intéressant.

Le premier élément de la protection de l'équilibre compétitif tient à la nature de l'équilibre concurrentiel dans une compétition. Une certaine distribution des victoires dans la ligue maximisera l'intérêt des supporters. La forme exacte de cette distribution dépendra de l'incertitude de l'issue et de la distribution des supporters entre les clubs de la ligue. Si un niveau donné de succès permet à chacun des clubs de pouvoir attirer le même nombre de supporters, tout porte alors à croire que la distribution des victoires maximisera l'intérêt des supporters. Mais, compte tenu du caractère variable de la taille des villes

et des effectifs de supporters des équipes, il y a de grandes chances pour que l'équilibre compétitif optimal reflète l'inégalité de leurs forces d'attraction¹⁰.

Une concurrence illimitée sera efficace du point de vue des équipes considérées collectivement si la distribution des victoires qui en découle maximise le soutien total accordé à la ligue. Cela étant, des résultats inefficients sont possibles si les équipes individuelles ne se soucient que de leur propre rendement, et non du rendement total pour la ligue¹¹. Pour les clubs, accroître l'efficacité de l'équilibre ne revient pas à accroître le bien-être social. Il n'est pas garanti que la distribution des victoires, qui maximise les rendements pour les clubs, maximisera la rente du consommateur. La distribution de la rente du consommateur entre les supporters inframarginaux sera généralement déterminante dans ce calcul, lequel sera probablement difficile à établir. Ces questions se posent, que les clubs aient des objectifs strictement commerciaux (c'est-à-dire s'ils recherchent la maximisation des profits) ou qu'ils poursuivent d'autres objectifs (comme la maximisation des victoires).

Le second élément de la protection de l'équilibre compétitif s'appuie sur la capacité des clubs et des ligues à concevoir des mécanismes qui permettront de se rapprocher de l'équilibre compétitif idéal pour la ligue. Les clubs et les ligues ont en effet coutume de se plaindre de ce qu'une distribution sans restriction selon les mécanismes du marché est trop favorable aux équipes opérant sur de grands marchés au détriment des équipes opérant sur de petits marchés, et qu'une redistribution des grands aux petits s'impose donc. Parmi les possibles mécanismes figurent des mesures visant à redistribuer les recettes, comme le partage des recettes de la billetterie, ou à contrôler la distribution des joueurs de talent (restrictions au fonctionnement du marché du travail). Ces types de mécanismes sont au centre de l'analyse de la relation entre sport professionnel et droit de la concurrence. Pour améliorer le bien-être social, il est non seulement nécessaire de démontrer qu'une restriction spécifique peut permettre d'atteindre un meilleur équilibre compétitif, mais aussi que la restriction est indispensable à la réalisation de cet objectif et qu'elle ne crée pas en même temps de nouvelles inefficiences dont les coûts seraient plus élevés que les avantages tirés de la restriction.

Malgré l'importance que les organisations sportives accordent à l'intérêt de l'incertitude de l'issue, il existe étonnamment peu de données systématiques sur ce qui, à part un déséquilibre extrême, pourrait constituer un problème. Même pour des motifs abstraits, on a de bonnes raisons de penser qu'un « déséquilibre » concurrentiel peut présenter un intérêt. D'abord, s'il est vrai que l'équilibre peut être stimulant, une compétition entre un David et un Goliath peut l'être tout autant. Même si David gagne rarement, une victoire complètement inattendue peut être extrêmement satisfaisante. Ensuite, la performance d'une équipe qui réussit toujours peut également susciter un surcroît d'intérêt, que ce soit parmi ceux qui soutiennent la « dynastie » ou ceux qui guettent sa chute. Par exemple, ceux qui ne soutiennent pas les Yankees de New York adorent les détester. Enfin, même s'il est vrai qu'une compétition entièrement prévisible ne serait pas intéressante, il est difficile de dire quelle serait l'incidence d'un petit

¹⁰ Supposons par exemple que le nombre de supporters soit une fonction croissante concave de succès (c'est-à-dire qu'il y a quelques pertes de recettes), alors le nombre maximum de supporters dans la ligue est atteint lorsque les rendements marginaux du succès sont égaux. Cela doit normalement signifier que les équipes des grandes villes devraient gagner plus souvent que les équipes des petites villes, mais ce sont les rendements marginaux qui importent le plus à strictement parler, et il est possible que la distribution optimale des victoires soit favorable à l'équipe d'une petite ville dont les supporters ont été séduits par l'idée de battre l'équipe d'une grande ville, les supporters de cette dernière lui restant fidèles quel que soit son succès.

¹¹ L'article de Stefan Szymanski « Professional team sports are only a game: The Walrasian fixed supply conjecture model, Contest-Nash equilibrium and the invariance principle » publié en 2004 dans le *Journal of Sports Economics*, 5, 2, pp. 111-126, illustre la façon dont cette inefficience peut se manifester dans une distribution de victoires *moins* inégale qu'optimale.

changement dans l'équilibre sur une distribution donnée de victoires. Quelques économistes estiment qu'une compétition parfaitement équilibrée serait du plus grand intérêt pour une ligue, étant donné que dans la plupart des ligues, les équipes des villes les plus grandes bénéficient d'un soutien plus solide – à un certain niveau, il est souhaitable que les équipes fortes soient relativement performantes de manière à susciter l'intérêt le plus large possible.

Le critère de l'incertitude de l'issue peut être formulé de différentes façons. L'approche la plus largement retenue a consisté à mesurer l'incertitude de l'issue d'un match particulier dans une ligue, et de vérifier si le degré d'incertitude influençait de manière significative la présence de spectateurs au match. L'incertitude d'un match peut elle-même être mesurée de diverses manières. Une approche consiste à utiliser une mesure de la qualité relative des deux équipes sur la base des résultats antérieurs, en privilégiant les matches les plus récents. La difficulté tient ici à ce que le chercheur ne peut pas être tout à fait certain que les résultats antérieurs constitueront une bonne indication des résultats futurs et, partant, toute estimation risque d'être insuffisamment définie. L'approche qui a été adoptée dans la plupart des publications les plus récentes est celle des paris à cote. Si ces cotes sont fixées par des bookmakers sur un marché concurrentiel, elles devraient alors offrir des indications objectives de la probabilité de victoire de chaque équipe (ou de match nul) et donc une base d'estimation de l'incidence qu'aura l'équilibre des probabilités sur le nombre de spectateurs. La prudence est ici de mise, sachant que dans certains pays et pour certains sports, comme le football au Royaume-Uni, les paris reposent sur des cotes fixes établies par le bookmaker une semaine à l'avance, ce qui signifie que les cotes publiées peuvent ne pas traduire avec précision les attentes du consommateur quant à l'incertitude du match. Qui plus est, il est probable que l'incertitude prise en considération par le consommateur soit définie à la date à laquelle le billet a été acheté, plutôt qu'à la date à laquelle les cotes ont été fixées, sachant que le niveau d'incertitude peut varier entre ces deux dates. Le problème se posera encore plus pour les abonnés à la saison. Enfin, lorsque tous les billets d'un match ont été vendus, il n'est pas possible d'observer directement une demande aux prix publiés, ce qui peut nécessiter le recours à des méthodes d'estimation à même de rendre compte de cet élément manquant, telles que le modèle de Tobit.

Les études empiriques relèvent remarquablement peu d'éléments probants en faveur de l'hypothèse de l'incertitude de l'issue en ce qui concerne les matches particuliers. Par exemple, Borland et Macdonald (2003) ont recensé 18 études à travers divers pays et couvrant divers sports et ont constaté que « seules à peu près trois d'entre elles donnaient de solides indications d'une incidence sur le nombre de spectateurs... D'autres études fournissent des éléments hétérogènes qui suggèrent que l'augmentation de la probabilité d'une victoire à domicile peut avoir une incidence préjudiciable sur le nombre de spectateurs, mais uniquement lorsque cette probabilité de victoire est de plus de deux tiers » (p. 486)¹². En d'autres termes, une compétition équilibrée n'intéresse pas les supporters d'une équipe locale : ils veulent que leur équipe gagne, et sont d'autant plus susceptibles d'assister au match que la probabilité de cette victoire est grande. Il convient également d'interpréter avec précaution l'indication selon laquelle la demande peut baisser en cas de probabilité très élevée d'une victoire à domicile, sachant que rares sont les matches à ce point déséquilibrés, et les estimations sont donc basées sur un très petit nombre d'observations. Que le nombre de spectateurs à un match augmente presque partout avec le succès de l'équipe locale n'est pas très surprenant, puisque la plupart des clubs populaires se développent grâce à leurs performances, mais cela semble indiquer que l'hypothèse de l'incertitude de l'issue doit être maniée avec prudence. Ces éléments ne sous-entendent pas que l'hypothèse est erronée, mais plutôt qu'elle n'est pas aussi importante que cela est souvent évoqué.

Comme les droits télévisuels représentent une part de plus en plus importante du revenu total, l'attention se porte progressivement sur l'incidence de l'incertitude de l'issue sur les téléspectateurs. Forrest

¹² Jeff Borland et Robert Macdonald, 2003, « The Demand for Sports » *Oxford Review Of Economic Policy*, Vol. 19, n° 4, pp. 478-502.

et al (2005)¹³ observent des effets limités de l'incertitude de l'issue. Alavy *et al.*, (2010)¹⁴ sur la base de l'audience en téléspectateurs calculée minute par minute, constatent que l'incertitude, prise au sens où le résultat final devient prévisible, réduit le nombre de téléspectateurs (ils ont tendance à changer de chaîne lorsque le score d'un match devient très inégal), mais leur nombre chute également lorsqu'ils s'attendent à un match nul, ce qui semble indiquer que « l'impasse » dans laquelle chaque équipe se retrouve a aussi peu d'attrait qu'un déséquilibre trop marqué.

L'incertitude d'un championnat peut être vue comme la probabilité qu'une ou quelques équipes dominent le championnat, que ce soit sur l'ensemble d'une saison ou à l'intersaison. Étant donné que le grand nombre de matches joués au cours d'un championnat laisse penser que le classement des équipes constitue probablement le reflet précis de leurs forces respectives, plus aucune mesure indépendante de l'incertitude de l'issue n'est nécessaire, et nous défendons alors la thèse selon laquelle la répartition réelle des victoires est le reflet exact de la répartition attendue, et donc de l'incertitude de l'issue.

Même si l'incertitude d'un match ne changeait rien à la demande (le nombre de spectateurs était partout en augmentation en cas de probabilité de victoire de l'équipe locale), on pouvait encore soutenir qu'un championnat plus incertain augmentait la demande, dès lors qu'on se trouvait en présence de rendements décroissants de la victoire. Il s'agit peut-être ici de la question la plus importante sur l'hypothèse de l'incertitude de l'issue : quelle répartition des victoires maximiserait le nombre de spectateurs sur l'ensemble de la ligue ? Les équipes et les organisateurs de ligue ont de tout temps affirmé que la concurrence sans limites entraînerait la domination excessive des équipes disposant des ressources les plus importantes (comme les équipes des grandes villes). Cette hypothèse peut en principe se vérifier. Si nous pouvons évaluer la relation entre le nombre de spectateurs et les victoires pour chacune des équipes d'une ligue, nous pouvons en principe comparer les résultats lorsqu'il y a concurrence sans limites à une estimation de la répartition des victoires qui maximiserait la présence du public (ou les recettes, ou tout autre objectif affiché).

Un des résultats possibles d'un tel exercice serait de constater que chacune des équipes de la ligue s'est montrée tout aussi sensible à la perspective de gagner qu'une autre, ce dont nous pourrions déduire que la distribution optimale des victoires exigerait un championnat parfaitement équilibré. Quelques observateurs estiment toutefois que toutes les équipes sont sensibles à la perspective de gagner. En pratique, les équipes des grandes villes y seront probablement plus sensibles, simplement parce qu'elles attirent une population plus grande. Cela étant, on peut imaginer des contre-exemples : ainsi, les supporters de petites villes pourraient avoir le goût du succès, et les équipes des grandes villes pourraient parvenir à remplir le stade quelque que soit leur succès. En cas d'asymétrie dans la sensibilité à la perspective de gagner, la stratégie visant à augmenter autant que possible le nombre de spectateurs dans l'ensemble de la ligue impliquerait alors de privilégier les victoires des équipes drainant le plus de spectateurs. Étant donné que ces équipes sont aussi souvent celles qui gagnent le plus, la répartition concurrentielle des victoires pourrait bien être également celle qui cherche à maximiser les bénéfices. Cette proposition, connue sous le nom de principe d'invariance, a été avancée par Rottenberg (1956) relativement à l'échange de joueurs, puis étendue par El-Hodiri et Quirk (1974) à l'impact du partage des recettes des entrées¹⁵. Ces résultats reposent sur

¹³ D. Forrest, R. Simmons et T. Buraimo, (2005) « Outcome uncertainty and the couch potato audience » *Scottish Journal of Political Economy*, 52(21), pp. 641-661.

¹⁴ Kevin Alavy, Alison Gaskell, Stephanie Leach, et Stefan Szymanski (2010) « On the Edge of Your Seat: Demand for Football on Television and the Uncertainty of Outcome Hypothesis », *International Journal of Sport Finance*, à paraître.

¹⁵ Simon Rottenberg, (1956) « The baseball player's labor market » *Journal of Political Economy*, 64, pp. 242-258 ; James Quirk et Mohamed El Hodiri, (1974) « The economic theory of a professional sports league » dans *Government and the Sports Business*, Roger Noll, dir. pub. Washington: Brookings Institution.

l'hypothèse d'un monde Coasien dans lequel il existe des entreprises où tous les gains potentiels tirés des échanges sont exploités et où toutes les externalités sont internalisées.

Les marchés concurrentiels se conforment rarement à l'idéal Coasien, en grande partie parce que les entreprises sont incapables de signer des contrats complets entre elles, le droit de la concurrence interdisant de toute évidence de tels accords. D'autres raisons peuvent tenir au manque d'informations convenables ou à des asymétries de l'information, qui peuvent entraîner la défaillance du marché. Szymanski (2004)¹⁶ compare la répartition des résultats des ligues visant à maximiser le nombre de spectateurs au résultat concurrentiel et montre que dans un monde où les équipes sont inégales, le résultat concurrentiel est en fait *plus* équilibré que l'optimum de l'organisateur. Il offre en outre des estimations économétriques pour la Major League Baseball pour corroborer sa théorie.

Chose étonnante, peu d'autres articles ont livré une analyse économétrique de l'incidence de l'incertitude d'un championnat, que ce soit sur l'ensemble d'une saison ou à l'intersaison. Deux des meilleures études menées ces dernières années sont celles de Schmidt et Berri (2001) et de Humphreys (2002)¹⁷. Si leurs estimations apportent un certain crédit à l'incertitude de l'issue, ce crédit est toutefois bien mince.

Les restrictions spécifiques et leurs conséquences seront examinées plus avant dans la suite du document.

5. Sport et culture

5.1 La télévision et le sport

Au cours de la deuxième moitié du XX^e siècle, la télévision a révolutionné le sport. La télévision a en effet permis à des millions de personnes de vivre ensemble l'expérience du sport en direct. Des événements tels que la Coupe du Monde de la FIFA ou la cérémonie d'ouverture des Jeux olympiques d'été réunissent une part considérable des audiences télévisuelles au niveau mondial. Au sein de chaque nation, le succès de certains athlètes ou de l'équipe nationale peut devenir le centre d'intérêt, au point même d'influencer le résultat d'élections nationales. La télévision a également contribué au rayonnement des sports individuels et des stars du sport, qui sont devenues des célébrités nationales et internationales de la même manière que le développement de l'enregistrement sonore a créé des pop stars, ou que le cinéma a produit ses vedettes. Le potentiel commercial de la télévision a également été à l'origine d'une augmentation massive de l'argent dans le sport.

5.2 L'identité nationale et la culture du sport

Le sport s'est tellement intégré dans les cultures nationales qu'il est impossible d'ignorer son importance sociale. Il arrive fréquemment que la façon dont un sport est pratiqué dans un pays particulier soit comparée à l'identité même de ce pays. On considère en outre que le sport incarne certaines valeurs saines, ce qu'indique l'emploi de mots tels que « fair-play » et « sportivité », et ce qui transparaît des aspirations de la Charte olympique. Beaucoup ont le sentiment que le sport qu'ils suivent leur « appartient », et qu'ils ont leur mot à dire dans la façon dont il est géré, de la même manière que les électeurs ont leur mot à dire dans la façon dont le gouvernement est administré. Cette question

¹⁶ Stefan Szymanski, 2004, « Tilting the Playing Field: Why a sports league planner would choose *less, not more, competitive balance* » <http://www3.imperial.ac.uk/pls/portallive/docs/1/43004.PDF>.

¹⁷ Brad Humphreys, 2002, « Alternative measures of competitive balance in sports leagues » *Journal of Sports Economics*, 3, 2, pp. 133-148. Martin Schmidt et David Berri, 2001. « Competitive Balance and Attendance: the Case of Major League Baseball », *Journal of Sports Economics*, 2, 2, pp. 145-167.

s'accommode mal avec le fait que la plupart des organisations sportives sont des associations privées, souvent dirigées par un groupe très restreint d'administrateurs qui ne sont responsables devant leurs membres qu'à titre occasionnel, et souvent dans des conditions assez restrictives.

Ces constatations ont quelques répercussions pratiques sur la façon dont le sport est organisé.

Premièrement, s'agissant de la télévision, bon nombre de gouvernements nationaux jugent essentiel que les grandes manifestations sportives puissent être suivies par le plus large public possible et de ce fait en réservent certaines à la télédiffusion sur les chaînes terrestres – c'est en particulier le cas dans l'Union européenne où chaque État membre est autorisé à sélectionner sa propre « liste d'événements ». Cela signifie que les titulaires des droits ne sont pas autorisés à les vendre à des services de radiodiffusion par abonnement (bien qu'ils puissent le faire sous certaines conditions).

Deuxièmement, les responsables politiques se voient souvent contraints d'intervenir d'une manière ou d'une autre lorsque les administrateurs sportifs sont impopulaires ou jugés défaillants dans leurs fonctions. Dans certains cas, les gouvernements peuvent être officiellement habilités à intervenir dans le fonctionnement d'une association privée et dans d'autres cas n'avoir qu'une marge d'intervention limitée.

5.3 *Sport, mercantilisme et éthique*

Il ne fait aucun doute qu'il y a aujourd'hui beaucoup plus d'argent dans le sport que par le passé. En 1950, les revenus combinés des seize équipes de la Major League Baseball représentaient 25.5 millions USD, soit l'équivalent de 228 millions USD actuels ; en 2008, on estimait que les trente équipes généraient un revenu de 5 819 millions USD, soit 26 fois plus, en tenant compte de l'inflation¹⁸. En 1980 déjà, les vingt-deux clubs de la première division du championnat de football d'Angleterre avaient des revenus combinés d'environ 38 millions GBP, soit l'équivalent de 120 millions GBP actuelles ; en 2008, les revenus combinés des vingt clubs de l'*English Premier League* étaient de 1 932 millions GBP, soit 16 fois plus, en tenant compte de l'inflation¹⁹. Le sport n'est peut-être pas un domaine d'activité très important (le chiffre d'affaires annuel des *Yankees* de New York ou de *Manchester United* est faible comparé à celui d'entreprises du Dow Jones ou du FTSE 100), mais l'accroissement des revenus a imposé une approche de la gestion plus commerciale. Cela ne semble pas poser de problème dans certains pays. Aux États-Unis par exemple, le sport professionnel a toujours été considéré comme une activité commerciale et la validité d'une approche commerciale du sport professionnel n'est pas contestée²⁰. Mais, dans d'autres pays, notamment en Europe, on pense que le mercantilisme nuit au sport d'une manière générale et que l'afflux d'argent a poussé au mercantilisme au détriment de l'éthique sportive. On prétend que le mercantilisme a été à l'origine d'un certain nombre de problèmes, tels que le recul « fairplay » (tricheries et mentalité de la « victoire à tout prix »), l'exclusion sociale (en raison de l'augmentation du prix des billets), le dopage, les paris et la corruption, ainsi que la possibilité d'une défaillance financière due à une mauvaise gestion financière.

¹⁸ Source : <http://www.rodneymart.com/SportsData/BizFrame.htm>. En 1950, l'indice des prix à la consommation américain était de 24.1 %, et atteignait 215,3 % en 2008, soit une multiplication par neuf.

¹⁹ Source : « Winners and Losers, the Business Strategy of Football », Stefan Szymanski et Tim Kuypers, 1999 London, Viking and Deloitte *Annual Review of Football Finance*, 2009. En juillet 1980, l'indice des prix de détail du Royaume-Uni était de 67,9 %, et atteignait 216.5 % en juillet 2008.

²⁰ Même si la NCAA (National Collegiate Athletic Association) a lutté pour tenir le professionnalisme à l'écart de l'athlétisme universitaire, malgré les importantes recettes générées par le football et le basketball masculins.

Cela a conduit à préconiser une plus grande réglementation du sport de manière à préserver les traditions nationales et les valeurs du sport. Dans la mesure où cela implique de restreindre des libertés commerciales normalement protégées par le droit de la concurrence, des conflits peuvent survenir.

5.4 Les différents modèles de compétitions sportives

La ligue de sport professionnel la plus ancienne au monde encore en activité est la *Baseball National League* (composant pour moitié la MLB), fondée en 1876. Le modèle économique du fondateur, William Hulbert, était un système de franchises exclusives, chacune représentant une ville à titre exclusif (et à ce jour, mêmes les plus importants districts métropolitains ne disposent que de deux franchises pour une ligue majeure de sport donnée²¹). Chaque membre détenait une part dans la ligue, et les décisions étaient prises par un comité des clubs. Il était possible d'ajouter de nouvelles franchises, mais chaque demande devait faire l'objet d'un vote, et l'équipe entrante devait s'acquitter d'une somme importante pour avoir le droit d'adhérer. Relativement peu d'autres pays ont suivi le modèle « fermé » américain : le baseball japonais suit ce modèle d'assez près, et le sport australien a évolué dans le même sens.

Un modèle différent a émergé en Europe. Après le succès de la création de l'*English Football League* en 1888, on a décidé de créer une deuxième division en 1892, et on s'est alors posé la question de la relation entre les équipes des deux divisions. Il a été convenu que les équipes de la division inférieure devraient pouvoir passer de l'une à l'autre, et après avoir essayé différentes options, le système de promotion et de relégation a été retenu en 1897. Ce système, qui implique la rétrogradation automatique des équipes situées au bas du classement et leur remplacement par les équipes les mieux classées de la division immédiatement inférieure, repose donc sur le mérite sportif²². Ce système « ouvert » a été largement repris. À mesure que les divisions s'ajoutent, la hiérarchie peut être étendue, comme en Angleterre où la « pyramide » descend jusqu'au niveau amateur (ce qui représente au moins neuf niveaux), et non seulement ces systèmes sont utilisés par les ligues de football dans quasiment tous les pays (à l'exception notable de la Major League Soccer aux États-Unis), mais bon nombre d'autres sports y ont également fréquemment recours²³.

Les implications économiques des systèmes fermés et ouverts sont profondément différentes. Dans le système fermé, les clubs sont fortement incités à investir dans le développement à long terme de leur marché local. Mais, tant que les franchises restent peu nombreuses, les clubs jouissent encore d'un important pouvoir de négociation, et peuvent menacer de s'installer ailleurs si une autre ville présente une offre plus intéressante pour les accueillir (comme la construction d'un nouveau stade aux frais du contribuable). Comme les clubs contrôlent l'admission, les franchises peuvent rester en nombre limité, sous réserve qu'il ne soit pas rentable pour une ligue concurrente de s'installer. La rivalité entre clubs est beaucoup plus intense dans un système ouvert où l'admission ne peut pas être restreinte. De plus, l'absence d'exclusivité territoriale a pour conséquence qu'un club est davantage intéressé par les victoires à court terme que par les investissements à long terme. La rentabilité a également tendance à être moins importante dans un système ouvert, où les équipes investissent leurs moyens dans des joueurs de talent en vue d'éviter la relégation. Même si les équipes en tête de championnat ne sont pas confrontées à un tel risque, leurs dépenses sont influencées par le niveau de dépenses des équipes concurrentes classées

²¹ Avant que les Dodgers ne soient transférés à Los Angeles, New York avait trois franchises.

²² Certaines ligues peuvent imposer des conditions relatives à la capacité du stade. En Espagne, lorsque la deuxième équipe d'un club est autorisée à jouer dans les divisions inférieures, elle ne peut pas jouer dans la même division que la première équipe.

²³ Les origines et les implications des deux différents systèmes sont examinées dans le détail par Stefan Szymanski dans « Playbooks and Checkbooks: An Introduction to the Economics of Modern Sport » (2009), Princeton University Press.

immédiatement derrière elles, qui peuvent elles-mêmes subir des pressions en cascade²⁴. L'incidence des difficultés financières est de la même façon beaucoup plus grande que dans les ligues majeures américaines, ces difficultés étant souvent suscitées par la relégation. Cela étant, les équipes elles-mêmes font rarement faillite, parce qu'elles prennent racine dans les collectivités locales (et que le changement de lieu d'implantation n'est pas possible). Les systèmes fermés défendent une approche plus égalitaire des problèmes économiques ; les clubs peuvent se reconnaître des intérêts communs en limitant la compétition économique tout en maintenant la compétition sportive, d'où le grand nombre de restrictions décidées par les ligues américaines relatives au partage des recettes et au recrutement des joueurs. Il en résulte que les disparités économiques entre les équipes sont beaucoup moins grandes qu'en Europe. S'il est vrai qu'il y a peu de preuves que l'équilibre compétitif au cours d'une saison soit plus grand aux États-Unis, en Europe les mêmes clubs dominent souvent avec le temps alors qu'aux États-Unis, le succès est réparti de façon plus égale²⁵.

En raison de la forte dimension culturelle du sport, les supporters ont souvent tendance à déclarer que leur système est le meilleur, et à dédaigner l'idée de copier celui des autres. En réalité, bon nombre de ligues à travers le monde ont observé le système américain ces dernières années et en ont adopté certains éléments. On peut affirmer que le système ouvert est plus proche d'un système de marché concurrentiel, qui inclut l'ensemble des avantages pour le bien-être du consommateur normalement associés à la concurrence²⁶.

6. Le lien entre sport professionnel et sport amateur

Les joueurs recrutés par des équipes professionnelles sont eux-mêmes issus des équipes amateurs. Il n'y a en général aucune raison de supposer qu'un club professionnel dédommagerait l'équipe amateur pour un joueur plus qu'une entreprise dédommagerait l'ancien employeur d'un salarié au moment de l'embaucher. Toutefois, on fait souvent observer qu'il existe une certaine réciprocité entre les clubs amateurs « de la base » et les clubs professionnels qui sont des entreprises commerciales. L'intégration du sport professionnel dans une structure de gestion qui inclut le sport amateur permet de concrétiser la réciprocité. Les organismes de tutelle peuvent effectivement « taxer » le sport professionnel de manière à financer les actions de développement au niveau local, pratique qui, en Europe, est connue sous le nom de « solidarité »²⁷. La taxation peut prendre la forme d'impôts particuliers ou être indirecte. Par exemple, les fédérations nationales imposent généralement aux clubs professionnels de libérer les joueurs pour qu'ils puissent participer aux grandes compétitions internationales et se réservent les recettes tirées de la vente

²⁴ On fait parfois valoir que les clubs européens recherchent la maximisation des victoires et que les bénéficiaires ne les motivent pas autant que cela semble être le cas pour les propriétaires des équipes américaines (voir par exemple S. Késenne (1996), « League Management in Professional Team Sports with Win Maximizing Clubs. *European Journal for Sport Management* », 2/ 2, 14-22) ; ce qui est possible, mais sachant que le système ouvert rend les profits plus difficiles, la question perd de son intérêt.

²⁵ Pour une analyse économique des systèmes de promotion et de relégation, se reporter aux ouvrages de S. Szymanski et T. Valletti, (2005) « Promotion and relegation in sporting contests », *Rivista di Politica Economica*, vol. 95, pp. 3-39, et de L. Buzzachi, S. Szymanski et T. Valletti (2003) « Equality of opportunity and equality of outcome: open leagues, closed leagues and Competitive Balance », *Journal of Industry, Competition and Trade*, 3, 3, pp. 167-186.

²⁶ Pour un point de vue sur le bien-être dans le système fermé, voir l'ouvrage de S. Ross et S. Szymanski, (2008) « Fans of the World Unite: A (Capitalist) Manifesto for Sports Consumers », Stanford University Press.

²⁷ Le terme même est tiré du Traité sur le fonctionnement de l'Union européenne (TFUE) qui fait référence à la solidarité et à l'esprit de solidarité entre les États membres, bien que sa signification exacte ne soit jamais totalement définie. On considère en général qu'il désigne l'obligation des membres de se porter mutuellement assistance.

des billets et des droits de retransmission. Les recettes ainsi générées sont parfois substantielles (notamment dans le cas du football), mais les clubs en leur qualité d'employeurs sont peu ou pas rémunérés et ne participent pas à la décision de libérer ou non les joueurs.

La question des paiements de solidarité des clubs professionnels aux équipes locales s'est posée dans les affaires de droit de la concurrence relatives aux restrictions convenues entre clubs professionnels (comme la vente collective des droits de retransmission). L'arrêt *Bosman*²⁸, qui concernait davantage la libre circulation des travailleurs dans l'Union européenne que le droit de la concurrence, a admis que des restrictions en matière de mobilité des joueurs pourraient en principe se justifier si elles servaient à maintenir la solidarité, bien qu'en l'espèce la cour ait rejeté l'argument selon lequel les restrictions contestées avaient pour objet de promouvoir la solidarité. Il est fréquent que les organismes de tutelle et les ligues déclarent que les restrictions sont justifiées au motif qu'elles profitent non seulement aux organisations de sport professionnel, mais également aux équipes locales.

7. La gouvernance, l'État et le droit

Dans des pays comme les États-Unis, l'État n'assume aucune responsabilité spécifique s'agissant du sport, mais il peut intervenir sur des problèmes particuliers. En pratique, même si peu de choses sont faites au niveau fédéral, les collectivités locales jouent un rôle important dans le sport, notamment dans le financement des écoles de sport et des parcs nationaux. D'un autre côté, dans certains pays comme la France, le sport relève de la responsabilité de l'État qui délègue alors son pouvoir aux collectivités locales et aux fédérations nationales²⁹. Ces différentes approches pourraient avoir des répercussions assez radicales sur l'application du droit de la concurrence. Par exemple, la question de la vente collective des droits de retransmission par une ligue pose un problème de droit de la concurrence si les clubs membres sont considérés comme des entités indépendantes mais n'en pose plus si la ligue est agréée par la fédération nationale qui est elle-même agréée par l'État (bien que la position dominante sur le marché puisse toujours poser un problème). Dans bon nombre de pays, le rôle de l'État se limite en grande partie au financement du sport, comme en Allemagne, où le pouvoir est décentralisé et l'autonomie des fédérations sportives garantie. Le modèle du Royaume-Uni était à divers égards identique au modèle des États-Unis jusqu'aux années 60, époque où l'État n'était pas formellement engagé dans le sport ; néanmoins l'implication des autorités publiques s'est depuis lors accrue, avec la création d'un ministère du sport, d'organismes publics de financement du sport et grâce à l'affectation au sport d'une partie des bénéfices de la loterie nationale.

Dans de nombreux pays du monde, le sport s'est développé en associations privées régies conformément au droit privé national, ce qu'illustrent des organisations telles que le CIO et la FIFA (bien que la relation entre les comités nationaux et les pouvoirs publics soit souvent étroite). Comme toute organisation, elles doivent se conformer au droit de l'État dans lequel elles résident. Ainsi, les règles sportives peuvent être examinées par les tribunaux, situation que bon nombre d'organismes sportifs trouvent contestable. Du point de vue du droit, on fait souvent valoir qu'il n'existe pas à proprement parler de « droit du sport », et qu'on a simplement recours à la loi applicable aux relations contractuelles, dans un cadre sportif. Cela étant, les organisations sportives ont demandé haut et fort que les tribunaux reconnaissent la nature particulière ou la « spécificité » du sport.

Aux États-Unis, pays qui a la plus longue expérience en matière de contentieux du sport, le Congrès a accordé une exemption particulière aux ligues de sport professionnel sous la forme du *Sports Broadcasting*

²⁸ Affaire C-415/93 *Bosman*, Recueil de jurisprudence 1995 I-4921.

²⁹ « L'État est responsable de la conduite des politiques sportives en France. Il délègue aux fédérations sportives le pouvoir d'organiser et de promouvoir la pratique de leurs disciplines et les soutient par le biais des conventions d'objectif et de la mise à disposition des cadres techniques. » <http://www.sports.gouv.fr/francais/acteurs-du-sport/role-du-ministere/>

Act. Au sein de l'Union européenne, la forte pression exercée par les organisations sportives a conduit à inclure une référence particulière au rôle du sport dans le TFUE. Dans les deux cas, la pression est née des contentieux relatifs à l'examen par les autorités de la concurrence des contrats commerciaux conclus par les ligues sportives.

D'une manière générale, les organisations sportives ont tenté de s'opposer à l'implication des tribunaux dans le règlement de leurs différends. Par exemple, la FIFA ne permet à aucune organisation membre d'engager des poursuites judiciaires sans son autorisation. Cela a conduit à l'élaboration d'autres mécanismes de règlement des différends approuvés par les organisations sportives, et en particulier par le Tribunal arbitral du sport.

8. Statut des ligues dans les affaires de droit de la concurrence

Certaines des circonstances générales dans lesquelles des questions de droit de la concurrence peuvent se poser ont été décrites dans la section 3. En pratique, les enquêtes ont souvent mis l'accent sur la conduite des ligues de sport collectif, principalement en matière de restrictions appliquées dans les contrats des joueurs et de vente de droits de retransmission. Avant d'examiner quelques cas particuliers, une des questions de principe essentielles réside dans la façon d'envisager une ligue comme entité économique. Certains ont qualifié les ligues de sport professionnel d'« exemples classiques, voire parfaits de consortiums »³⁰. Cela étant, comme on l'a vu dans la section 4, les particularités du sport appellent une certaine coopération entre les membres d'une ligue de manière à créer la concurrence.

Si les accords entre les participants à une compétition sportive ne constituent pas une violation automatique du droit de la concurrence, chaque restriction contestée doit alors être jugée au cas par cas. Cette approche a été expliquée par la Cour suprême des États-Unis dans l'affaire *NCAA c. Board of Regents* (1984) : « la fixation horizontale des prix et la limitation de la production sont normalement proscrites en droit, en vertu du critère de « l'illégalité en soi » au motif que la probabilité que ces pratiques soient anticoncurrentielles est très élevée [...] Néanmoins, il est décidé qu'il serait inapproprié d'appliquer en l'espèce la règle de l'illégalité en soi [...] Ce qui est déterminant dans la présente affaire est qu'elle concerne un secteur dans lequel les restrictions horizontales en matière de concurrence sont indispensables à l'existence même du produit[...] Ce que la NCAA et ses institutions membres commercialisent ici est la concurrence elle-même – des compétitions entre des institutions concurrentes. Cela serait bien sûr totalement inefficace s'il n'existait pas de règles sur la base desquelles les concurrents avaient accepté de créer et de définir la concurrence destinée à être mise sur le marché »³¹.

Dès lors, la véritable question tient à la marge de manœuvre accordée aux ligues membres pour conclure des accords. Il existe essentiellement deux points de vue sur cette question :

8.1 L'approche de la coentreprise

Cette approche est bien décrite par Flynn et Gilbert (2001). Une coentreprise est un accord entre des entreprises potentiellement concurrentes dans le but de partager des moyens et des capacités pour produire un produit que ses membres ne seraient pas à même de produire aussi efficacement s'ils devaient agir séparément. La coentreprise est de ce fait souhaitable dès lors qu'elle constitue la solution la plus efficace pour répondre aux besoins du consommateur. Une ligue professionnelle correspond par nature à cette description, étant donné que les différents clubs ne peuvent pas produire une compétition sans avoir convenu de se joindre pour cela à d'autres membres. Se pose alors la question de savoir si un accord de coentreprise a des effets anticoncurrentiels. La théorie de la coentreprise requiert une analyse au cas par cas

³⁰ Fort et Quirk (1995).

³¹ NCAA v. Board of Regents, 468 U.S. 85, 100-101 (1984).

des restrictions individuelles. Celles-ci doivent être examinées afin de déterminer a) si elles procurent des avantages aux consommateurs (en créant par exemple une compétition plus intéressante) et b) si elles entravent la concurrence d'une manière préjudiciable aux consommateurs. Si, tout bien considéré, les restrictions contestées sont avantageuses, il reste encore à établir si un accord moins restrictif n'aurait pas permis d'atteindre les mêmes objectifs.

Ainsi dans l'affaire *Smith c. Pro Football*³², la Cour d'appel des États-Unis a examiné le « *draft system* », système de recrutement qui accorde des droits de négociation sur les nouveaux joueurs qui entrent dans la ligue à une équipe déterminée, les équipes classées les dernières étant prioritaires pour choisir les nouveaux joueurs. Il était admis que le projet pouvait en théorie stimuler la concurrence dans un sens sportif (puisqu'il permettrait aux équipes faibles de concourir), mais pas dans un sens économique au motif que les clubs ne sont pas des concurrents économiques sur le terrain, de sorte que du point de vue du droit de la concurrence, il n'y avait pas d'effets bénéfiques sur la concurrence ; Prenant le contre-pied de cette position, la cour a jugé que ce système n'était en fait qu'une restriction significative du marché des services de joueur et qu'il constituait donc en définitive une restriction commerciale injustifiée. Tout porte manifestement à croire que les clubs pourraient prendre des dispositions pour stimuler les effets bénéfiques du système sur la concurrence (dans un sens sportif) sans avoir à restreindre le marché du travail (par exemple, par l'adoption d'un système de handicap qui pénaliserait les équipes qui obtiennent des résultats et récompenserait les équipes moins performantes).

8.2 La théorie de l'entité unique

La validité d'un accord portant exclusivement sur les relations entre les filiales d'une même société ne peut être contestée au titre du droit des ententes – on ne peut pas dire d'une entreprise qu'elle est de mère avec elle-même. Cela étant, une société peut dans son propre intérêt, encourager la concurrence entre ses filiales – par exemple General Motors a longtemps maintenu une certaine concurrence entre ses divisions, comme entre Cadillac et Buick. Les partisans de la théorie de l'entité unique affirment qu'une ligue de sport professionnel devrait être considérée de la même façon³³. Les défenseurs de cette thèse ne nient pas que les clubs membres soient des personnes morales indépendantes (à l'inverse de l'exemple de General Motors) mais font valoir que la logique économique l'emporte sur le formalisme juridique en droit de la concurrence. Selon ces allégations, comme les adversaires sportifs ne peuvent pas créer de concurrence sportive sans coopération mutuelle, cela veut dire qu'ils devraient être considérés comme une entité unique aux fins de l'examen de leurs comportements anticoncurrentiels.

La théorie de l'entité unique laisse à l'évidence une grande latitude aux ligues pour conclure des accords restrictifs, mais ses défenseurs affirment qu'elles resteraient soumises au droit de la concurrence en matière de monopolisation/position dominante. En substance, cette approche se fonde sur la sanction par les mécanismes de la concurrence au niveau de la ligue de tout comportement monopolistique (ou par les lois antimonopole si le comportement monopolistique consiste en une pratique d'exclusion). Dès lors, si une ligue est en mesure de générer des bénéfices monopolistiques, une ligue concurrente peut alors s'installer et rivaliser en proposant des prix inférieurs, un meilleur accès aux diffuseurs, etc.

Le problème de cette approche tient à ce que la plupart des ligues majeures aux États-Unis (la *Major League Baseball* (MLB), la *National Football League* (NFL), la *National Basketball Association* (NBA) et la *National Hockey League* (NHL)) n'ont pas eu à faire face à un nouvel arrivant prospère depuis qu'elles sont des ligues majeures, ce qui pour la plupart d'entre elles remonte à avant la deuxième guerre mondiale. Cela tient notamment à la logique de la compétition sportive elle-même, qui suppose généralement le

³² Smith v. Pro Football, 593 F.2d 1173. (D.C. Cir., 1978).

³³ Voir par exemple G. Roberts (1984) « Sports Leagues and the Sherman Act: the Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry », *U.C.L.A. Law Review*, 32, 219, pp. 286-87.

souhait de voir jouer le meilleur contre le meilleur (exigence de qualité), ce qui empêche deux ligues de concourir côte à côte sur le même marché.

Par conséquent, il est peu probable que la concurrence par l'arrivée de nouveaux entrants au niveau des ligues constitue une véritable menace dans le contexte des États-Unis. Une des raisons de l'attrait de la théorie de l'entité unique aux États-Unis tient à ce que les équipes acceptent de limiter leur concurrence sportive à une seule ligue ou à un seul championnat. C'est la raison pour laquelle certains affirment que les clubs ne produiront rien du tout s'ils n'élaborent pas eux-mêmes le produit de la ligue. En dehors des États-Unis, la théorie de l'entité unique est moins plausible, puisque les clubs participent souvent à différentes compétitions en même temps (par exemple le championnat national et la Ligue des champions de l'UEFA dans le football européen), ce qui signifie que les clubs ne sont pas complètement tributaires de leurs concurrents dans une ligue en particulier pour élaborer leur produit. En effet, beaucoup considèrent que la différence de niveau de compétition entre la Ligue des champions et les championnats nationaux a créé des problèmes de déséquilibre concurrentiel dans les ligues nationales.

La théorie de l'entité unique a récemment été examinée par la Cour suprême des États-Unis dans l'affaire *American Needle c. National Football League (NFL)*³⁴. L'affaire portait sur la fabrication de vêtements sous licence, que la NFL, représentant 32 clubs membres, avait décidé de gérer au moyen d'un contrat exclusif unique conclu avec Reebok. *American Needle* avait été préalablement le fabricant de la NFL et des équipes individuelles sur une base non exclusive. *American Needle* a poursuivi la NFL sur la base de l'article 1 du Sherman Act mais a été débouté par le tribunal de district et la cour d'appel, qui ont admis qu'aux fins de délivrance de licences de propriété intellectuelle, la NFL devait être considérée comme une entité unique. La NFL a alors appuyé la demande de pourvoi formée par *American Needle*, en vue de voir confirmer la décision générale de considérer la ligue comme une entité unique. Le 24 mai 2010, la Cour suprême a rejeté la demande de la NFL d'une protection plus large du droit de la concurrence, déclarant qu'il y avait lieu de prendre en considération 32 équipes séparées – et non une entité unique – en cas de vente d'articles de marque comme des maillots ou des casquettes.

L'argument repose ici sur la question de savoir si l'article 1 s'applique ou non à une ligue sportive comme la NFL. L'affaire *Copperweld*³⁵ a établi que les filiales d'une société mère ne pouvaient pas être poursuivies au titre de l'article 1 puisqu'en fin de compte une conspiration visant à instaurer une restriction commerciale était impossible entre des entités contrôlées par une seule et même source. Le demandeur soutient que la NFL n'est pas une entité unique au motif que les clubs sont détenus par des propriétaires distincts. Par conséquent, ils peuvent conclure des accords entre eux mais ceux-ci restent soumis au contrôle de l'article 1 de la loi, ce qui est conforme à l'approche adoptée jusqu'alors par les tribunaux américains et le Congrès³⁶. Les restrictions n'ont pas été considérées illégales en soi au titre de l'article 1, mais ont été soumises au critère de la règle de raison. Le mémoire d'*amici curiae* rédigé par les économistes à l'appui de la thèse du demandeur a établi une distinction entre les accords entre équipes qui amélioreraient la qualité de la compétition et, partant, favoriseraient les intérêts des consommateurs d'une part et les accords qui n'étaient pas indispensables au développement de la ligue mais constituaient une restriction à la concurrence économique d'autre part. Pour différencier ces deux cas, l'application continue d'un critère de règle de raison au titre de l'article 1 est nécessaire (approche de la contrepense). Les défendeurs ont fait valoir que la NFL ne constituait pas une collaboration entre des sources indépendantes de puissance « économique ». Puisque la compétition de la NFL constitue le « produit » et qu'il ne peut être

³⁴ Affaire 08-661. L'auteur de la présente note de référence est l'un des quelques économistes qui ont conjointement déposé auprès de la Cour suprême un mémoire d'*amici curiae* en faveur du demandeur.

³⁵ *Copperweld v. Independence Tube*, 467 U. S. 752 (1984).

³⁶ En exemptant la vente collective des droits de retransmission de l'application du droit de la concurrence, le Congrès a considéré que sans cette exemption, la vente collective pourrait être contestée au titre de l'article 1.

élaboré sans la collaboration des équipes, la NFL et ses clubs membres devraient être considérés comme une entité économique unique. Chose intéressante, le mémoire d'*amici curiae* des économistes à l'appui de la cause des défenseurs rejetait la pertinence de l'expérience internationale soulevée dans le mémoire d'*amici curiae* des demandeurs pour illustrer toute l'étendue de l'action indépendante possible entre les clubs appartenant à une même ligue, au motif que les structures sportives présentent une spécificité culturelle ou ne sont pas économiquement rentables. Le mémoire d'*amici curiae* présenté pour le gouvernement américain a défendu une position intermédiaire, affirmant que si l'article 1 pouvait ne pas s'appliquer en toutes circonstances, si les clubs décidaient de fusionner officiellement leurs activités et qu'aucun effet anticoncurrentiel n'en découlait sur un autre marché, alors l'article 1 n'avait pas besoin de s'appliquer. En dehors de ce cadre assez limité, on estime que la règle de raison de l'article 1 devrait continuer à s'appliquer.

Les conséquences de cette décision sont importantes. Si les ligues se voyaient accorder le statut d'entité unique, alors les clubs américains seraient en mesure de conclure quasiment tout type d'accord sans que le droit de la concurrence puisse leur être opposé. Parmi les exemples notables d'accords restrictifs actuellement conclus par les ligues américaines figurent le partage des recettes, la vente collective des droits de retransmission, les plafonds salariaux, les limites d'embauche et les règles applicables au « *draft system* ». Mais, la plupart de ces accords sont déjà exempts de l'application du droit de la concurrence soit parce qu'ils font partie de conventions collectives (abordés ci-dessous), soit qu'ils bénéficient d'une exemption par le législateur.

La cour a décrété que les arrangements de la NFL en matière de licences constituaient une action concertée qui rapproche les décideurs et prive le marché de centres indépendants de décision. Chacune des équipes est une entreprise de taille importante, détenue et gérée indépendamment, et dont les initiatives générales en tant que société sont guidées par la conscience d'être une entreprise distincte des autres. Les équipes se font mutuellement concurrence, non seulement sur le terrain de jeu, mais aussi sur le terrain des supporters qu'elles se disputent, des recettes de billetterie et des contrats de personnel de direction et de joueurs. Bien que les équipes de la NFL aient des intérêts communs, tels que la promotion de la marque NFL, elles restent des entités distinctes, cherchant à maximiser leurs profits.

La cour a rejeté l'argument de la NFL selon lequel la ligue constitue une entité unique au motif que sans la coopération des clubs, il n'y aurait pas de football NFL :

« La justification de la coopération est sans rapport avec la question de savoir si cette coopération est une action concertée ou une action indépendante... Toute coentreprise comporte de multiples sources de puissance économique qui coopèrent pour produire un produit. Et pour beaucoup d'entreprises similaires, la participation de tiers est nécessaire, ce qui ne signifie pas que la nécessité de coopérer doit transformer une action concertée en action indépendante ; une vis et un écrou ne peuvent fonctionner qu'ensemble, mais un accord entre un fabricant de vis et un fabricant d'écrous sera toujours soumis au critère de l'article 1. »

La cour a jugé que « quoi qu'il en soit, il ne ressort pas des faits que la conduite présumée ait été indispensable. Bien que deux équipes soient nécessaires pour jouer un match de football, tous les éléments d'une coopération inter-ligue détaillée ne sont pas nécessaires pour produire un match. De plus, même si des accords à l'échelle de la ligue sont nécessaires pour produire du football, il ne s'ensuit pas que l'action concertée de commercialisation de la propriété intellectuelle est nécessaire pour produire du football ».

Cela étant, tous les accords entre les membres d'une ligue n'en sont pas illégaux pour autant : « Les équipes de football qui ont besoin de coopérer ne sont pas liées par le droit de la concurrence. Le fait que les équipes de la NFL aient un intérêt commun à la performance et à la rentabilité de la ligue, et qu'elles doivent coopérer dans la production et la programmation des matches, fournit une justification

parfaitement sensée à l'élaboration de toute une série de décisions collectives. Mais la conduite en cause dans le cas d'espèce reste une action concertée au sens du Sherman Act, soumise au critère de l'article 1. Lorsque 'des restrictions à la concurrence sont indispensables à l'existence même du produit', les règles de l'illégalité en soi ne s'appliquent pas et la restriction doit au contraire être jugée à l'aune de la règle de raison, plus souple ».

9. Législation du sport

Comme on l'a vu, certains pays ne sont dotés d'aucune législation générale en matière de sport, tandis que dans d'autres, l'État se voit attribuer un rôle formel dans l'organisation du sport. La législation a assurément une influence sur le sport dans certains domaines :

- les contrats de travail
- la protection des droits de propriété intellectuelle
- le règlement des différends
- l'application des règles en matière de dopage
- les règles relatives à la tricherie et à la corruption
- la discrimination
- la violence sur le terrain et en dehors
- la sécurité dans les stades

Ces questions peuvent interagir avec le droit de la concurrence à un niveau ou à un autre, et manifestement le droit du travail aura sans doute le plus d'influence en la matière.

Par ailleurs certaines dispositions législatives ont un rapport direct avec le droit de la concurrence. Aux États-Unis, le *Sports Broadcasting Act* de 1961 exonérait les « programmes télévisés sponsorisés » du droit de la concurrence, à la suite des pressions exercées par la NFL sur le Congrès après la décision de la Cour suprême de 1953 de considérer la vente collective de droits de retransmission comme anticoncurrentielle. Une série analogue d'événements s'est produite en Allemagne : en 1994, le *Bundeskartellamt* (autorité fédérale de la concurrence) a déclaré que la vente collective des droits de retransmission par le *Deutscher Fussball-Bund* était illégale, en l'absence d'exemption de l'application des règles de la concurrence votée par le parlement allemand.

La législation la plus significative de ces dernières années susceptible d'avoir des répercussions sur la pratique du sport et sur le droit de la concurrence figure dans le TFUE (tel qu'introduit dans le traité de Lisbonne ratifié en 2009). L'article 165 du TFUE donne à l'Union européenne une compétence explicite dans le domaine du sport :

« L'Union contribue à la promotion des enjeux européens du sport, tout en tenant compte de ses spécificités, de ses structures fondées sur le volontariat ainsi que de sa fonction sociale et éducative ... L'action de l'Union vise ... à développer la dimension européenne du sport, en promouvant l'équité et l'ouverture dans les compétitions sportives et la coopération entre les organismes responsables du sport, ainsi qu'en protégeant l'intégrité physique et morale des sportifs, notamment des plus jeunes d'entre eux ... L'Union et les États membres favorisent la coopération avec les pays tiers et les organisations internationales compétentes en matière d'éducation et de sport. »

Ce texte est le fruit de plus de dix ans de débat sur la place du sport en Europe. Dans l'affaire *Walrave et Koch* de 1974, la Cour de justice de l'Union européenne a établi que « l'exercice des sports ne relève du droit communautaire que dans la mesure où il constitue une activité économique », mais comme la dimension économique du sport européen s'est sensiblement réduite même dans les années 80, l'intervention du droit communautaire s'est dès lors réduite. L'avènement des services de télévision par abonnement, surtout par satellite, et la déréglementation des marchés de la télévision ont considérablement augmenté la valeur des droits de retransmission en même temps que les salaires des joueurs atteignaient des niveaux qui devenaient comparables aux salaires des joueurs aux États-Unis. Au cours des années 90, un certain nombre d'affaires très médiatisées, notamment l'affaire *Bosman* devant la Cour de justice de l'Union européenne ainsi que des enquêtes sur la vente collective des droits de retransmission, aux niveaux européen et national, ont amené bon nombre d'administrateurs sportifs à estimer que le statut spécifique du sport dans la société européenne n'était pas respecté. Ce point a été confirmé en particulier dans la décision de la Cour dans l'affaire *Meca Medina*³⁷ estimant qu'une réglementation purement sportive (concernant des règles antidopage) devait être appréciée au regard des articles 101 et/ou 102 du TFUE. La Cour parvient à la même conclusion que le Tribunal de première instance, en ce que les limites imposées aux athlètes par les règles antidopage étaient considérées comme « inhérentes à l'organisation et au bon déroulement de la compétition sportive ». Nonobstant l'intérêt de son approche méthodologique, visant à apprécier si une règle adoptée par une association sportive concernant l'organisation du sport enfreint ou non les articles 101 et/ou 102 du TFUE, la Cour instaure en outre dans cette affaire un possible droit d'agir pour les athlètes souhaitant contester les règles sportives en même temps qu'elle limite la liberté des associations sportives de remplir leur rôle social, éducatif et culturel³⁸. Bon nombre d'administrateurs sportifs en ont déduit que le droit communautaire permettait de considérer le sport comme une activité commerciale, en négligeant sa dimension sociale.

La déclaration de Nice des États membres de 2000 a expressément reconnu la « spécificité » du sport, et le Livre blanc sur le sport de la Commission européenne publié en 2007 a présenté un programme d'action, abordant des sujets tels que la promotion de la santé, la valorisation de l'activité physique et du rôle social du sport. Le Livre blanc a également confirmé que le droit de la concurrence continuerait à s'appliquer au sport, et expliqué ce qui était entendu par « spécificité », en reconnaissant notamment le rôle que l'équilibre compétitif pourrait jouer pour rendre le sport intéressant aux yeux des spectateurs et en respectant l'autonomie des organismes de tutelle. Cela étant, le Livre blanc a aussi précisé que les affaires actuelles respectaient déjà la spécificité du sport en ces termes, et qu'il n'y avait donc pas eu de changement fondamental de politique. Dans ce contexte, on peut considérer que l'article 165 relève d'une approche évolutive du sport bâtie sur le régime juridique existant, s'agissant notamment du droit de la concurrence. Cela étant, il confère aussi à l'Union européenne un nouveau rôle dans la gestion et la réglementation du sport sur son territoire. Aucun « modèle européen » du sport particulier n'a été décrit, mais les traditions du sport européen tel qu'il est pratiqué dans les États membres doivent être respectées. Compte tenu du caractère général de ces observations, leurs conséquences pratiques sont encore floues.

En annexe du Livre blanc sur le sport publié en 2007³⁹, la Commission a défini sa conception du sport et des règles de concurrence de l'Union. L'annexe divise le sujet en deux parties :

- a) Le régime des organisations sportives. Tout en reconnaissant la nature spécifique du sport, la Commission a expliqué qu'une règle ne saurait être dispensée de toute remise en cause au titre

³⁷ Affaire C-519/04 P, David Meca-Medina et Igor Majcen contre Commission des Communautés européennes, Recueil de jurisprudence 2006, p. I-06991.

³⁸ J. Zylberstein, « Collision entre idéaux sportifs et contingences économiques dans l'arrêt Meca-Medina », *Cahiers de droit européen*, Vol. 43, n°1-2, 2007, p. 213.

³⁹ http://ec.europa.eu/sport/white-paper/whitepaper100_fr.htm.

des articles 81 et 82 (devenus les articles 101 et 102 du TFUE) au seul motif qu'elle avait été définie comme règle purement sportive. Les règles contestées seraient plutôt examinées à la lumière de leur contexte et de leurs objectifs, pour déterminer si elles sont inhérentes à la poursuite d'un objectif sportif et proportionnées à celui-ci. La Commission a décrit les types de règles qui seraient probablement admises (par exemple les règles de sélection sur la base de la nationalité, les règles qui empêchent la propriété multiple de clubs participant aux mêmes compétitions, les règles antidopage, et les règles qui encouragent la stabilité financière), et celles qui ne le seraient pas (par exemple les règles qui créeraient un conflit d'intérêts pour une instance dirigeante en sa qualité d'autorité de tutelle d'un sport et de promoteur d'une compétition particulière au détriment d'autres organisateurs de compétitions, ou les règles d'arbitrage qui empêchent les recours des participants devant les tribunaux nationaux). Elle relève en outre certains domaines dans lesquels des problèmes persistent – les conditions de la libération par les clubs des joueurs appelés à jouer en équipe nationale, les règles concernant les joueurs formés localement et les plafonds salariaux.

- b) Les activités génératrices de revenus (essentiellement la vente des droits de retransmission). La position de la Commission européenne est examinée ci-dessous.

10. Jurisprudence

La plupart des affaires de droit de la concurrence relatives au sport portaient soit sur les contrats de joueurs, soit sur les droits de retransmission. Dans ces affaires, il s'agissait de déterminer si les clubs, les ligues ou les fédérations avaient pris part à des accords collectifs anticoncurrentiels.

10.1 Définition du marché

Les compétitions sportives les plus importantes opposent souvent quelques concurrents directs. Dans tous les sports, souvent seule une poignée de championnats au plus haut niveau est à même de générer d'importants revenus commerciaux. Cela illustre le phénomène du « vainqueur emporte tout », selon lequel même s'il y a une faible différence de qualité entre le premier et le deuxième, la différence de demande est très importante. Par exemple, les spectateurs qui assistent aux matches de *l'English Premier League* sont en moyenne plus de deux fois plus nombreux que les spectateurs du *Football League Championship* (deuxième division), et respectivement cinq et huit fois plus nombreux que ceux qui assistent aux matches de troisième et de quatrième divisions, alors même que les billets sont nettement plus chers. La substituabilité est faible, que ce soit entre les différents niveaux d'un sport donné ou même, entre différents sports ; Winfree indique par exemple que pendant le lock-out de 2004-05 qui s'est soldé par l'annulation de toute la saison, l'augmentation du nombre de spectateurs a été négligeable lors des matches de la MLB et de la NBA et dans certains cas, l'audience de la retransmission était en baisse⁴⁰. De la même façon, la substituabilité est faible entre les équipes d'une même ligue s'agissant des supporters assistant aux matches, particulièrement aux États-Unis où les franchises sont souvent situées assez loin les unes des autres. Les supporters se plaignent souvent de l'exploitation que font les clubs de leur puissance commerciale en augmentant le prix des billets, et certaines données laissent penser que les prix sont fixés quasiment au point d'élasticité (optimal pour un monopoliste avec un coût marginal nul)⁴¹, mais il n'y a pas eu d'affaires de droit de la concurrence liées au prix des billets dans un club particulier, ce qui n'est pas surprenant sachant que le droit de la concurrence américain ne contient aucune disposition interdisant les prix excessifs.

⁴⁰ Winfree, J. (2009) « Fan substitution and market definition in professional sports leagues », *The Antitrust Bulletin*, 54, 4, 801-822.

⁴¹ Rodney Fort, *Inelastic Sports Pricing*, 25 *MANAGERIAL & DECISION ECON.*87 (2004).

De la même façon, en 2003, l'OFT (bureau britannique de la concurrence) a imposé des amendes à un groupe de détaillants de maillots de sport pour avoir fixé le prix des répliques des maillots de l'équipe nationale d'Angleterre et de *Manchester United*. Aux fins d'appréciation des amendes, le marché pertinent a été défini au sens strict comme le marché des répliques des maillots d'un club ou d'une équipe individuels, au motif que les supporters d'une équipe ne verraient probablement pas la réplique du maillot d'une équipe concurrente comme un article de substitution acceptable⁴².

Le prix des places en loges pour les entreprises a également fait l'objet d'une étude au Royaume-Uni. L'affaire était relative aux billets d'accès aux loges pour le Championnat de tennis de Wimbledon, dont la vente a été accordée sous licence à deux distributeurs. L'OFT a rejeté les allégations selon lesquelles cela constituait une restriction de concurrence au motif que les acheteurs de l'hospitalité d'entreprise avaient le choix entre plusieurs manifestations prestigieuses (comprenant le football, le cricket, les courses hippiques, etc.)⁴³. Il n'existe par conséquent aucune thèse unanime sur la concurrence/substituabilité entre les sports.

En ce qui concerne les différends relatifs aux contrats des joueurs, le marché peut être défini comme le « marché des services de joueur ». D'une manière générale, la question de la définition du marché ne suscite pas de controverses, dans la mesure où les stars du sport professionnel ont souvent un nombre limité d'options et qu'il est exclu que la ligue ou les clubs aient pour intention d'entraver la concurrence. Ainsi, aux États-Unis, il est évident que le « *draft system* » ou bien les règles sur le transfert des joueurs s'appliquent à l'emploi dans la ligue majeure en question, et que les joueurs disposent de peu de solutions équivalentes. Dans l'affaire *Mackey c. NFL*⁴⁴, le défendeur a fait valoir que le marché des joueurs n'entrait pas le champ d'application du Sherman Act, qui vise les marchés de produits plutôt que les restrictions sur les marchés du travail ou des facteurs, mais la cour a jugé que « les hommes d'affaires ne pouvaient pas agir de concert pour éliminer la concurrence dans l'achat de produits de base essentiels à l'exploitation de leurs entreprises »⁴⁵. En Europe, l'affaire *Bosman* a manifestement été la plus importante mais elle portait sur la question de la liberté de circulation plutôt que sur le droit de la concurrence, et la question de la définition du marché ne s'est donc pas posée.

Dans les affaires de radiodiffusion, la question de la définition du marché a fait l'objet de discussions plus approfondies. Lorsqu'il est question de la vente de droits télévisuels, les acheteurs sont généralement des diffuseurs qui utilisent le contenu pour remplir leurs grilles de programmes. En achetant un contenu qui intéresse les téléspectateurs, les diffuseurs peuvent vendre des espaces publicitaires, et dans le cas des chaînes cryptées, commercialiser des services de télévision payante. Par conséquent, on peut parler de marchés séparés pour les téléspectateurs, les annonceurs et les diffuseurs, qui peuvent eux-mêmes être subdivisés en fournisseurs de chaînes de télévision (comme ESPN) et en plates-formes de retransmission (la plupart des plates-formes sont aussi fournisseurs de chaînes, de la même manière qu'un service d'abonnement par satellite peut offrir ses propres chaînes, tout en vendant des chaînes produites séparément). Souvent, la question de la définition du marché consiste surtout à savoir dans quelle mesure des articles de substitution existent pour le contenu d'un sport particulier. Ainsi, dans l'affaire de radiodiffusion *NCAA*⁴⁶, la Cour suprême a déclaré que :

« Il ne fait aucun doute que le football universitaire constitue un marché distinct pour lequel il n'existe pas de solution de substitution raisonnable. Par conséquent, nous convenons avec le

⁴² Affaire OFT n° CA98/06/2003.

⁴³ Revu par A. Lewis et J. Taylor (2003) dans « Sport: Law and Practice », London: Butterworths, p. 395.

⁴⁴ 543 F.2d 606 (8ème Circ. 1976).

⁴⁵ *Ibid*, point 61.

⁴⁶ *NCAA v. Board of Regents*, 468 U.S.. 85, 107 (1984).

tribunal de district qu'il importe peu que le marché soit défini du point de vue des diffuseurs, des annonceurs, ou des téléspectateurs ».

Il existe une distinction importante entre les marchés de la télévision payante et les marchés de la radiodiffusion traditionnelle. C'est ce qui ressort de la formulation du Sports Broadcasting Act mentionné ci-dessus, qui accorde une exemption de l'application des règles de la concurrence aux seuls « programmes télévisés sponsorisés », ce qui désigne souvent la radiodiffusion traditionnelle. Cela peut en partie expliquer la différence frappante qui existe entre les États-Unis, où la majorité des droits sont vendus collectivement à des chaînes gratuites (ou du câble de base) plutôt qu'à la télévision payante, et l'Europe où cette dernière option a été retenue pour une part importante des droits de retransmission du football. Si les clubs américains vendaient collectivement leurs droits de retransmission à la télévision payante, ils ne seraient pas protégés par l'exemption, de sorte qu'ils préféreraient les vendre collectivement à des chaînes gratuites⁴⁷.

Plusieurs affaires en Europe ont concerné la migration des droits vers la télévision payante, surtout pour la retransmission en direct des matches de football. Dans ces affaires, la question de la définition du marché consiste à savoir a) si des formes de contenu autres que le sport en question offrent des solutions de substitution et b) si des plates-formes autres que la télévision payante constituent d'autres possibilités de programmation. Les autorités de la concurrence ont toujours adopté une définition stricte sur les deux points⁴⁸. Compte tenu des exigences contraignantes en matière de données nécessaires à l'application d'un critère de l'augmentation limitée mais significative et non transitoire du prix de manière empirique, la justification a le plus souvent pris la forme d'arguments basés sur la grande différence entre les prix des contenus sportifs de qualité et des chaînes sportives de qualité et toute autre option.

Par exemple, la retransmission des matches de football de la Série A en Italie pourrait subir la concurrence des matches de la Ligue des champions de l'UEFA, mais sans doute pas celle du basketball italien ou de jeux télévisés sur la télévision gratuite. Cela est souligné par le fait que les diffuseurs de la télévision payante considèrent souvent les sports de qualité (ce qui en Europe désigne le football dans une large mesure) comme un moteur essentiel s'agissant des services par abonnement. Par conséquent, même le contenu des chaînes par abonnement peut ne pas être directement substituable. Dans une récente enquête sur la tarification des services de la télévision payante Sky au Royaume-Uni, l'OFCOM a interrogé les consommateurs sur les raisons pour lesquelles ils s'abonnaient à la chaîne Sky Sports, et l'accès à la *Premier League* a été cité comme raison principale par près d'un tiers des personnes interrogées et comme facteur très important pour les trois quart restants. Les répondants ont indiqué que d'autres formes de football les intéressaient aussi (comme la Ligue des champions, la coupe d'Angleterre de football, les matches des équipes nationales) mais aucun autre contenu sportif ne les intéressait autant que le football⁴⁹.

Cela étant, un tribunal a eu l'occasion au moins une fois de défendre une définition large du marché. L'affaire portait sur la création par *News Corporation* d'un nouveau championnat de rugby venant

⁴⁷ Pour aller plus loin, voir l'article de S. Szymanski (2006) « Why have premium sports rights migrated to Pay-TV in Europe but not in the US? » paru dans : « The Economics of Sport and Media » sous la direction de C. Jeanrenaud et S. Kesenne. Cheltenham : Edward Elgar.

⁴⁸ Par exemple, décision de la Commission COMP/C.2/37.398 Vente centralisée des droits commerciaux sur la Ligue des champions de l'UEFA ; décision de la Commission COMP/C.2/37.217 Vente combinée des droits médiatiques sur le championnat allemand de football (Bundesliga) ; décisions de la Commission, Affaire n° COMP/M.3595 - Sony / MGM (2005), Affaire n°COMP/M.2050 – Vivendi/Canal+/Seagram (2000), ou COMP/M.2876, Newscorp/Telepiù (2003). Enquête relative à une fusion entre News Corp et Premiere : COMP/M.5121/Newscorp/Premiere. Enquête sur la Vente centralisée à titre exclusif des droits médiatiques sur le championnat de football britannique, Affaire COMP/C-2/38.173.

⁴⁹ OFCOM (2010) Sports and general market definition and market power, Annex 4 to Pay TV Statement. http://www.ofcom.org.uk/consult/condocs/third_paytv/statement/annex4_statement.pdf.

concurrencer la *New South Wales Rugby League* (NSWRL) qui domine le marché et qui appartenait à l'*Australian Rugby League*, l'organisme national de tutelle. La ligue existante et l'organisme de tutelle avaient obtenu l'engagement des clubs qu'ils ne participeraient pas au nouveau championnat, ce que *News Corporation* avait contesté au motif que cet engagement constituait une tentative d'exclure toute concurrence du marché. Pour examiner le marché sur lequel NSWRL opérait, les requérants ont cherché à qualifier le marché de restreint, et se sont référés entre autres aux décisions américaines pour corroborer leurs allégations. Le juge a retenu que si la définition d'un marché restreint pouvait s'appliquer aux États-Unis, elle n'était pas admise en Australie où il était nécessaire de tenir compte des conditions réelles du marché. Le juge a estimé que les championnats de rugby subissaient des contraintes considérables de la part d'autres sports comme le football australien et a de ce fait proposé de définir le marché d'une façon plus large⁵⁰.

10.2 Questions relatives au marché du travail

La décision de justice américaine la plus connue relative au sport concerne l'affaire *Federal Baseball c. National League*, (259, U.S. 200 (1922)), où il a été conclu que le baseball n'était pas exonéré de l'application du droit fédéral de la concurrence puisqu'il ne jouait en fait aucun rôle dans le commerce interétatique⁵¹. Ce litige résulte de la tentative de la *Federal League* de se mettre elle-même en concurrence avec les ligues nationales et américaines dominantes (qui ont par la suite été désignées sous le nom de Major League Baseball), pour finalement s'apercevoir qu'il était difficile de recruter des joueurs venant de ligues concurrentes, ceux-ci étant menacés d'exclusion à vie s'ils adhéraient à la ligue. Depuis, les tribunaux ont retenu l'interprétation la plus stricte possible de cette exemption pour les ligues sportives, affirmant dans l'affaire *Radovich* (qui mettait en jeu des thèses analogues)⁵² que l'exemption ne s'étendait pas aux autres sports.

Un autre exemple du recours aux restrictions sur le marché du travail pour faire obstacle à l'entrée a été donné en 1977 en Australie par la *World Series Cricket* (WSC), compétition commerciale à laquelle s'étaient inscrits bon nombre des meilleurs joueurs de cricket au niveau mondial et qui avait pour objet de rivaliser avec les matches préliminaires internationaux existants, programmés par les organismes nationaux de tutelle du cricket⁵³. En réponse, l'organisme international de tutelle (l'ICC) a révisé ses règles de manière à interdire aux joueurs de participer à des compétitions non autorisées puis a déclaré que la WSC n'était pas autorisée. Les joueurs engagés par la WSC se sont vus interdire le droit de représenter leurs pays lors des matches préliminaires, et l'organisme anglais de tutelle (alors appelé le TCCB) a exclu trois de ces joueurs de la ligue nationale professionnelle de cricket, qui constituait à l'époque leur principale source de travail. Dans cette affaire, le juge a dans une certaine mesure approuvé l'exclusion des joueurs de la compétition internationale étant donné que celle-ci pouvait directement concurrencer les matches organisés par les organismes de tutelle (c'est-à-dire que les compétitions de la WSC feraient concurrence aux matches préliminaires du TCCB et qu'il serait loisible aux joueurs de choisir entre les deux), mais il a retenu que l'exclusion nationale constituait une restriction commerciale, dans la mesure où la compétition de la WSC, qui se jouait en Australie pendant l'été austral, n'était pas en concurrence, du point de vue des joueurs ou des spectateurs, avec l'activité des joueurs nationaux de cricket de l'hémisphère nord.

La plupart des affaires de droit de la concurrence relatives aux règles régissant le marché du travail n'ont pas été motivées par la question des barrières à l'entrée de championnats et de compétitions concurrents, mais portaient sur les droits des joueurs face aux pratiques concertées des organisateurs de

⁵⁰ A. Pike (1996) « *News Limited v Australian Rugby League* », *UNSW Law Journal*, 19, 2, 490-99.

⁵¹ L'exemption est analysée en détail par A. Zimbalist dans « *May the best team win: Baseball economics and public policy* » (2003), Brookings Institute.

⁵² *Radovich v. National Football League*, 352 U.S. 445 (1957).

⁵³ *Greig v Insole ; World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449; [1978] 1 WLR 10.

championnats et de compétitions. Les ligues majeures nord-américaines ont eu recours à un nombre d'obstacles au marché du travail plus étendu qu'aucune autre ligue dans le monde, et il n'est dès lors pas surprenant que l'analyse du droit de la concurrence vienne en grande partie des États-Unis. Parmi les obstacles au marché du travail figurent généralement la clause de réserve⁵⁴ (qui consiste à lier un joueur à son club), le « *draft system* »⁵⁵, les plafonds salariaux⁵⁶, les limites d'embauche et les restrictions en matière de transfert des joueurs⁵⁷. Les tribunaux américains ont souvent appliqué la « règle de raison » aux restrictions contestées, mettant en balance les avantages pour l'équilibre compétitif et le tort causé aux joueurs.

En définitive, les tribunaux ont fait preuve d'un certain scepticisme quant à la justification des restrictions tirée de l'équilibre compétitif, bien qu'ils aient admis qu'elles pouvaient constituer une justification en application d'une règle de raison. Cela étant, cet état d'avancement a été perturbé par l'exemption extra-légale applicable aux conventions collectives. Jusque dans les années 60, il était possible d'affirmer que les athlètes professionnels étaient sous-payés. Les niveaux de salaire dans le sport collectif étaient peut-être plus élevés que ceux de bon nombre d'ouvriers, mais ils restaient bas, comparés à certaines professions. Par ailleurs, bien que l'on puisse faire valoir la thèse que ce sont les résultats des stars qui intéressaient surtout le public, la part des recettes générées par les joueurs était relativement faible⁵⁸. Les stars du cinéma et de la musique pop à cette époque étaient souvent beaucoup plus fortunées. C'est dans les années 60 que le pouvoir des syndicats de joueurs a évolué. Les joueurs, de plus en plus mécontents de leurs conditions d'embauche, se sont alors montrés plus résolus à entrer en conflit avec leurs employeurs et à faire grève.

Le *National Labour Relations Act* donne au syndicat qui dispose du soutien d'une majorité d'employés le droit de conclure des conventions collectives avec les employeurs à titre exclusif. Les conventions collectives sont exemptées de l'application des règles de la concurrence (exemption extra-légale), ce qui a permis aux employeurs dans les ligues majeures d'obtenir par la négociation avec les syndicats ce qui aurait été jugé irrecevable par les tribunaux. Les syndicats ont accepté certaines restrictions comme les plafonds salariaux, en échange de concessions sur des questions telles que les salaires minimums.

En Europe, les affaires relatives au sport ont surtout concerné le football et sont apparues récemment, à mesure que l'importance économique du football professionnel grandissait. Le système traditionnel de contrats de joueurs n'était pas très différent de la clause de réserve du baseball (que l'on appelle le système du « *retain and transfer* » au Royaume-Uni) et accordait un pouvoir de négociation unilatéral aux clubs. Notamment, les droits d'un joueur en fin de contrat de changer de club sans l'autorisation de son employeur étaient limités, ce dernier pouvant exiger des indemnités de transfert de la part des employeurs potentiels. L'essor du système de transfert a conduit à payer de plus en plus cher l'acquisition de joueurs, même lorsque les salaires des joueurs restaient relativement bas. Aux États-Unis, les paiements aux clubs

⁵⁴ Examinée dans l'affaire *Flood c. Kuhn* (107, U.S. 258 (1972)).

⁵⁵ Affaire *Smith v Pro Football* déjà citée.

⁵⁶ « *Bridgeman v. NBA* » (re: Chris Dudley), 838 F. Supp. 172 (D.N.J. 1993).

⁵⁷ La décision « *Mackey v. NFL* », 543 F.2d 606 (8^e Cir.1976) a écarté l'application de la « Règle Rozelle » selon laquelle les équipes qui recrutent un joueur en disponibilité dans la NFL sont tenues de dédommager l'ancienne équipe du joueur en lui accordant des choix de repêchage et la décision « *McNeil et al v. NFL* » (70, F. Supp. 871 8^e Cir. 1992) a rejeté le plan ultérieur (plan B) de la NFL consistant à permettre aux équipes de protéger jusqu'à trente-sept joueurs sur leurs listes d'embauche. La décision « *Finley v. Kuhn* » (569, F. 2d 1193, 6^e Cir. 1978) a confirmé le droit pour le Commissaire du baseball de pénaliser les équipes qui vendent des joueurs contre une somme d'argent, au motif que cela pourrait affaiblir l'équipe vendeuse et réduire l'équilibre compétitif.

⁵⁸ Dans le baseball, la part des salaires était proche de 35-40 % dans les années 50, et s'élevait à près de 60 % en 1990.

s'attachant les services de joueurs n'ont jamais été importants, et d'après le cas le plus apparenté qui s'est présenté ces dernières années, un club qui n'est plus disposé à payer le salaire d'un joueur vedette l'échangera avec un autre club tout en continuant à participer au paiement du salaire. En Europe, le système de transfert est apparu comme un moyen de redistribuer les revenus des clubs les plus importants aux plus petits (solidarité), en particulier des clubs des divisions supérieures aux clubs des divisions inférieures, même si, en réalité, le flux de trésorerie était négligeable⁵⁹.

Ce système a été mis en cause par les tribunaux du Royaume-Uni en 1963 au motif qu'il constituait une restriction commerciale⁶⁰, ce qui avait conduit des joueurs hors contrat à prendre le statut de joueurs en disponibilité, alors que leur ancien employeur était toujours en mesure d'exiger des indemnités de transfert. Contrairement aux États-Unis, l'Europe compte de nombreuses ligues nationales en concurrence de qualité à peu près équivalente et la mobilité des joueurs d'un pays à un autre a toujours été importante. Les systèmes restrictifs de transfert ayant cours en Europe se sont ainsi heurtés aux lois de l'Union européenne sur la libre circulation des travailleurs dans l'arrêt Bosman⁶¹. Bien qu'il ne s'agisse pas d'une affaire de droit de la concurrence, la cour a pesé le pour et le contre de ce système, en reconnaissant les caractéristiques particulières de la concurrence sportive :

« Ainsi, la nécessité de promouvoir l'équilibre sportif a été admise, mais compte tenu de l'importance sociale considérable que revêtent l'activité sportive et, plus particulièrement, le football dans la Communauté, il convient de reconnaître que les objectifs consistant à assurer le maintien d'un équilibre entre les clubs, en préservant une certaine égalité des chances et l'incertitude des résultats, ainsi qu'à encourager le recrutement et la formation des jeunes joueurs, sont légitimes. S'agissant du premier de ces objectifs, M. Bosman a relevé à juste titre que l'application des règles relatives aux transferts ne constitue pas un moyen adéquat pour assurer le maintien de l'équilibre financier et sportif dans le monde du football. Ces règles n'empêchent pas les clubs les plus riches de s'assurer les services des meilleurs joueurs ni que les moyens financiers disponibles soient un élément décisif de la compétition sportive et que l'équilibre entre les clubs en soit considérablement altéré. »⁶²

L'arrêt Bosman a en outre retenu que les règles qui limitaient le nombre de joueurs étrangers représentant un club étaient contraires au droit communautaire. Les principales conséquences économiques en étaient donc que les clubs ne pourraient plus exiger de indemnités de transfert pour des joueurs hors contrat (tout en pouvant en fixer pour le transfert des joueurs sous contrat) et que la mobilité des joueurs dans l'Union européenne ne serait pas limitée. L'arrêt Bosman a semé le trouble parmi les administrateurs du football qui ont estimé que le statut particulier du sport n'avait pas été respecté, et que le sport n'était considéré que comme une activité commerciale. Les organismes de tutelle ont alors envisagé la création d'un nouveau système de transfert, lequel a fait l'objet d'un accord entre la FIFA, l'UEFA et la Commission européenne en 2001. Le nouveau règlement fixe la durée des contrats de un à cinq ans, et n'autorise les transferts qu'une fois la saison achevée ou au cours d'une brève période en milieu de saison. Pour les joueurs de moins de 23 ans, il prévoit, en cas de transfert, un dédommagement aux clubs où il a été formé. Les joueurs ont aussi obtenu le droit de résilier leurs contrats unilatéralement s'ils ne jouent pas régulièrement (juste cause sportive).

⁵⁹ Voir par exemple S. Szymanski et T. Kuypers (1999) « Winners and Losers: The Business Strategy of Football ». London: Viking, pp. 110-117.

⁶⁰ Eastham v Newcastle United [1964] 3 All ER 139.

⁶¹ Cour européenne de justice, Affaire C-415/93 (1995).

⁶² *Ibid.*, points 106-107.

Ce règlement, bien qu'appliqué à l'échelle mondiale, était essentiellement destiné à concilier les règles de transfert avec le droit communautaire. Les transferts se sont poursuivis sous le nouveau règlement, sans effets néfastes apparents pour le système. Les inégalités financières se sont accentuées, et la position dominante des équipes des grands pays s'est accrue. Cela étant, il semble que cela soit davantage dû à l'inégalité croissante des recettes tirées de la Ligue des champions de l'UEFA, dont les versements aux clubs sont basés sur la taille du marché de retransmission ainsi que sur les exploits sportifs. Depuis 1996, seule une équipe ne faisant pas partie des cinq principaux marchés télévisuels (Angleterre, France, Allemagne, Italie et Espagne) a réussi à atteindre la finale de la Ligue des champions⁶³.

Beaucoup pensaient que l'arrêt Bosman aurait marqué la fin des indemnités de transfert, mais les transferts se sont en fait intensifiés. Avant l'arrêt Bosman, le record du monde était de 12 millions GBP ; à l'été 2009, il avait atteint 80 millions GBP, correspondant à la somme payée par le *Real Madrid* à *Manchester United* pour le joueur Cristiano Ronaldo⁶⁴. La possibilité de payer des indemnités aussi élevées reste une énigme. Constituent-elles un dédommagement pour résiliation du contrat ? Si le salaire des joueurs s'apparente à la rétribution de services fournis, il est surprenant que des sommes si importantes soient nécessaires. Qui plus est, que se passerait-il si un club concurrent offrait de payer à Ronaldo un salaire plus élevé et de réduire les indemnités de transfert dues au club ? À l'évidence, le club voudrait vendre, et insisterait sur ses droits prévus par le règlement de la FIFA. S'il est vrai que les indemnités réduisent le potentiel de revenus du joueur en question, on ne sait toujours pas très bien quel objectif économique motive des indemnités aussi élevées.

Le recours accru à des instances d'arbitrage a eu tendance à se développer ces dernières années en Europe⁶⁵. La juridiction la plus célèbre est le Tribunal arbitral du sport (TAS) dont les décisions sont contraignantes pour les parties et peuvent être soumises à exécution forcée en application des règles du droit international privé. Une récente sentence arbitrale du TAS portait sur une décision concernant le transfert d'Andrew Webster, un joueur du club écossais de Hearts, qui avait décidé de rompre son contrat environ 18 mois avant son terme, ce qu'il pouvait faire « sans juste cause » en application de l'article 17 du règlement de la FIFA sur les transferts, moyennant le paiement d'une indemnité⁶⁶. La question soulevée par cette affaire portait sur le niveau approprié de l'indemnité. Le club faisait valoir que l'indemnité devait être fixée par rapport au coût d'acquisition sur le marché des transferts d'un joueur de même qualité, mais le comité a décidé de ramener la somme à 150 000 GBP, montant que les parties avaient arrêté comme étant la valeur finale du contrat. Cela a fait naître des inquiétudes sur le fait que les joueurs pourraient être libres de leurs mouvements à leur discrétion tout en n'ayant à verser qu'une infime indemnité aux clubs. Une décision ultérieure, rendue en 2008⁶⁷ concernait le joueur Matuzalem qui avait quitté son club (Chakhtar Donetsk en Ukraine) pour rejoindre le club espagnol du *Real de Saragosse*, ce qui constituait une rupture unilatérale du contrat sans juste cause. À son arrivée dans son nouveau club, ce dernier a estimé que l'indemnité devait être fixée à 2.4 millions EUR, correspondant à peu près aux salaires en souffrance au titre de son ancien contrat, quand le Chakhtar réclamait de son côté la somme de 25 millions EUR, conformément à la clause libératoire prévue au contrat. Le comité a arrêté l'indemnité à 11.9 millions EUR, décision qui a été interprétée comme un signal envoyé aux joueurs qu'ils ne pouvaient pas simplement rompre leurs contrats en se contentant de payer les salaires auxquels ils avaient renoncé à titre d'indemnité.

⁶³ L'exploit a eu lieu à neuf reprises entre 1986 et 1996.

⁶⁴ http://en.wikipedia.org/wiki/World_football_transfer_record.

⁶⁵ Aux États-Unis, l'arbitrage salarial a été instauré dans le baseball au début des années 70.

⁶⁶ CAS/2007/A/1298/1299/1300.

⁶⁷ CAS/2008/A/1519/1520.

10.3 *Retransmission*

10.3.1 *Vente collective*

La grande question concernant la retransmission aura porté sur la vente collective des droits audiovisuels par les ligues ou les organismes de tutelle pour le compte de leurs clubs membres. La vente collective désigne la commercialisation centralisée des droits par un organisme représentant les clubs. La question préalable est de savoir « à qui appartiennent les droits ? », question à laquelle les juridictions ont apporté des réponses diverses. Le plus souvent, il s'agit de l'équipe locale ou du propriétaire du stade de l'équipe locale, bien qu'il ait été soutenu que l'équipe en déplacement était copropriétaire (en qualité de fournisseur indispensable du produit), mais les droits peuvent appartenir à la ligue ou à l'organisme de tutelle, en tant qu'organismes de la compétition. Cela étant, comme en atteste la remise en cause de la vente collective des droits de retransmission de la *Premier League* devant les tribunaux du Royaume-Uni en 1999⁶⁸, la question de la vente collective peut être tranchée sans avoir à se déterminer sur la question de savoir à qui appartiennent les droits.

La vente collective peut présenter un certain nombre d'avantages :

- La capacité de vendre le calendrier d'un championnat dans son ensemble, ce qui peut s'avérer plus avantageux que la somme de ses composantes (par exemple, un diffuseur qui achète les droits de tout un championnat peut avoir envie d'investir dans la promotion du championnat dans son ensemble, plutôt que dans des matches particuliers)
- La capacité de générer un revenu plus élevé qu'une vente individuelle ne le permettrait, ce revenu étant réinvesti dans les joueurs et dans les installations, bénéficiant ainsi au public
- La capacité de partager les recettes et par conséquent de renforcer l'équilibre compétitif (les clubs soutiennent généralement dans de tels cas que les autres mécanismes de répartition ne sont pas réalisables ou pas aussi efficaces, bien qu'au vu du nombre des accords de répartition des recettes qui existent dans le sport américain cet argument semble difficile à justifier)
- La capacité de redistribuer les revenus à la base (principe de solidarité, qui peut se traduire par des investissements dans la promotion et l'expansion du jeu, la formation des jeunes joueurs, ou des plans d'action des collectivités)
- L'incitation à la concurrence entre les diffuseurs, si les droits exclusifs permettent d'obtenir une grille de programmes plus attrayante (certains ont fait valoir que lorsqu'un lot intéressant était vendu aux enchères, les diffuseurs étaient incités à développer leurs propres services pour gagner les enchères)

À l'inverse, la vente collective peut être à l'origine d'un certain nombre de coûts, en ce qu'elle peut :

- Limiter l'offre de retransmission des matches (dans bon nombre de cas, le contrat de vente collective comprend l'accord de ne pas vendre tous les matches, limitant ainsi l'accès des consommateurs : par exemple, en Angleterre seuls 138 des matches de la *Premier League* sont diffusés au Royaume-Uni sur les 380 matches que compte la saison, même si tous les matches peuvent être suivis en dehors du Royaume-Uni)
- Limiter la concurrence sur les marchés de la retransmission (la vente collective risque de concentrer les droits entre les mains de quelques diffuseurs, qui pourraient utiliser leurs droits sur les sports de qualité comme un moyen de s'attribuer le marché de la retransmission à titre exclusif)

⁶⁸ À la suite d'un accord entre Premier League et BSkyB [2000] EMLR 78, [1999] UKCLR 258.

- Limiter l'innovation dans la retransmission (si les droits sont concentrés dans les mains d'un ou de quelques diffuseurs, les incitations à concevoir des programmations novatrices peuvent s'avérer limitées).

De plus, même si les avantages de la vente collective sont réputés l'emporter largement sur les coûts, des moyens moins restrictifs permettent aussi de parvenir au même résultat (les équipes pourraient par exemple convenir de partager les recettes de la vente, ce qui aiderait à atteindre l'équilibre compétitif, même si les droits étaient vendus individuellement).

La relation entre la vente collective de droits télévisuels, l'équilibre compétitif et le partage des recettes a été examinée dans les affaires *États-Unis c. NFL* 116 F. Supp. 319 (E.D. Pa. 1953) et *NCAA c. Board of Regents*, 468 U.S. 85, 107 (1984) et dans les deux cas, les justifications de l'équilibre compétitif ont été retenues comme motifs potentiellement valables du maintien des restrictions contestées (sur la vente individuelle) et n'étaient donc pas illégales « en soi ». Toutefois, en application de la « règle de raison », ces restrictions ont dans un cas été jugées excessives, et dans l'autre mal adaptées à l'objectif poursuivi⁶⁹. Le *Sports Broadcasting Act* a permis aux ligues majeures de participer à la vente collective des « programmes télévisés sponsorisés ». Les droits ne sont pas tous vendus collectivement aux États-Unis. Dans le baseball, par exemple, les clubs vendent leurs droits de retransmission sur le marché local, et même si des transactions collectives sont menées avec la télévision nationale, elles génèrent moins de recettes. D'un autre côté, la NFL vend tous ses droits de retransmission collectivement.

En Europe, la question de la vente collective a pris de l'importance dans les années 90 à mesure que les droits de retransmission migraient de plus en plus de la télévision gratuite vers la télévision payante. De même qu'elle est mise en cause devant la Restrictive Practices Court au Royaume-Uni (autorité compétente en matière de concurrence), la vente collective a été contestée en Allemagne, en Italie, en Espagne et aux Pays-Bas. En Allemagne, comme on l'a vu, la vente collective a été jugée illégale par les tribunaux, avant de se voir accordée une exemption de l'application des règles de la concurrence.

En Europe, les décisions des différentes juridictions nationales ont été diverses :

- **Royaume-Uni** – La vente collective est déclarée valable. En l'espèce, la cour était préoccupée par la question de savoir si la loi permettrait aux clubs de conclure un « quelconque » accord relatif à la retransmission s'il était contraire aux accords existants de la *Premier League*. Ainsi, la cour ne s'est pas considérée compétente pour examiner les accords moins restrictifs. Cette affaire était particulière en ce qu'elle reposait sur l'ancienne loi sur les pratiques commerciales restrictives (*Restrictive Trade Practices Act*), qui a peu après été remplacée par la loi sur la concurrence (*Competition Act*), loi d'harmonisation du Royaume-Uni avec le droit communautaire.
- **Italie** – La vente collective des droits de retransmission est interdite. L'autorité de la concurrence a jugé que la vente collective des droits de retransmission par la fédération nationale (*Lega Calcio*) ne devrait pas être autorisée au motif que les droits n'appartenaient pas à l'organisme de tutelle et que les objectifs légitimes de redistribution et de solidarité pouvaient être réalisés au moyen d'accords moins restrictifs (dans les cas où les clubs acceptaient de partager 30 % des recettes à l'entrée). Mais, la vente collective des droits de retransmission d'événements marquants et de la coupe d'Italie devrait être autorisée au motif que la vente individuelle s'est avérée irréalisable. Comme en Allemagne, le gouvernement a depuis adopté une loi (la loi « Melandri » n° 106, datée du 19 juillet 2007) qui permet la poursuite de la vente collective tout en rendant obligatoires des paiements minimums de solidarité de la Série A vers la Série B

⁶⁹ L'arrêt NCAA a en outre étudié en détail l'incidence des recettes à l'entrée.

et vers la base. Toutefois, les clubs de la Série A ont depuis menacé d'organiser leurs compétitions de manière autonome.

- **Pays-Bas** – La vente collective des droits de retransmission est interdite. L'organe de la ligue (Eredivisie) a demandé au tribunal de la concurrence une exemption pour la vente collective des droits de retransmission en direct et de retransmission d'événements sportifs importants. La première demande a été rejetée au motif que la vente collective a conduit à une restriction de la production (seuls les matches des meilleures équipes étaient diffusés) et que la restriction n'était pas indispensable à l'objectif de juste redistribution, qui pouvait être atteint par des moyens moins restrictifs. La vente collective des droits de retransmission d'événements importants a été admise au motif que les accords collectifs étaient indispensables pour constituer le produit (à l'opposé de la position de la Commission européenne qui a fait valoir qu'ils pouvaient être plus efficaces, mais pas indispensables).
- **France** – La vente collective est légale. La loi accorde à la fédération nationale le droit d'exploiter l'ensemble des droits de retransmission (articles 17 à 18 de la loi n° 84-610 du 16 juillet 1984).
- **Espagne** – Le système est mixte. Certains droits sont vendus à titre individuel (par exemple les droits de retransmission en direct des clubs les plus importants) mais la vente collective a été autorisée dans certains cas (comme pour les clubs plus petits)⁷⁰.

La Commission européenne s'est également intéressée de près à un certain nombre de cas de vente collective⁷¹. Elle est intervenue dans la vente collective des droits de la Ligue des champions, de la *Premier League* en Angleterre et de la *Bundesliga* en Allemagne. Dans aucun de ces cas, la Commission n'a élevé d'objection précise à l'encontre de la vente collective, mais elle s'est montrée préoccupée par la question des conditions de vente de ces droits. Notamment dans le cas de la *Premier League*, l'accord final exigeait que les droits soient divisés en lots pour être soumis aux enchères aux diffuseurs à la condition que, sur les six lots que la *Premier League* déciderait de vendre, un diffuseur ne puisse pas en acheter plus de cinq⁷². Par cette décision, la Commission a très clairement indiqué qu'elle était davantage préoccupée par la concurrence au niveau de la retransmission que par la concurrence au niveau de la ligue. Par conséquent, les arguments sur la nécessité de redistribuer les revenus entre les équipes et de recourir à la vente collective pour y parvenir ont été accueillis favorablement. La concentration dans le secteur de la télévision payante européenne, dont on estime qu'elle est soutenue par la maîtrise d'un contenu de qualité (voir l'annexe du Livre blanc de la Commission mentionné précédemment) est apparue comme un sujet plus important pour la Commission. De récentes affaires de concurrence en Italie et en Allemagne ont également suscité des questions sur la façon dont les droits sont vendus et sur la capacité des diffuseurs plus petits d'acheter du contenu.

Les cas de vente collective en Europe semblent donc avoir porté principalement sur deux questions : premièrement, la nécessité de telles ventes pour promouvoir le championnat et deuxièmement, leur incidence sur les marchés de la retransmission en aval. Concernant la première question, la nécessité de la vente collective pour atteindre des objectifs sportifs légitimes, tels que la solidarité, semble douteuse. Admettre que d'autres mécanismes de redistribution sont impossibles à mettre en œuvre semble revenir à suggérer que les clubs refuseraient de reconnaître leurs intérêts communs dont ils font valoir eux-mêmes

⁷⁰ Voir S. Szymanski (2002) « Collective selling of broadcast rights to sporting events », *International Sports Law Review*, 2, 1, pour plus de détails.

⁷¹ La conception que retient la Commission européenne de la relation qu'entretiennent le droit européen de la concurrence et le sport en général est décrite dans une annexe du Livre blanc sur le sport de 2007, COM(2007) 391, http://ec.europa.eu/sport/white-paper/whitepaper100_fr.htm.

⁷² <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356&guiLanguage=de>.

qu'ils sont très importants. Étant donné que la théorie de l'entité unique n'a pas été confirmée en droit européen, les arguments selon lesquels une collaboration est nécessaire pour réaliser un calendrier intéressant de matches sont tout aussi douteux. Même la vente individuelle permettrait à un diffuseur d'acheter tout un éventail de droits susceptibles de constituer des lots attrayants. Le risque que la vente collective ne restreigne la production (en cas de refus ou d'échec de la commercialisation de tous les matches que les téléspectateurs pourraient vouloir voir s'ils étaient offerts à des prix compétitifs) est également important⁷³.

10.3.2 Commercialisation exclusive

La question de la retransmission en exclusivité a également fait l'objet d'une grande attention de la part du droit européen de la concurrence. Les ligues majeures aux États-Unis ont tendance à répartir les droits vendus collectivement entre les différents diffuseurs terrestres en concurrence alors qu'en Europe, la tendance a plutôt été de vendre les droits à titre exclusif. Dans un document de 1998, la Commission a exposé sa politique, expliquant que malgré ses éventuels avantages lorsqu'elle incite les diffuseurs à investir dans la fourniture de produits de haute qualité, l'exclusivité risquait sur une trop longue période de limiter la concurrence sur les marchés de la retransmission⁷⁴. La Commission a précisé que l'exclusivité pendant une période inférieure à un an ne posait pas de problèmes, mais qu'au-delà de cette durée, elle devrait faire l'objet d'un examen plus attentif ; en pratique, la Commission semble s'accommoder des transactions offrant une exclusivité de trois ans maximum⁷⁵.

11. Conclusion

La façon dont le sport est traité en droit de la concurrence est perturbée par un certain nombre de facteurs. Premièrement, l'analyse du sport a une logique économique propre, qui repose sur la concurrence sportive et sur une coopération économique qui pourraient rendre légitimes toute une série d'accords apparentés à une entente. Deuxièmement, le sport occupe une place spéciale dans notre société, et ne peut pas être considéré simplement comme une activité commerciale, même s'il existe des exemples évidents d'opérations commerciales. Troisièmement, il existe un lien direct entre le sport professionnel et le développement du sport « à la base », qui justifie par conséquent l'existence de subventions croisées de l'un à l'autre. Quatrièmement, le sport est souvent régi par des associations indépendantes qui établissent leur propre droit privé, lequel cohabite mal avec le droit civil.

Cela explique peut-être le grand nombre de litiges liés au sport et l'abondance de la législation, qui prévoit souvent une exemption de l'application des règles de la concurrence. Le présent document a passé en revue certaines des grandes affaires relatives aux deux principaux domaines que sont les obstacles au marché du travail et les droits de retransmission d'événements sportifs. Depuis l'arrêt de la Cour suprême des États-Unis dans l'affaire *American Needle*, on peut dire qu'un consensus se fait jour, au moins entre les États-Unis et l'Europe. Ce consensus peut se définir par l'acceptation que l'activité des organisations sportives relève du droit de la concurrence s'agissant des accords visant à restreindre la concurrence, et que cette acceptation doit être évaluée en application de la règle de raison. Une certaine latitude est accordée aux organisations sportives en reconnaissance de leurs aspects économiques particuliers, mais la preuve doit être apportée que les restrictions sont bénéfiques pour les consommateurs, proportionnées et indispensables à la réalisation de leurs objectifs déclarés.

⁷³ Voir par exemple D. Forrest, R. Simmons, et S. Szymanski (2004) « Broadcasting, attendance and the inefficiency of cartels », *Review of Industrial Organization*, 24, pp. 243-265.

⁷⁴ http://ec.europa.eu/competition/speeches/text/sp1998_037_en.html.

⁷⁵ Pour des commentaires sur la retransmission exclusive dans le cadre d'une vente collective, consulter l'ouvrage de D. Harbord et de S. Szymanski (2004) « Football Trials », *European Competition Law Review*, 2 février, pp. 114-119.

AUSTRALIA

1. Introduction

This submission focuses on two areas of particular interest to Australia in relation to competition and professional sport: exclusive rights for broadcasting sports events; and the nature of cases involving professional sports. An exclusive dealing notification by Ice Hockey Australia and Australian Competition and Consumer Commission (ACCC) proceedings against Fila for alleged breaches of the misuse of market power (abuse of dominance) and exclusive dealing provisions of the *Trade Practices Act 1974* (TPA) will be used as case studies for the latter topic.

2. Exclusive broadcasting rights for professional sports

The granting of broadcasting rights for sports events on an exclusive basis is an established commercial practice. Exclusive contracts for single sporting events or for any specific season in a championship would not normally pose any competition problem, and indeed may have a neutral impact on competition. In some circumstances, such arrangements may even be pro-competitive; for example, by promoting consumer choice by allowing operators to differentiate their services through content provision.

However, in some cases exclusivity of content rights might limit competition, particularly if a broadcaster holding exclusive rights is in a dominant position or if the market is oligopolistic in nature. For example, concerns may arise where one broadcaster in a market obtains all the valuable broadcasting rights to the exclusion of all others. In such a situation, it may not be feasible for the broadcaster to fully exploit these rights, which may limit consumer choice in sports-related services and broadcasts. Conversely, granting exclusive rights for key sporting events to a subscription television provider may allow it to exert greater influence over the price of content, which would reduce overall consumer welfare.

2.1 Access to sports broadcasting rights

Like many other countries, Australia has arrangements to ensure that all Australians have free access to sporting events of national importance and cultural significance. Known as the ‘anti-siphoning’ list, in Australia this scheme operates via a licence condition on subscription television broadcasters, which prevents them from buying the rights to televise listed sporting events before free-to-air television broadcasters have had an opportunity to purchase these rights. Australia’s current anti-siphoning list is attached at [Appendix A](#).

As penetration of subscription television in Australia is relatively low (at 34 per cent of households),¹⁵¹ albeit steadily increasing, there is an argument for the anti-siphoning list to continue in some form. However, among the criticisms of the list are that it:

- Unduly restricts competition in the market for sport broadcasting rights;
- May limit the number of events that are ultimately aired, thus restricting a consumer’s access to events; and
- May reduce revenue for owners of sports broadcasting rights.

¹⁵¹ Australian Subscription Television and Radio Association (n.d.). *Facts and Figures*, accessed at <http://astra.org.au/pages/facts-figures>.

The anti-siphoning regime is currently under review by the Australian Government, and the outcome of that review is expected to be made known in coming months.¹⁵²

2.2 *Convergence and exclusive sports broadcasting rights*

Convergence poses challenges for policy frameworks, such as the anti-siphoning list, that were designed for traditional communications platforms (such as TV, telephone and radio) but not modern communication platforms (such as the internet and mobile devices).¹⁵³

The potential for non-broadcasting internet-based platforms to obtain exclusive rights to sporting events hinges on the technical capability of the relevant platforms, and also on the capacity of those platforms to deliver audience reach. The latter issue is likely to be of key concern to sports rights holders, as they generally derive significant non-broadcasting revenue from sports merchandise and other related products.

The impact of new media platforms is likely to be enhanced by the Australian Government's decision to build and operate a new high speed National Broadband Network (NBN), with the objective of providing 90 per cent of homes, schools and workplaces with optical fibre-to-the-premise delivering speeds of up to 100 megabits per second and connecting all other premises with next generation wireless and satellite technologies, offering speeds of up to 12 megabits per second.¹⁵⁴ The NBN is expected to provide a ubiquitous platform that would increase the viability and uptake of new media technologies such as Internet Protocol television (IPTV) and internet video.

In order to be commercially viable, however, potential IPTV and internet video providers will still need to be able to access sufficient content to provide a compelling service. There have been several recent Australian examples of sports rights holders selling coverage rights to operators of new media platforms. While there is little evidence to suggest that sporting content is being 'siphoned' to these new technologies, there is some concern that premium content may begin to be exclusively acquired by operators of these technologies.

The sale of sports rights for new media platforms is not currently covered by the anti-siphoning scheme. At present, IPTV and internet video content of sporting events are not considered a 'broadcasting service' under the Broadcasting Services Act 1992 and as such are not regulated by the Act. Sporting content carried on mobile phones is also not specifically regulated by the Act. Further, the provision of sporting content via internet video hosted on international websites is not regulated by Australian broadcasting law. Australian free-to-air television broadcasters have suggested that the exclusion of new media platforms and services from the anti-siphoning list could result in the gradual migration of major sporting events exclusively onto internet-based subscription-only platforms, such as IPTV.¹⁵⁵

¹⁵² For a discussion paper on the review, see: Australian Government (The Department of Broadband, Communications and the Digital Economy) (2009). *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*, accessed at http://www.dbcde.gov.au/_data/assets/pdf_file/0010/118864/Sport_on_Television_Review_discussion_paper.pdf.

¹⁵³ Some of these challenges are canvassed more fully in: OECD (2008). *OECD policy guidance on convergence and next generation networks*, accessed at <http://www.oecd.org/dataoecd/14/52/40869934.pdf>.

¹⁵⁴ Conroy, S et al (2009), *New National Broadband Network*. Joint media release on the National Broadband Network can be accessed at http://www.minister.dbcde.gov.au/media/media_releases/2009/022.

¹⁵⁵ FreeTV Australia. (2009). *Submission by Free TV Australia Limited: National Broadband Network – Regulatory Reform for the 21st Century Discussion Paper*, accessed at http://www.dbcde.gov.au/_data/assets/pdf_file/0013/115321/Free_TV_Australia.pdf.

A key policy question, therefore, is whether the anti-siphoning list should be extended to include new media platforms such as the internet and mobile phones. Those in favour of the extension of the list may suggest that this is necessary to ensure that regulation remains neutral across different technologies and platforms, so as to reduce market distortions that favour particular providers. Further, some have suggested that integrated communication companies, whose business interests include IPTV services, may have significant market power which could be used to obtain exclusive content rights.

Conversely, extending the coverage of the anti-siphoning list to new media platforms may restrict consumer choice by not allowing services that are conducive to sports viewership, such as the option of 'pay-per-view'. The extension of the list may also limit consumers' ability to access sports broadcasts. It may also reduce competition in the market for sports rights, and in turn reduce revenues for sports rights holders. In addition, making sports events available on a number of platforms enhances consumer welfare by increasing choice, both in terms of number of events that can be accessed, and in the mode of access (for example: free-to-air, pay-per-view IPTV, mobile TV or subscription television).

2.3 Exclusive broadcasting rights – Future directions

The full impact of new media on sports broadcasting rights is yet to be fully felt in Australia. However, as the roll out of a high speed NBN to all Australians is likely to facilitate uptake of IPTV, access to sports content will become increasingly critical for the viability of these new media services, and for existing broadcasting services. Any consideration of extending existing policy frameworks for sports broadcasting rights to new media services, therefore, should take into account the impacts on competition and consumer welfare.

3. Digital media and sports news reporting

The emergence of digital media has created new opportunities for content such as sporting scores to be transmitted over new technologies. As such, digital content has become a new and potentially lucrative commodity in the market place.

For example, sporting organisations such as Cricket Australia and the Australian Football League (AFL) recognise the value of sporting information and images and maximise this value by restricting access to a handful of media outlets who, in turn, trade on this exclusivity. Publishers face other issues, such as restrictions on the number of updates of match reports and how many photographs can be published or sold on.

In early 2009, the Australian Senate Standing committee on Environment, Communications and the Arts recommended that media outlets and key sporting organisations negotiate among themselves for access to sporting events for bona fide journalists and photographers, regardless of the technological platform they use to distribute information and images.¹⁵⁶

A further recommendation of the committee was that, failing a successful resolution between parties, a mandatory code of practice under the TPA be developed.

There now exists a voluntary code supported by an administration committee on which sit the major players from sport – including the AFL, the National Rugby League, Cricket Australia, Tennis Australia

¹⁵⁶ Australian Senate - Standing Committee on Environment, Communications and the Arts (2009). *The reporting of sports news and the emergence of digital media*, accessed at http://www.aph.gov.au/senate/committee/eca_ctte/sports_news/report/report.pdf.

and Australian Rugby Union – and the major players from the media – Fairfax, News Limited, APP, Getty Images and Agence-France Press.

The ACCC, which is responsible for enforcing Australia’s competition law, the TPA, played a key role in mediating roundtable discussions on developing the code. The code requires sporting organisations to allow all bona fide news organisations, to be accredited to report sporting news subject to the principles of fair dealing and where syndication occurs, the recipients of the content should be bound by the same principles of fair dealing.

4. The nature of cases involving professional sports

The ACCC is responsible for enforcing Australia’s competition law, the TPA. The aim of the TPA is to promote competition; fair trading, as between competing businesses and as between businesses and consumers; and to ensure consumers are protected in their dealings with business.

The TPA generally prohibits corporations from engaging in anti-competitive conduct and unfair trading practices. Sporting associations, corporations that supply sporting goods or services and professional sporting teams are subject to the provisions of the TPA.

4.1 Vertical agreements

The TPA contains prohibitions relating to vertical restraints. Restraints that are not related to price are referred to as “exclusive dealing” in Australia. Exclusive dealing conduct broadly involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals. In Australia, exclusive dealing may take many forms including the bundling of products or agreeing to supply a good or service on condition that the acquiring party does not acquire goods or services from anyone else.

Exclusive dealing is prohibited under section 47 of the TPA. Specifically, section 47 prohibits a corporation from supplying or acquiring goods or services, or refusing to supply or acquire goods or services, if the acquisition or supply is on certain conditions. Most exclusive dealing practices only breach section 47 if they have the purpose or effect of substantially lessening competition.

All forms of exclusive dealing may be authorised by the ACCC by way of a notification or authorisation, and therefore deemed immune from prosecution under the TPA, if they confer sufficient public benefits to outweigh the anti-competitive effects.¹⁵⁷ To determine this, the ACCC assesses the likely effect on competition that the anti-competitive conduct may have and weighs up the likely public benefits and public detriments arising from the proposed conduct. The ACCC can withdraw the immunity conferred by the authorisation or notification where it assesses that the detriments arising from the conduct outweigh the benefits.

This paper notes court action taken by the ACCC regarding a vertical arrangement imposed by a sporting apparel company that restricted the acquisition of sporting apparel by retailers and prevented other apparel suppliers supplying goods to retailers and consumers. The main focus of the paper concerns a recent decision by the ACCC to revoke the immunity conferred by a notification lodged by a sporting association to sanction, through suspension or expulsion, any member of the association that participated in non-sanctioned sporting events.

¹⁵⁷ The ACCC maintains a public register of all notifications, which contains all publicly available information concerning the consideration of a notification, including submissions by interested parties and decisions made by the ACCC. The notifications register can be located at: <http://www.accc.gov.au/content/index.phtml/itemId/776499>.

4.2 *Licensed apparel legal action*

The ACCC can take legal proceedings against corporations that have engaged in vertical agreements that restrict consumer choice and affect competition in the market for goods or services relating to sporting apparel. One such case is the 2002 proceedings the ACCC instituted against Fila Sports Oceania Pty Ltd (Fila) for alleged breaches of the misuse of market power (abuse of dominance) and exclusive dealing provisions of the TPA.¹⁵⁸

Fila was the Australian subsidiary of Italian based clothing manufacturer Fila Holding Spa, which had operations in over 20 countries and a worldwide sales turnover at the time of approximately 1 billion Euro. In Australia, Fila operated as a wholesale supplier of both leisurewear and sportswear and also operated a number of Fila retail stores. Fila was also a sponsor and the official supplier of on-field and licensed supporter wear for 5 teams playing in the Australian Rules Football League (AFL). Fila's sales in Australia in 2001 were AUD\$42 million, of which around AUD\$2.5 to 3 million resulted from AFL apparel.

The ACCC alleged that Fila implemented a selective distribution policy in relation to the supply of Fila's AFL licensed apparel to retailers. The ACCC claimed Fila's distribution policy in late 1999 was to only supply clothing retailers with Fila AFL licensed apparel on condition that these retailers agreed not to stock AFL licensed apparel from Fila's competitors. The policy was alleged to have been in place on a national basis for approximately 19 months, during which time Fila withdrew its supply of Fila AFL licensed apparel from a number of major retailers who did not agree to embrace Fila's policy and decided to stock Fila's competitors' products.

The Court ordered Fila to pay AUD\$3 million in pecuniary penalties for breaching the TPA. Fila was found to have market power in the wholesale markets for licensed apparel and to have taken advantage of that power in contravention of s46 of the TPA by threatening to refuse supply to retailers who might otherwise have engaged in competitive conduct in other markets (being the retail markets for AFL licensed apparel for the teams that Fila sponsored). The Court also found that Fila breached s47 of the TPA where Fila supplied licensed apparel to retailers in the relevant wholesale markets on the condition that the retailers would not acquire apparel from suppliers which were competitors of Fila.¹⁵⁹

4.3 *Overview of sporting notifications in Australia*

In Australia many sports are controlled by a peak sporting association which administers the rules for the competition, operates a disciplinary system and organises various events. Some sports associations might be internationally recognised or affiliated.

In the past few years, the ACCC has received a range of notifications for various types of exclusive dealing conduct relating to sport. For example, the ACCC has received notifications involving sporting associations seeking to make participation in their league conditional upon players not participating in competing leagues.

¹⁵⁸ The ACCC also instituted proceedings against two individuals alleged to be knowingly concerned in the conduct of Fila. The proceedings against the individuals were dealt with separately by the Court and as such have not been discussed in this paper.

¹⁵⁹ *Australian Competition and Consumer Commission v Fila Sport Oceania Pty Ltd (Administrators Appointed) & David Robert Carney & Craig James Reidy* [2004] FCA 376.

The ACCC has also received a number of third line forcing¹⁶⁰ notifications involving sporting associations allowing participants to play in a particular league only after they have purchased uniforms or sporting equipment from a nominated supplier or number of suppliers.

Below is an analysis of a recent case example in Australia regarding the issue of exclusivity in a sporting context.

4.3.1 A notification case study in Australia

On 27 July 2009, Ice Hockey Australia (IHA) lodged an exclusive dealing (other than third line forcing) notification (N94049) to sanction, through suspension or expulsion, any member of IHA who participated, or was participating, in a non-sanctioned Australian or international ice hockey game or league. This sanction or expulsion applied to players and officials, including referees or coaches.

IHA is the peak governing body for ice hockey in Australia. It is recognised as the sole provider of the sport by the International Ice Hockey Federation (IIHF) and the International and Australian Olympic Committees. IHA has six affiliated member state ice hockey associations and more than 3700 members. IHA and its member associations control and regulate all officially sanctioned ice hockey that is played in Australia. While IHA is the dominant provider of organised ice hockey competition services in Australia, there are some leagues that operate independently of it and are not affiliated with it or the IHA's state associations.

IHA-sanctioned leagues operate at three levels in Australia – national, state and local. IHA is the only provider of ice hockey administration and competition services at the national level. Services provided at the national level include providing eligibility for participation in State Championships, and eligibility for selection and participation in National Championships and World Championships.

Some leagues operate at a regional or local level which may or may not be sanctioned by IHA. Interested party submissions noted that there were cost differences in sanctioned compared to non-sanctioned leagues, with players paying higher costs to participate in sanctioned leagues. It was also noted that sanctioned leagues are generally scheduled on the weekend whereas the non-sanctioned leagues operate on weeknights. Submissions indicated that players who participated in non-sanctioned leagues during the week may also participate in IHA-sanctioned leagues on weekends. One company that operates an ice rink noted that although it derives income from sources other than ice time reserved for ice hockey leagues or training, it relies heavily on revenue from ice hockey activities.

4.3.2 Competition issues arising in this context

For this type of conduct, the test the ACCC applies is whether the conduct has the purpose, effect or likely effect of substantially lessening competition and in all the circumstances will not grant notification if:

- The conduct has not resulted or is not likely to result in a benefit to the public, or
- The benefit will not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

¹⁶⁰ Third line forcing (s 47(6) and (7) of the TPA) has as its objective prohibiting the supplier of particular goods or services requiring consumers who want those goods or services having to take other (perhaps unwanted) goods or services from a third party in order to get the supplier's goods or services.

On 4 December 2009, the ACCC issued a draft notice proposing to revoke the notification. A pre-decision conference was held and interested parties provided further oral and written submissions. Further submissions were taken into consideration prior to a final decision being made. On 2 March 2010 the ACCC decided to issue a notice revoking the notification.

4.3.2.1 Purpose or effect of substantially lessening competition

The first step for the ACCC in carrying out its assessment is to determine the relevant markets. The following markets were considered relevant to the ACCC's assessment of the notified conduct:

- The organisation and administration of ice hockey competitions at a national level
- The organisation and administration of ice hockey competitions at a regional or local level, and
- The acquisition of ice time at ice rinks.

The ACCC was of the view that the conduct proposed by IHA was likely to substantially lessen competition for the provision of ice hockey competition and organisation and administration services by:

- Imposing a barrier to the establishment and expansion of rival ice hockey leagues, and
- Reducing the competitive viability of existing rival leagues.

In particular, the ACCC noted that:

- IHA held a substantial degree of market power in the organisation and administration of ice hockey competitions at the national level
- The notified conduct allowed IHA to leverage that power into the market for the organisation and administration of ice hockey competitions at a regional or local level, and
- By imposing barriers to the establishment and expansion of rival ice hockey leagues and reducing the competitive viability of existing rival leagues, the notified conduct had the effect, or was likely to have the effect, of substantially lessening competition in the market for the provision of ice hockey competition organising services at a regional or local level.

The ACCC also considered that the conduct had the potential to lessen competition in the market for the acquisition of ice time at ice rinks.

4.3.2.2 Assessment of public detriments

The following public detriments were identified as likely to result from the notified conduct:

- Reduced consumer choice – the notified conduct limited the ability of existing and future members of IHA to participate in whichever ice hockey competitions they chose. Further, it would have a particularly detrimental effect on players who wished to participate in more games than was offered by IHA, whether for leisure reasons or to improve their standard of play, and
- Participation in sports activities in general is beneficial for overall health and fitness and the reduced availability of opportunities to participate in ice hockey competitions would be likely to reduce overall participation in the sport.

Following the draft notice, IHA proposed an amendment to the notification to try to alleviate the ACCC's concerns.¹⁶¹ The IHA submitted that its proposed amendment would result in the notified conduct being less restrictive by adding words to the end of the notified conduct, such that the conduct would be described as:

Ice Hockey Australia proposes to sanction, through suspension or expulsion, any member of Ice Hockey Australia who has participated, or is participating, in a non-sanctioned Australian or international ice hockey game or league, unless the operation of that game, league or competition is limited solely to a region or portion of the year where no sanctioned league operates.

The ACCC considered that while the amendment would enable players and officials to play in a non-sanctioned league where/when no IHA competition is offered, it remained concerned that the notified conduct would still create barriers to the establishment or expansion of rival leagues, restrict the ability of players and officials to switch between sanctioned and non-sanctioned competitions and reduce the frequency of playing time that would otherwise be available to ice hockey players.

4.3.2.3 Assessment of public benefits

IHA submitted that a number of public benefits would flow from the conduct. The ACCC considered in relation to each of the following:

- Economies of scale in the provision of ice hockey services
 - The ACCC accepted there may be some efficiencies achieved by having a single governing body administer a sport's health and safety guidelines.
- Adequate risk management practices and lower insurance premiums
 - The ACCC accepted the importance of having adequate risk management practices in place, particularly in relation to high contact sports such as ice hockey. However, the ACCC considered that preventing IHA members from participating in unsanctioned leagues was unlikely to result in improved safety or reduce the risk of injury when compared to ice hockey events run by alternate providers. There was no evidence to suggest that absent the notified conduct, IHA members would face higher insurance premiums.
- Ability to effectively discipline players
 - IHA submitted that the primary sanction it can use to deter players from engaging in conduct not within the rules of the game is suspension from competition. IHA submitted this sanction would not be an effective deterrent if players are able to play in rival leagues. The ACCC considered that the IHA's ability to prevent members from participating in Australian and international championships is likely to be an effective disciplinary measure on its own, without imposing a restriction on players as to which league they may be permitted to participate in.

¹⁶¹ The *Trade Practices Act 1974* does not provide for an exclusive dealing notification to be amended after it is lodged, nor does it provide for the ACCC to impose conditions on the operation of the notified conduct. This means that neither an applicant, by amendment, nor the ACCC, by condition, can modify the conduct that is the subject of a notification after it is lodged.

- IHA's obligation as a member of the International Ice Hockey Federation
 - The IHA submitted that if it did not implement the notified conduct its membership of the International Ice Hockey Federation may be compromised. The ACCC considered that its decision to revoke IHA's notification did not affect IHA's ability to govern the sport of ice hockey in Australia at a national level. The ACCC did not consider there to be any legitimate basis for the IIHF to exclude IHA from its membership and remove any associated benefits as a result of the ACCC's decision.

4.3.2.4 *Balance of public benefits and detriments*

Based on the information available to it, the ACCC considered that the notified conduct had the effect, or was likely to have the effect, of substantially lessening competition for the provision of ice hockey competition organisation and administration services at the regional or local level. The ACCC also considered that the notified conduct had the potential to substantially lessen competition in the market for the acquisition of ice time at ice rinks and result in reduced choice for consumers. Further, the ACCC did not consider that the notified conduct was likely to deliver the public benefits claimed by the IHA.

On balance, the ACCC considered that the substantial anti-competitive detriments outweighed any public benefits resulting from the notified conduct. The ACCC noted in its decision of 2 March 2010 that the notified conduct was not required for IHA to be able to continue with the effective governance of the sport of ice hockey at the national level.

4.4 *Summary*

A wide variety of vertical restraints in the supply of goods and services associated with professional sport come to the attention of the ACCC in Australia, particularly supply arrangements relating to insurance, apparel, licensing, ticketing systems and sponsorship.

The ACCC will consider court action against corporations seeking to implement vertical arrangements that restrict or hinder competition and limit consumer choice.

Parties proposing to enter into such arrangements may seek immunity from prosecution under the TPA for conduct that might otherwise breach the competition provisions, only where the arrangements result in benefits to the public that outweigh the anti-competitive effects of the conduct. For further information on these decisions, see <http://www.accc.gov.au/content/index.phtml/itemId/776499>

APPENDIX A
AUSTRALIA'S ANTI-SIPHONING LIST

The events listed below conducted during the period commencing on 1 January 2006 and ending on 31 December 2010 are specified.

1. Olympic Games

1.1 Each event held as part of the Olympic Games.

2. Commonwealth Games

2.1 Each event held as part of the Commonwealth Games.

3. Horse Racing

3.1 Each running of the Melbourne Cup organised by the Victoria Racing Club.

4. Australian Rules Football

4.1 Each match in the Australian Football League Premiership competition, including the Finals Series.

5. Rugby League Football

5.1 Each match in the National Rugby League Premiership competition, including the Finals Series.

5.2 Each match in the National Rugby League State of Origin Series.

5.3 Each international rugby league "test" match involving the senior Australian representative team selected by the Australian Rugby League, whether played in Australia or overseas.

6. Rugby Union Football

6.1 Each international "test" match involving the senior Australian representative team selected by the Australian Rugby Union, whether played in Australia or overseas.

6.2 Each match in the Rugby World Cup tournament.

7. Cricket

7.1 Each "test" match involving the senior Australian representative team selected by Cricket Australia played in either Australia or the United Kingdom.

7.2 Each one day cricket match involving the senior Australian representative team selected by Cricket Australia played in Australia or the United Kingdom.

7.3 Each one day cricket match involving the senior Australian representative team selected by Cricket Australia played as part of a series in which at least one match of the series is played in Australia.

7.4 Each World Cup one day cricket match.

8. Soccer

8.1 The English Football Association Cup final.

8.2 Each match in the Fédération Internationale de Football Association World Cup tournament held in 2006.

8.3 Each match in the Fédération Internationale de Football Association World Cup tournament held in 2010.

9. Tennis

9.1 Each match in the Australian Open tennis tournament.

9.2 Each match in the Wimbledon (the Lawn Tennis Championships) tournament.

9.3 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the French Open tennis tournament.

9.4 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the United States Open tennis tournament.

9.5 Each match in each tie in the Davis Cup tennis tournament when an Australian representative team is involved.

10. Netball

10.1 Each international netball match involving the senior Australian representative team selected by the All Australian Netball Association, whether played in Australia or overseas.

11. Golf

11.1 Each round of the Australian Masters tournament.

11.2 Each round of the Australian Open tournament.

11.3 Each round of the United States Masters tournament.

11.4 Each round of the British Open tournament.

12. Motor Sports

12.1 Each race in the Fédération Internationale de l'Automobile Formula 1 World Championship (Grand Prix) held in Australia.

12.2 Each race in the Moto GP held in Australia.

12.3 Each race in the V8 Supercar Championship Series (including the Bathurst 1000).

12.4 Each race in the Champ Car World Series (IndyCar) held in Australia.

AUSTRIA

The Austrian Federal Competition Authority (FCA) has dealt with several cases relating to sport. In this contribution the FCA focuses on the two following issues suggested for consideration in the present roundtable:

- Exclusive broadcasting rights
- Certification and exclusivity

1. Exclusive broadcasting rights: ORF / ÖSV Ski World Cup

1.1 *Facts of the case*

The case was initiated by a complaint to the Austrian Federal Competition Authority (FCA) by a Pay TV operator in Austria in 2005.

The complaint concerned the agreement concluded in 2001 between ÖSV and ORF in order to confer on ORF exclusive media rights for transmission of all Ski World Cup events in Austria for a period of ten years (seasons 2002/3 until 2011/12). The rights conferred cover live TV- and radio transmission in Austria. Competitors had no opportunity to participate in tender procedures.

When dealing with the case it was relevant to consider that TV and radio broadcasting activities have been liberalised in Austria only in 2002. ORF - the former public law broadcaster - still had a very high market share in the TV advertising market with competitors far behind. ÖSV - the national association of regional and local skiing clubs - is acting as single seller of media rights relating to Ski Worldcup events organised in Austria. The events affected by the agreement represent 10-20% of Worldcup events organised annually by the International Ski Federation. In addition, ski events are by far the most popular sports events in Austria. Live transmissions of those events traditionally reach extraordinary coverage. Thus media rights of top ski events belong to the most valuable sport rights in Austria.

1.2 *Observed problems for competition*

The long duration and exclusivity of the treaty between ÖSV and ORF had the effect of foreclosing the new competitors completely from the valuable media rights of top ski events held in Austria.

Competitive constraints have been identified particularly in the Austrian market for media rights relating to Ski Worldcup events (Alpine, Nordic, free style etc) and related aftermarkets such as the market for trading of those media rights in Austria and markets for Pay TV and for TV advertising. However, also trade between EU Member States was affected as Ski Worldcup events are organised in several countries and are marketed on a country by country base by different international enterprises. Thus, both European (Art 101 TFEU) and national law were applicable.

1.3 Procedure and commitments

In 2006 the FCA informed ORF and ÖSV that several clauses of the contract were considered to violate Art 81 EC (now 101 TFEU) and started negotiating on commitments. In July 2006 a formal procedure at the Cartel Court was opened by the FCA with the aim of reaching binding commitments by ÖSV and ORF. In February 2008 the Cartel Court made the commitments agreed upon by decision binding on ORF and ÖSV. The decision has been co-ordinated with the European Commission according to Art 11 para 4 Reg 1/2003.

As part of the commitment the parties agreed to abolish exclusivity granted by the treaty concluded by ORF and ÖSV in 2002/3: ÖSV agreed to immediately tender non exclusive pay TV rights, parallel rights for TV Highlight coverage and rights for radio transmission for the seasons 2008/9 to 2011/12. This first phase of the commitments was intended to allow competitors to gain know how and develop a marketing strategy in the field of broadcasting ski events.

Moreover, ÖSV agreed to certain conditions for the tender procedure scheduled in 2010 for awarding the media rights *after* the expiration of the original treaty between ÖSV and ORF for the seasons 2012/3 onwards: Most importantly, the ÖSV agreed to tender media rights only for a period of five years, to offer several smaller packages of media rights and to abide to a no single buyer rule. Thus, other broadcasting operators have the opportunity to participate in the tender procedure for the Ski Worldcup media rights. In addition, several procedural rules have been agreed to safeguard a transparent and non-discriminatory tender procedure.

1.4 Key issues

One of the key issues addressed in the procedure was the question what duration of media rights agreements would be acceptable to competition law. At that time EC case law - mainly dealing with media rights in football events - only allowed allotment for three years. The organiser made very clear that a long duration of contracts on media rights was in its interest of safeguarding best public awareness of the events which is the key factor for fund raising through sport sponsoring and advertising. Since on European or worldwide level skiing is much less commercially attractive than football, it was considered appropriate to confine the duration to five years.

Furthermore, there was an exhaustive discussion on the extent of exclusivity of broadcasting rights that should be allowed. This topic mainly concerned the exclusivity granted to ORF by the contested licensing agreement and mechanisms to safeguard that after the expiration of this agreement there is a realistic chance of other TV operators to have access to at least some media rights in the field of Ski Worldcup events.

For the first period until the expiration of the agreement between ÖSV and ORF the commitments aimed to open the markets for competitors by a duty of ÖSV to tender parallel rights. For the new allotment after season 2012/3 the commitments laid down a no single buyer rule and the duty to tender several smaller right packages. This should ensure that the extent of exclusivity attainable by a single bidder (or bidding consortium) would be limited.

Also the extent of exclusivity of broadcasting rights was challenged by competitors. They expressed the view that it would not be commercially attractive for them to bid for Ski Worldcup rights unless they would be allotted an attractive range of exclusive rights.

This argument was particularly raised by the complaining Pay TV operator who asked for exclusive Pay TV rights or at least a relevant time window to show live transmissions before any Free TV licensor. The FCA did not support the demand of the Pay TV operator. EC case law never required the tendering of

exclusive rights packages for Pay TV and for Free TV operators. EC decisions rather left the matter of allotting the rights between those two operators to the discretion of organisers and operators participating in a tendering procedure. Given the major effects such a decision may have on the financing of sports events it was not considered appropriate to oblige an organiser of sports events to give preferential exclusive rights to Pay TV operators.

2. Certification of particular brand: Karting and bike regulations

In January 2004 a complaint against several organisers of national karting championships as well as the Austrian National Sporting Authority (i.e. Oberste Nationale Sportkommission, hereafter referred to as OSK) was lodged with the FCA. It was argued that by introducing a one branded tyre rule by various organisers (approved by the OSK) for national karting championships, competition between the suppliers of tyres, on the level of such championships, is being impeded. The one branded tyre rule obliged participants to buy tyres only of one specific brand for a specified price with a specific distributor or the organiser.

Organisers of national karting events regularly adopt sporting rules (i.e. the rules under which participating drivers compete) and technical rules (i.e. the conditions equipment must satisfy to be admissible for the races) they consider necessary for national championships. These rules are thereafter approved by the OSK which controls and develops the sporting and touring aspects of motoring and governs motor sport at a national level.

After thorough investigation the FCA found that the organisers had allotted sponsorship agreements for the supply of tyres unilaterally, without any objective selection criterion. At the FCA's request, the organisers changed their practice and adopted an open procedure for calls for tender with objective conditions open for all tyre suppliers as from 1 January 2005. The selection is monitored and organised by the OSK. Additionally, it was agreed with the OSK that this practice is to be applied also to national bike championships.

CHILE

1. Introduction

First of all we would like to underline the fact that the FNE's contribution to this roundtable will be made based on professional football only. This is due to the fact that, in Chile other sports are not as developed at a professional level as football is.

Second, given that no investigation has made it to the Competition Tribunal so far, and therefore judicial decisions have not been issued on the topic, we will base our answers on preliminary enquiries we have undertaken in the field.

In the Chilean professional football industry, it is possible to distinguish four main operators: 1) the clubs and clubs' associations; 2) the players; 3) broadcasting organisations; 4) sponsors and advertising agencies.

The clubs are organised into the following three club associations: Chile's National Football Federation, the umbrella organisation that represents Chile at the international level; the National Professional Football Association (ANFP); and the National Amateur Football Association (ANFA). The ANFP and the ANFA are members of Chile's National Football Federation.

The ANFP congregates all the Chilean professional football clubs. It organises all of the professional championships and is the only entity entitled to enter into contracts to broadcast, by any means, the matches of those championships. Moreover, the ANFP owns nearly 90 % of the "*Canal del Futbol*", company that is the sole controller of the broadcasting rights of Chile's professional football championship matches, both real time and delayed broadcasting. These rights are sold to free-to-air broadcasters and pay-television programmers.

Chilean football clubs have traditionally been organised as non-profit corporations. However, in view of, among other things, their higher professionalization, the growing business oriented nature of the clubs and the financial insolvency of some of them, in 2005 a law was passed which main purposes were to structure the organisation of professional sport clubs; regularise their financial condition and the remuneration of their players; and establish an external surveillance system of their functioning.¹ This law establishes that professional sport organisations may be incorporated as either public limited companies (*Sociedades Anónimas Deportivas Profesionales*) or non-profit corporations. The former must have as their sole object the organisation, production, commercialisation of and the participation in professional sport events and their ancillary activities. Currently, 16 out of the 18 professional football clubs in the first division are incorporated as public limited companies.

Regarding now the suggested issues to be touched upon in this contribution, and first, on the subject of market definition, the FNE has deemed that in Chile it clearly there exists a relevant market for professional football. Indeed, given the singularities of this industry and the way it is organised, it could be said that, for instance, regarding sports broadcasting rights, the relevant market may be narrowed down to

¹ Law N° 20019/2005 that Regulates Professional Sports' Public Limited Companies.

the broadcasting rights of the Professional Football's National Championship matches. This assertion is based on the fact that, in general, different sports (and thus their broadcasting) are not seen as substitute or homogenous goods for one another by consumers, particularly if interchangeability is assessed between football and other sports, (even between one football tournament and another). According to foreign agencies' findings taken into account by the FNE in its enquiries, evidence has shown that consumers would be willing to pay more for a channel broadcasting their favourite sports, as in the case of the Professional Football's National Championship matches. Furthermore, this interest would not only be in a single match but in the entire tournament.²

Concerning barriers to entry in professional football, the statutes of the ANFP establish that the number of its associates cannot exceed 32 clubs, 16 of which will belong to the first division and 16 to the second (*Primera B*). However, the number of clubs in each division may be altered and the total number of clubs associated to the ANFP may be increased, if 4/5 of the ANFP council members so approve. In this regard, in 2003 the FNE initiated a non adversarial procedure before the *Comision Preventiva*³ about a "programmed relegation"⁴ system that the ANFP was implementing. This system allowed that for the years 2003 and 2004, no first division club would be relegated to the second division, regardless of the tournaments results, and that 4 clubs from the second division (two each year) would be promoted to the first. The FNE considered that this system would prevent competition among the clubs for it would eliminate an important economic stimulus for competing, which was the fear of relegation that entails a severe loss of profits from reduced broadcasting rights, publicity, ticket sales and others. However, the *Comision* dismissed the FNE concerns and decided that the system did not restrain competition. In this regard, given the recent developments of our competition system and the improvement the FNE's procedures have undergone, the likely effects on competition of the current promotion/relegation system may deserve a closer and more comprehensive examination by the FNE.

Also regarding the topic of barriers to entry in professional football, in relation to the broadcasting of matches, the FNE is of the view that the main entry barrier for this market is the unavailability of the broadcasting rights associated to the specific sport event, which in the case of professional football, as stated before, are entirely controlled by "*Canal del Futbol*".

Regarding the nature of football federations and leagues and whether they are subject to competition law, in Chile the former are organised as non-profit corporations and are subject to competition law, as any other legal or natural person is.⁵ On the other hand, leagues, which in Chile are called Divisions, are not legal entities, but only categories in which football teams are arranged for purposes of organising championships and the respective promotions/relegations.

As for whether teams in leagues and federations should be considered as single entities, joint ventures, or multiple, independent entities, although the FNE has never dealt with such an issue as that posed by *American Needle v. National Football League*, (Case No. 08-66), the recent decision of the U.S. Supreme Court of Justice on that case may be viewed as a desirable outcome. As the Court stated "*Although NFL*

² An additional factor that should be pondered is that consumers value real time broadcasting way higher than delayed broadcasting.

³ Up until 2004, when the Competition Tribunal was established, the adjudicative competition bodies were the *Comisiones Preventivas* and the *Comision Resolutiva Central*.

⁴ Descenso programado.

⁵ Article 3° of the Chilean Competition Act (DL 211 of 1973) states that: "Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalised with the measures indicated in Article 26 hereof...."

teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned". It is obvious that for professional football to exist, and given the so called "peculiar economics of professional team sports",⁶ *it is desirable to permit teams in a league to co-ordinate their activities--agreeing rules, scheduling matches and so on, in ways that would be wholly unacceptable in other industries. To this extent leagues are like joint ventures, and this analogy can help to interpret the activities of sports leagues in a number of contexts.*⁷ Having said this, and assuming as a given that teams in leagues and federations should be considered as joint ventures or independent entities, perhaps the question that should be answered is whether such arrangements are indispensable.

Taking as an example "*Canal del Futbol*", ANFP's owned sole controller of the broadcasting rights of Chile's professional football championship matches, one could assess, for instance, whether there is a need for this company to manage the entirety of those rights on behalf of the football teams (it could be shown that in the absence of this arrangement it will not be possible to arrive at a realistic schedule and therefore matches will either not be shown or shown at times not attractive to the viewers⁸) or whether this arrangement is welfare enhancing.

⁶ Neale, "The Peculiar Economics of Professional Sport", (1964), Quarterly Journal of Economics, 78, 1, 1-14.

⁷ Szymanski, Stefan COLLECTIVE SELLING OF BROADCAST RIGHTS TO SPORTING EVENTS, 2006-07-11, I.S.L.R. 2002, 1(MAR), 3-7.

⁸ Szymanski, Stefan COLLECTIVE SELLING OF BROADCAST RIGHTS TO SPORTING EVENTS, 2006-07-11, I.S.L.R. 2002, 1(MAR), 3-7.

CZECH REPUBLIC

1. Introduction and regulatory framework in the Czech Republic

Approximately 63 % of citizens of the Czech Republic participate in sporting activities.¹ 28 % of Czech citizens exercise sport or play sport on a regular basis. Sport activities in the Czech Republic are mainly organised through respective associations. Key legislation sport and its organisational structure is Act No. 83/1990 Coll., on association of citizens. This law is based on Article 20 of the Charter of Fundamental Rights and Basic Freedoms, which governs the freedom of assembly and of association. Article 12(1) of the Charter particularly says *"Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."*

As the economic aspects of sport grow in importance there are not only associations established as civil association under Act No. 83/1990 Coll. that are involved in sports. Especially professional sport clubs in the Czech Republic are due to their nature entities established under commercial law.

Office for the protection of Competition of the Czech Republic has two investigations that concerned issues of competition and professional sports. Generally, issues that raised potential problems of competition distortion concerned the exclusivity of particular organisational bodies ("leagues") which tend to create conditions that prevent other competitors from joining the structure in question. As for the fact that major professional leagues always attract media and publicity, both investigations and relevant inquiries were made within close co-operation with all involved parties and, above all, with regard to the sensitivity of the abovementioned issue. The Office has repeatedly confirmed that competition mechanisms should apply to all sectors that are not directly excluded from the scope of the Competition Act and thus the tendencies to create even more exclusive level for highest-level leagues bring more negative effects and impacts on competition than intended and general foreclosure of certain levels of sports leagues is not desirable.

2. 1st case - Foreclosure of the major ice hockey league

2.1 Czech hockey league and its organisation

Ice hockey as a team sport is organised in leagues throughout each season. The system consists of several levels of vertically connected leagues whereby teams in lower leagues try to win their leagues in order to advance to higher-level league. The less successful teams try to avoid the descent to lower-level leagues. The organisational level of ice hockey is characterised by a monopolistic pyramid structure. Traditionally, there is single national sports association. Particularly ice hockey is governed by the Czech Ice Hockey Association (ČSLH). The two highest-level leagues are played by professional ice hockey teams. The highest-level league "Extraliga" (ELH) consisted in the season 2006/2007 of 14 professional clubs, all of which were commercial companies. The number of teams that played in the lower-level professional league was 16.

¹ Eurobarometer Survey – Sport and Physical Activity (02/10-19/10/2009), <http://ec.europa.eu/public_opinion/archives/ebs/ebs_334_fact_cz_en.pdf>.

The ČSLH granted the ruling of ELH to the Association of Professional Clubs of Ice Hockey (APK LH), which consisted only of clubs playing in ELH in the season 2006/2007 ice hockey season. APK LH was not only granted the right to change game rules of ELH but also the right to change promotion rules.

The descent to the lower-level league is a major problem for any club. Clubs must challenge lower incomes but still high expenses resulting especially from high players' salaries. Sponsors often seize to support money to unsuccessful teams. In the abovementioned season the teams associated in APK LH signed a new broadcasting contract granting a substantial amount of money every year. ELH teams wanted to ensure that they will not be forced out of ELH by ambitious and rich clubs playing lower-level professional league.

2.2 *Barriers to entry*

The arranged changes were applicable as from the season 2006/2007. No team of the ELH could have been descended from the league any more. Higher financial criteria for those clubs pursuing the possibility to play ELH, bank guarantees etc. were also set. Each participant of the ELH had to have a junior or any other youth team in the Czech highest-level league in the particular season.

The most important change concerned team which wanted to enter ELH. Only the winner of the lower-level professional ice hockey league was allowed to enter the ELH. Moreover, the entering to the ELH was made conditional upon the payment of an entrance fee of CZK 25 mil. (This entrance fee accounted for more than an average season budget of a club in that league). Moreover, the entrance fee was meant to be a fee for obtaining ELH license. Anyway teams which were already in the ELH did not have the obligation to pay this fee. All clubs in the ELH obtained the license for free. The license might be transferrable to any other club. The entrance fee had to be sent to APK LH bank account and if not spent, it would be allocated into budgets of clubs which played last ELH season.

Professional clubs playing the lower-level league announced that the level of entrance fee could prevent them from the promotion to ELH. Further, oral hearing with the party provided strong evidence to the Authority as a representative of the APK LH directly answered on the questioning that the main aim of the entrance fee is to prevent other clubs from entering ELH. He also stated that it seems that the entrance fee is too low as some clubs declared to be able to pay the fee. For this reason the APK LH planned another rise in the amount of the fee for the next season.

2.3 *Rules of economic nature*

The Czech Competition Authority (hereinafter referred to as "the Authority") launched a preliminary investigation of the case, collected available data and requested APK LH and ČSLH for information. As there was no judgment of the Court of Justice (CFI) in the *Meca Medina* case, the Authority based its evaluation of proposed promotion changes on the evaluation method described in the CFI judgment. It means that the evaluation of promotion rules by the Authority was based on whether the promotion rules are of sport or economic nature. There were no doubts that promotion rules were of economic nature.

All clubs in the ELH were professional clubs and they were joint-stock companies. Their primary aim was a success in league – the best way to raise incomes. APK LH was evaluated as an association of competitors under Czech competition law as there were no doubt that it had many business activities and aims (incomes from a sale of collective broadcasting rights, incomes from players appearances in the national ice hockey team, incomes from team players participation in TV advertisements, sponsorship incomes etc.)

2.4 *Relevant market*

Men's ice hockey in the Czech Republic can be divided into two categories. The first category includes two highest-level ice hockey leagues in which professional ice hockey clubs perform. The other leagues contested by amateurs form the second segment of the market. The market of the professional hockey can be further divided into two separate markets because conditions for clubs in both these leagues differ widely. The Authority preliminary defined the relevant product market as the men's highest ice hockey league. Geographic market was determined as a whole region of the Czech Republic.

2.5 *Co-operation with ECAs*

Investigation of the Authority was carried out in co-operation with other member states within the European Competition Network. The Authority was interested in their experience on the sport market and tried to find any similar case in other jurisdictions. The Authority co-operated especially with Italian, Dutch and British NCAs.

APK LH confirmed that clubs of the ELH will be sponsored by the newly entering club. They justified their behaviour by the existence of the NHL and the same (in their point of view) situation in Finland (where the league was also foreclosed).

According to a communication with the Finnish Authority concerning their ice hockey league, the foreclosure of the Finnish league had been approved by the national competition authority because there were several cases of bankruptcy on the market and several clubs were not able to complete the season. Anyway there was no entrance fee in Finland. New entrant only was supposed to buy an equity share in a joint-venture owned by clubs in the highest ice hockey league. The Authority evaluated Czech situation as a very different from the Finnish one. There was only one club which had financial problems and the entrance fee had a discriminatory character.

The Authority also detected one very similar case in the Netherlands where there had been an attempt to foreclose the 2nd Dutch football league. This agreement had been declared as prohibited by the Dutch competition authority.

The Authority also evaluated whether there conditions in the Czech competition law that are similar to those set in the Article 101 (3) of the TFEU were met. The proposed changes could bring some benefits, but only for the present ELH clubs. In the long term they would lead to lessening of competition among ELH clubs. The clubs in the second highest league would have no incentive to compete if there was no chance of getting promoted. Moreover, one of them announced that it was leaving the second highest-level league because it had not money to pay the entrance fee and playing the second league was expensive itself. Benefits for competition was not preliminary able to exceed damages caused by the market foreclosure.

2.6 *Conclusions*

The representatives of the APK LH were invited for the oral hearings, where the Authority declared that it was ready to open an administrative proceeding concerning the prohibited decision of association. The Authority's assessment of the proposed promotion changes led to the conclusion that the new rules resulted in potential foreclosure of the market. Especially the entrance fee seemed to be a high barrier of entry to the market and to be a possible obstacle capable of distorting competition. The Authority also informed APK LH about possible penalty which can be imposed (fines up to 10 % of the last year's turnover that was achieved on the relevant market by the participants of the prohibited agreements).

Representatives of APK LH asked whether they could avoid opening the administrative proceeding and imposing any penalties. They suggested remedies as follows – in the first year, no team there will be descended whereas the winner of second highest league will advance without paying any entrance fee. In the next year, there will be 15 teams in the ELH; two of them will later play a series of descent matches with a next winner of the second highest league for one place in the ELH. This proposal had been approved by the Authority. Few days later, APK LH announced the reopening of the ELH.

3. 2nd case - Descent from the highest-level league

This investigation followed the decision of APK LH to descent hockey club Vsetínská hokejová from the highest-level ice hockey league because of breach of duties.

APK LH set the terms for participation in the contest. If a club seriously breaches its duty, it can be excluded from the contest. According to APK LH's opinion hockey club Vsetínská hokejová breached its duty to pay deposit to APK LH which would be a guarantee for liabilities of the club up to CZK 7 million. But the warranty of Vsetínská hokejová did not meet APK LH's requirements.

There was a matter of common knowledge that Vsetínská hokejová got into serious financial troubles. It became untrustworthy member of APK LH because of outstanding debts towards hockey players and also towards non hockey subjects.

The investigation of the Authority did not prove that the descent of Vsetínská hokejová was unreasonable and such it constituted no infringement of the Czech Competition Act.

4. Sources

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DENMARK

1. Introduction

This paper reflects the views of the Danish Competition Authority (hereinafter: the DCA) on the topic “Competition and Sports”.

The background of this roundtable is that professional sports have become increasingly commercialised and continue to generate substantial revenues, particularly from the sale of broadcasting rights.

Danish competition law is aligned with the EU competition rules. The two prohibitions in the Danish Competition Act - section 6 (the prohibition against anti-competitive agreements) and section 11 (the prohibition against abuse of a dominant position) - are similar to Article 101 and Article 102 of the Treaty for the Functioning of the European Union (TFEU). Consequently the prohibition set out in section 6 does not apply if anti-competitive agreements meet the conditions set out in section 8 of the Danish Competition Act (similar to article 101 (3) TFEU). The Danish provisions are applied in conformity with EU-legislation including EU-case-law of the European Commission, The General Court and the European Court of Justice - also when it comes to matters which include questions regarding competition *and* professional sports.

The views in this paper are based on legal provisions and considerations within the DCA as well as the DCA’s own experience from cases relating to professional sports.

2. The experience of the DCA

The DCA has dealt with the joint selling of media rights to Danish Football. In 2007 the Danish Competition Council accepted commitments offered by the Danish Football Association (DBU) and the Danish League Association (DIV) in relation to joint selling of media rights to Danish Football.

DBU organises all official football tournaments in Denmark, inter alia the Super League (Superligaen) and 1st division (1. division). DBU holds the media rights to these tournaments but not to the actual matches. DIV is an association of the Super League and 1st and 2nd division clubs. DIV is authorised by DBU and the clubs to conduct negotiations concerning media rights to football matches in Denmark to which DBU and DIV’s members, respectively, hold the rights.

The DCA identified the following problems:

- The media rights were sold jointly
- The media rights were sold exclusively
- The media rights were sold for up to 5 years per contract
- The media rights were sold to one single broadcaster
- The contract ensured the broadcaster the right to exclusive negotiations as to an extension of the contract

The media rights had not been out for a tender since 1998, and in December 2006 DBU/DIV announced that the existing contract had been extended once again - this time until 2013. If that contract had come in to effect, the media rights would not have been put out for a tender for a total of 15 years.

The DCA addressed DBU/DIV with its objections with reference to section 6 in the Danish Competition Act and article 101 (TFEU). The objections were due to the fact that the present situation, where one distributor had almost a monopoly on these important media rights, restricted other TV and media distributors' possibilities to compete on the TV and distributions markets to the detriment of competition. Similar cases had been raised by the EU Commission concerning major football leagues within in the EU.

In order to meet the DCA's objections DBU/ DIV offered the following commitments:

- All media rights must be put out for open non-discriminatory tenders. Bids may be negotiated on the basis of the bid submitted;
- The media rights must be unbundled in separate packages;
- There must be separate packages containing exclusive and non-exclusive media rights and separate packages for different media platforms;
- A "no single buyer" obligation was imposed on packages containing rights for live broadcasting of matches in the Super League. The live broadcasting rights were split into 3 packages containing 2 weekly matches each;
- The rights are only to be awarded for a period of maximum 3 years per tender;
- A monitoring trustee will follow the tender and the awarding process.

These commitments align with the principles set out in similar decisions adopted by the European Commission. The commitments were made binding by the Danish Competition Council in October 2007, and a tender was carried through in 2007/2008. The rights to broadcast the matches in the Super League are now shared between three broadcasters each showing two games a week (instead of the original situation where all media rights were held by one broadcaster only).

3. Specific questions and issues for discussion

3.1 Exclusive broadcasting rights

From a consumer welfare standpoint, is it good or bad for multiple broadcasters each to obtain exclusive rights over different sporting events? Why? Take into account that the more widely distributed such exclusive rights are among broadcasters, the more television channels consumers will have to receive (and possibly pay more for) to get coverage of all the sporting events they wish to see.

The DCA acknowledges that consumers may – in the short term – prefer all major sporting events to be distributed by one or a limited number of broadcasters. At least this was the subsequent reaction to the case from 2007 on football media rights (see question 2) expressed by some Danish consumers.

On the other hand – the obligation of the DCA is to promote competition – in this case on the downstream market between TV-channels and between TV- and other media distributors. Media rights to major sporting events are a decisive source of content for many media operators, just as ownership to important sports media rights in many respects is the entry-key and driving force behind the emergence of new TV-channels or new media services.

In this context it is the view of the DCA - all depending on the structure of the market and the media rights in question - that breaking up exclusive rights in multiple (possible exclusive) packages in combination with no single buyers obligations will be an advantage to consumers in the long term, because it will improve the conditions for competition between TV-channels in respect of both price and quality. This may result in a broader, more diversified supply of TV-channels (hopefully at lower prices as well) - all to the benefits of consumers. Worth mentioning is also competition between TV-channels on the development of new concepts to broadcast live sporting events. Consumers are in general heterogeneous. For those consumers who want to follow all events – e.g. all football-matches in a tournament - the breaking up of exclusive media rights on more distributors will result in increased expenditures to watch TV. On the other hand - other consumers may prefer a more varied TV-supply including the possibility of watching some but not necessarily all matches in the tournament. For those consumers, the breaking up of exclusive media rights will likely result in lower expenditures. As far as the experience of the DCA is concerned the DCA has noted, that the actual number of football games from the Super League broadcasted live on TV increased from 77 games in the season 2006-2007 to 198 games in the season just concluded. This follows at least partly the decision in the 2007-case on football media rights. It can therefore be concluded, that the split of media rights on several channels undoubtedly has led to a broader and more diversified supply.

3.2 Market definition

In thinking about the issue of exclusive broadcasting rights, consider the problem of market definition. What is the relevant unit of output? Is it an individual game or is it an entire season of games, culminating in a championship? Furthermore, are there even relevant markets for individual professional sports in the first place? To what extent do consumers' differing tastes for sports affect competition? In other words, is there one market for professional basketball, another for professional rugby, etc., or do all the major professional sports compete with one another for consumers' attention (and thus for broadcasters' attention, as well) such that there is just one large product market for major pro sports, notwithstanding the fact that the supply of athletes is (almost always) specialised for each sport?

All depending on the person in focus some sports are more interesting than others, just as the preferences for specific sports may vary from country to country.

Nevertheless, seen from a Danish point of view football is *the major sport* when it comes to exclusive broadcasting rights. In the 2007-case on football media rights (see question 2) the relevant market was defined as a separate market for the sale and acquisition of broadcasting rights to Danish premium football for the entire season. The DCA made the same distinction between football and other sporting media rights in another case from 2007, where the Danish Competition Council approved a joint venture creating a new sports TV-channel (TV2Sport).

The DCA also found indications that separate markets for matches of the national football team and Danish league handball, and cycling (especially Tour de France) could be defined. Since it was not necessary for the merger case in question to decide whether further separate markets existed in relation to other sports the question was left open.

3.3 Barriers to entry

Are entry barriers high in professional sports markets? Why? To what extent are barriers in your jurisdiction expressly permitted by government regulations, e.g., by allowing leagues to control the number of teams that may join? What other factors make entry in professional sports markets difficult?

The DCA believes that the entry barriers in professional sports markets are high. Events played regularly throughout the season (like football and handball tournaments) have limitations as to the number of teams participating in the different leagues. Such limitations are usually drawn up by the relevant sports association. Besides from this restriction of participants financial barriers are high. In order to achieve success a new-started team will need a strong financial basis in order to be able to form a strong team. The alternative is to develop “own players” which will take years, just as the most talented players will be in great demand and thus might switch to another club before the club has reached the desired level of success. Finally, all sports need dedicated fans, and it takes both notable results and time to build up a loyal fan base.

3.4 *Leagues and federations: Normal commercial enterprises or non-profit regulators?*

What is the nature of professional leagues/federations in a competition policy sense? Should they be subject to competition law just like any other business, or should they be viewed simply as non-commercial bodies that make a sport safer and more organised by issuing and enforcing rules, procedures and equipment standards?

Although sport fulfils important educational, public health, social, cultural and recreational functions that obviously must be preserved, there exists a wide ranging field of activities in sport that clearly constitute economic activities. Examples include the sale of tickets for sports events, advertising activities, the sale of media rights for sports events, sale of merchandise.

It is the view of the DCA that professional leagues/federations should be considered normal commercial enterprises subject to competition law.

The relevant aspect is, whether the league or the sport association in focus is to be considered “*an undertaking*”. The term “*undertaking*” includes every entity engaged in an economic activity, regardless of the legal status of the entity and the way of which it is financed. *Economic activity* is any activity consisting of offering goods or services on the market. This means, that a league or an association is an “*undertaking*” to the extent it carries out an “*economic activity*” itself.

The Danish Competition Act applies to any “*business activity*”. Business activity is defined as any “*economic activity*”, which takes place in a market for goods or services, no matter whether the business activity is profitable or not. This means that the Act also applies to a non-profit business activity. Nor is it of any importance, how the business is organised (i.e. if the undertaking is a limited liability company, a private company, a co-operative undertaking, a partnership, a one-owner firm, a trade union, or a private foundation).

Danish competition law is aligned with the EU competition rules, and it has long been established by the Commission and the Community Courts that economic activities in the context of sport do fall within the scope of EC law, including article 101 and 102 and internal market freedoms. This has been confirmed in the Meca Medina Case by the European Court of Justice (Case C-519/04 P David Meca-Medina and Igor Majcen v. Commission).

It should be noted that “*economic activities*” may take place at various levels in the sport sector, including activities by individual athletes, sports clubs and sports associations, and that activities of individual athletes and sports clubs/teams may also fall under the scope of “*economic activities*” to the extent they carry out economic activities or participate in events which generates economic activity (e.g. tickets, broadcasting, sponsoring, merchandise). The DCA will monitor behaviour with connection to such economic activities whereas the DCA has no intention of interfering in amateur or hobby-like sport activities carried out in traditional amateur sports clubs based on voluntary work etc.

3.5 *Certification and exclusivity*

Certification in the sports context means accreditation (and is sometimes also called homologation). Competition policy issues may arise when a team or a league certifies a particular brand of sporting equipment or apparel to the exclusion of other, competing brands. Again from a consumer welfare standpoint, is certification by professional teams or leagues good or bad? Why? Couldn't leagues certify an objective standard rather than a particular manufacturer, and wouldn't that restrict competition less? Or, at least in some potentially dangerous sports such as Grand Prix racing, is certification a form of regulation that is necessary to ensure the sport's safety even though it may raise entry barriers? If different jurisdictions give differing answers, how is an international sports federation that wants to have a certification program supposed to design it so that it complies with all the relevant competition regimes?

Seen in a general perspective certification based on objective standards rather than a particular manufacturer is always the optimal situation. On the other hand, certification in relation to clothes/apparel is closely connected with sponsorships. Sponsorships are an efficient way for a sport team or league to raise financial means, and the organisation of the sporting sector and the dependency of sponsorships have reached a point where it would be more than difficult (and most likely not desirable) to put back the clock and ban certification/sponsorships.

However, if the period of certification goes on for many years (or is undetermined) and covers a substantial part of all activities in an entire league or federation the DCA would in general recommend the certification/sponsorship to be put out for open, non-discriminatory tenders for short-cycled periods and unbundled in separate packages. E.g. the DCA has recommended that the Danish Tennis Association put out their sponsor agreements for tennis ball supplies (for tournaments) for tender for periods of 2-3 years. In line with this an international sports federation wanting a certification programme should at minimum consider applying tender procedures etc.

Another aspect is when certification relates to sports carried out with expensive equipment. In such cases there seem to be a greater need for the application of objective and approved standards rather than demands for specific manufacturers. When it comes to potentially dangerous sports such as Grand Prix racing safety should be ensured via objective and approved standards without affiliations to a specific products or producers.

3.6 *Teams in leagues and federations: single entities, joint ventures, or multiple, independent entities?*

On January 13, 2010, the US Supreme Court heard oral arguments in American Needle v. National Football League, (Case No. 08-661), which concerns whether the teams belonging to the National Football League should be treated as a single entity, as 32 independent entities, or as participants in a joint venture for antitrust purposes. If the single entity view is adopted in this case, the teams in the NFL could be immune to lawsuits brought under Section 1 of the Sherman Act, which applies only to combinations of two or more separate entities. Is that a desirable outcome? Why or why not?

Section 6 of the Danish Competition Act applies both to the conduct of individual teams in leagues just as section 6 applies to the conduct of the league as well.

The Danish Competition Act section 6 (similar to article 101 TFEU) applies to *both* undertakings and associations of undertakings, while section 11 of the act (similar to article 102 TFEU) applies to undertakings. The term "undertaking" includes every entity engaged in an economic activity, regardless of the legal status of the entity and the way of which it is financed (see also question 3.4.).

With reference to settled EU case law *sports clubs/teams* are undertakings within the meaning of section 6 and section 11 of the Danish competition act to the extent that they carry out economic activities – e.g. if they sell tickets to sports events, to broadcasting rights or if they conclude sponsoring or advertising agreements. In Denmark the professional sports clubs are more or less organised as professional undertakings with a management and a board of directors. Several are stock listed companies and have other activities – e.g. renting out premises, sale of food/beverages, merchandise etc. In most events the professional club is an extension/a superstructure of an amateur club. In that case the Danish Football Association has laid down rules demanding separate accounts for the professional division and the amateur division of the club respectively. The segregation is necessary in order to ensure, that the amateur division is in a position to receive public aid and in reverse – that the professional division does not receive public support (which is prohibited in general in the Danish Competition Act section 11a – see also question 3.8).

National sports associations (or federations) may both be undertakings under section 6 and 11 and associations of undertakings under section 6. Sports associations are undertakings themselves where they carry out economic activity – e.g. by commercially exploiting a sporting event. Sports associations are “associations of undertakings” under section 6 to the extent they constitute groupings of sports clubs/teams or athletes for which the practice of sport constitutes an economic activity.

In general sports associations are based on groupings of sport clubs. Conduct arising from associations of undertakings representing the general interests of particular lines of trade, business – e.g. trade associations – or other groupings of interests are subject to section 6 of the Danish Competition Act. Consequently behaviour of sports associations will in general be subject to section 6.

Section 11 does not include the concept “association of undertakings” but EU case law have stated that even where a sports association is not itself active on a given market it may be considered an undertaking under article 102 TFEU to the extent the association is the emanation of its members which are active on the market. The DCA would reach the same conclusion regarding section 11 of the Danish Competition Act.

Summing up – in Denmark both to the conduct of individual teams in leagues *and* the conduct of the league as well would be subject to section 6 of the Danish Competition Act to the extent they carry out economic activities.

3.7 *The market for players*

Different professional leagues around the world have different rules governing the circumstances under which players can switch teams. What competition issues arise with respect to those rules? Furthermore, how should salary caps be viewed by competition authorities and courts? Are they just a form of price fixing or can a legitimate argument be made that they actually enhance competition? Why or why not? Should competition laws even be applied to labour markets in the first place? If so, where does the domain of labour law end and that of competition law begin?

The Danish Competition Act does not apply to wages and labour relations due to section 3 of the act. However, in general section 3 only applies if the relation concerns collective agreements between an employer and employees. In any other case the Danish Competition Act applies on normal terms. The wage and labour relations for professional sportsmen will as a starting point not derive from collective agreements and the act will consequently apply.

The DCA does not have any experience with *salary caps* in relation to professional sports but is of the opinion that the Danish Competition Act in general would apply in such cases – and is likely to be

considered a price ceiling agreement if the agreement was entered into by individual clubs. Such an agreement would consequently be subject to section 6 of the Danish Competition Act. Having said that it is important to point out that in professional sports it is essential for the teams/clubs to acquire the best players etc. An element of suspense is an essential prerequisite for sports to be interesting for the general public. With unlimited freedom to hire and pay players the “richest” teams will (almost) always win the sporting competition because they are able to buy the best players and hence compose the strongest teams. That may in the long run be a disadvantage to the sporting competition between the teams/clubs as such because the results of the games etc. at worst become foreseeable and uninteresting for the public. As a starting point it may be difficult for a price ceiling agreement to meet the conditions for exemption set out in section 8 of the Danish Competition Act (similar to article 101(3) TFEU). Nevertheless it should be pointed out that - viewed in this light – there may be other considerations that would have to be taken into account when assessing an eventual agreement between clubs on salary caps.

To complete the picture – as mentioned in the introduction of this paper Denmark is subject to EU-law as well. A sport activity is subject to EU-law in so far as it constitutes an economic activity within the meaning of the Treaty (TFEU). In that case the *conditions for engaging in the activity* will be subject to all the obligations which result from the various provisions of the Treaty. E.g. where a sporting activity takes the form of a gainful employment or the provision of services for remuneration (which is true of the activities of semi-professional or professional sportsmen), it falls also within the scope of article 45 TFEU (the freedom of movement for persons) and article 56 TFEU (the freedom to provide services), and in this case the private rules of sporting associations are precluded from restricting these fundamental rights of the treaty.

3.8 *The nature of the cases*

What types of competition cases involving professional sports have you encountered in your jurisdiction? How have your enforcement agency and the courts analysed them?

Apart from the case on football media rights from 2007 the DCA has not handled many cases involving professional sports.

One case worth mentioning dealt with the conditions and the size of rent for public owned sports stadiums used by professional sports clubs (the conditions for hiring municipality-owned stadiums – 2003). Traditionally local municipalities support local sports, but the professionalisation of sports has made it necessary to distinguish between traditional amateur clubs and professional clubs. Aid from public funds to the benefit of specific forms of business activities is prohibited in the Danish Competition Act (section 11a). Consequently professional sports clubs will have to pay rent etc. on market terms for the use of public facilities like stadiums and the like. The case drew up the principles on which rent from professional sports clubs were to be calculated.

FINLAND

1. Background

Competitive sports have always been an essential part of national culture in Finland. According to the Ministry of Education and Culture, one in ten Finns takes part in organised competitive sports. However, only few of them aim at the world top. There are between 2 000 and 4 000 athletes competing at the national level, of whom only 500-800 become world-class athletes. Thus, the number of professional athletes, that is, athletes who make their living from sports, is relatively low.¹

Today's professional sports are characterised by growing professionalism, media exposure and commercialisation. Additionally, competitive sports have an international dimension, among others, due to cross-border sports leagues and international sports events, player transfers and activities of international sports federations.²

The 1990's saw an increased commercialisation of the Finnish sports sector. Sport clubs became more media and commercially orientated, with sports events beginning to attract greater media coverage. Professional sports are often connected with strong media coverage and publicity: The value of broadcasting rights, especially television rights to sports events, has increased the economic importance of professional sports.

2. Application of competition law to the sports sector

Pure sporting rules often fall outside of the scope of the competition law. However, a thorough assessment of the objective of sporting rules, the economic dimension of the activity and the applicability of competition rules due to for example a possibility to view agreements as contracts of employment excluded from competition laws is often of high relevance.

2.1 Economic activity

The Finnish *Act on Competition Restrictions (480/1992 incl. amendment 318/2004)*³ does not contain any specific exceptions for agreements and practices in the field of sports. According to the Act, a business undertaking shall mean a natural person, or a private or public legal person, which professionally offers for

¹ For more details of the Finnish sports sector, see the webpage of the Ministry of Education and Culture at <http://www.minedu.fi/OPM/Liikunta/?lang=en>. In 2008, 96 per cent of ice-hockey players at the national hockey league did not have other employment. However, approximately 30 per cent of the players studied besides playing ice-hockey. Survey of the Finnish Ice Hockey Players' Association. 20 February 2008. Available at http://www.sjry.fi/files/u32/Pelaajakysely_Liiga_Lehdist%C3%B6versio.pdf.

² In general, the co-operation in the sports sector appears to be increasing in the European Union. With the Treaty of Lisbon the European Union has official competence in the sector of sports, as Article 165 of the Treaty on the Functioning of the European Union (TFEU) calls on the union to promote sport and to develop the European dimension in sport.

³ The provisions of the national competition law are similar by content and interpreted in a uniform way with Articles 101 and 102 TFEU.

sale, buys, sells, or otherwise obtains or delivers goods or services in return for compensation. Therefore, *economic activity* in the context of sports falls within the scope of competition rules.

In a case concerning the *Finnish Basketball Association*,⁴ the FCA found that arranging competitions for the National Basketball League was a commercial activity involving a financial risk. Further, activities related to sports can be carried out on a commercial basis, even if there are voluntary workers involved.

The particular activity in question has to be identified, as one part of the activities may fall under the concept of economic activity, while the rest may fall outside of such concept. Competition rules are typically applicable for instance to sponsorship arrangements carried out by sports federations, as sponsorship constitutes an economic activity. For example sponsorship related to ski-jumping was considered economic activity in an alleged abuse of dominant case.⁵

2.2 *Sporting rules*

Regulations of various sporting organisations necessary for the organisation itself or for organising competitions might not be subject to the competition law. The rules inherent to sport are, above all, the “*rules of the game*”. However, sporting rules may constitute agreements or decisions in the meaning of competition law and therefore be prohibited if their object or effect is restriction of competition.

Certain criteria must normally be fulfilled in order for a sport team to participate in professional leagues or to be promoted to a higher league. For example, the objective of a financial rule may be to ensure the financial stability of sport teams and thus the regularity of sports events. It is typically considered vital that no team in a competition drop out prematurely, for example because of financial difficulties and therefore such sporting rules may be legitimate.

The FCA has objected to a rule by the *Finnish Basketball Association*⁶ requiring teams applying to take part in the Finnish Basketball Championship League to meet more stringent financial conditions than teams already playing in the league. The FCA approved a rule that the applicant team must be able to guarantee financial survival for one season but found that any requirements exceeding this criterion would go beyond what is necessary and would constitute an abuse under the competition law.

Sports federations may unnecessarily hamper competition by preventing participation of athletes to non-authorized events, i.e. events organised by other parties. Since sports federations have a special position relating to the particular sport, the actions of such organisations must be transparent and non-discriminatory.⁷

2.3 *Different entities on field of professional sports*

Finnish sport policy traditionally rests on strong civic participation.⁸ Also competitive sports are largely based on volunteer work. There are various actors in the professional sports sector who can be

⁴ FCA's decision on 5 September 1995. Case 511/61/1994. The FCA found that the corrective measures of the Association were sufficient and closed the case.

⁵ The case concerned ski-jumpers and the *Finnish Skiing Federation's* sponsorship agreement. FCA's decision on 11 November 2004. Case 756/61/04.

⁶ See footnote 4.

⁷ A motor sports federation had rules entitling holders of the federation's license to participate only in car races organised by its member organisations. The FCA found that the corrective measures of the federation were sufficient and closed the case. FCA's decision on 9 June 2004. Case 329/61/2003.

⁸ The *Sports Act (1054/1998)* imposes certain obligations to municipalities in the field of sports. The government and local authorities are responsible for creating favourable conditions for sports and physical

considered business undertakings or associations of business undertakings: independent athletes, sports clubs, sports federations (associations) and international sports federations.⁹ For instance, national sports federations often have a special position in the given sports. The pyramid structure of the organisation of sport in Europe (there is typically only one national sports federation for each discipline) gives sporting federations a practical monopoly.¹⁰

The FCA has dealt with a few cases where the national sports federation has been considered a business undertaking in the meaning of the competition law. For example, when selling tickets to World Championship games, the *Finnish Ice-hockey Association* was considered an undertaking.¹¹ Independent athletes may also constitute undertakings.¹²

2.4 *Intersection of the labour law and competition rules*

Issues related to the field of sports may be subject to assessment under other legal norms than competition rules. Certain agreements, decisions or practices may be sited in an intersection of the labour and competition law. The *Finnish Act on Competition Restrictions* does not apply to agreements or arrangements which concern the labour market. For example, agreements between associations representing athletes and sports leagues may be considered to have a nature of collective labour agreements.

3. Case examples in the field of professional sports

The FCA has to date dealt with a few cases which involve the application of competition law to professional sports.¹³ The cases relate to the application of competition law as regards certain revenue-generating activities such as licenses, sponsoring, ticketing arrangements and media rights for sports events.

3.1 *Insurance tied to the sport license*

While certain licensing rules may be legitimate sporting rules, certain rules may go beyond what is necessary and therefore breach the competition law. Requirement for athletes to take out injury insurance in order to obtain a sporting licence may be legitimate, but demanding the insurance to be taken from a

activity, for instance by providing sports facilities. In addition to municipalities, private businesses and third sector actors have an important role in the area of sports activities. Certain concerns have been raised with regard to competition neutrality, i.e. ensuring equal operating conditions for all market actors. See footnote 13 as an example of FCA's efforts to address such concerns.

⁹ The FCA has concluded that the City of Rauma was not to be considered an undertaking referred in competition rules, when it acted as the lessor of sports facilities. Therefore, the way in which the city priced its sports facilities could not be assessed on the basis of the Act on Competition Restrictions. However, the FCA is of the opinion that local authorities should make a clear distinction between the obligation to arrange sports services and the obligation to produce them.

¹⁰ Report from the Commission to the European Council. 10 December 1999, p. 9. Available at <http://www.sportdevelopment.org.uk/helsinkireport.pdf>.

¹¹ FCA's decision on 19 April 2002. Case 950/61/2001.

¹² The case concerned ski-jumpers and the *Finnish Skiing Federation's* sponsorship agreement. FCA's decision on 11 November 2004. Case 756/61/04.

¹³ Besides professional sports, the FCA has considered issues related to the field of sports in general. In June 2009 the FCA, the Ministry of Education, the Association of Finnish Local and Regional Authorities and the Federation of Finnish Enterprises have jointly published a recommendation to promote business activity in the field of sports activities of municipalities. The purpose of the recommendation was to address competition concerns, which may arise when public and private parties meet in the same market.

specific insurance company and tying the insurance to the licence may be forbidden. Concentrating supply to only one or few insurance companies may affect price formation.

The FCA has objected to requirements where some sport federations tied sport injuries insurances to sports licenses.¹⁴ Thus, the athletes could not obtain a license required for example to participate in competitions without also taking injury insurance from the insurance company indicated by the federation. Such compulsory license insurance was required even if the athlete already had an existing insurance against sport injuries with similar or wider coverage for injuries. As a conclusion, the sport federations agreed to change their practice and not require injury insurance from a specified insurance company, but the insurance could be taken separately from any company on the market.

3.2 *Ticket sales*

Certain ticketing arrangements have drawn the attention by various competition authorities. For example arrangements where no individual tickets are offered but tickets are available only in packages may raise competition concerns. The FCA found the selling method of the 2003 Ice-Hockey World Championship tickets to be problematic from the viewpoint of competition law. In its advance marketing, the *Finnish Ice Hockey Association*¹⁵ had announced that it will only sell the tickets in packages of 2-6 games.

At the FCA's demand, the *Finnish Ice Hockey Association* clarified the ticket sales system by announcing that it would commence selling individual tickets three weeks prior to the start of the games. The Association committed to being more transparent in its subsequent marketing: Individual tickets would be sold to all games to which unsold tickets were available. The prices of the tickets would be the same as in the package option.

3.3 *Sponsorship*

As noted, sports federations often have a dominant position and therefore also exclusive sponsorship agreements may raise competition concerns. Exclusive sponsorship agreements may hinder individual athletes' possibility to make sponsorship agreements with competing sponsors to the federation's contracting party. Such sponsoring agreements that close the market by removing other suppliers for no objective reason are prohibited.

The FCA has examined the activities of the *Finnish Skiing Federation*¹⁶ in the sponsorship agreement market. The written agreements between the Federation and ski jumpers contained detailed provisions on the allotment of commercial rights of both parties, primarily regarding advertising space. Under the agreement, the advertising space of skis was assigned to the jumper to sell on certain conditions concerning the sponsor's field. The *Finnish Skiing Federation* did not approve the sponsors acquired by two of the jumpers as the Federation itself had active co-operation partners operating in the same sector. The FCA paid particular attention to the distortions of the sponsorship market caused by the conduct of the Federation. Companies were found to have several alternatives available to them in the sponsorship market. Because it was only forbidden to make an agreement which competes with the Federation's

¹⁴ FCA's decision on 4 March 1998. Case 1089/61/95.

¹⁵ As granted by the *International Ice Hockey Federation* (IIHF), the *Finnish Ice Hockey Association* had a sole right for arranging the World Championship games in Finland. The FCA therefore found the Association to have a dominant market position in arranging the 2003 Ice Hockey Championship event in Finland. FCA's decision on 19 April 2002. Case 950/61/2001.

¹⁶ FCA's decision on 11 November 2004. Case 756/61/04.

sponsorship agreement, an athlete could make an agreement with a company representing another field. According to the FCA's investigations, the *Finnish Skiing Federation's* limitation of the sponsors was in the interests of companies supporting the Federation's activities. Removing the sectoral limitation might endanger the fundraising system of the Federation.

3.4 *Media rights*

Another sector of sports with an increased economic significance is broadcasting rights. As experienced in some other countries, also in Finland captured rights to events that historically have been broadcast on free-to-air stations have at some extent shifted to pay-TV channels. The pay-TV market in Finland has developed mainly during the past few years.

Those exercising exclusive television broadcasting rights to an event of high interest to the public are to grant other broadcasters the right to use short extracts for the purposes of general news programs after the sports event has ended.¹⁷ Additionally certain sports events are considered to be of such importance to society in Finland that their coverage shall be broadcast in the area of Finland so that a substantial proportion of the public can follow the events free.¹⁸

Competition concerns related to media rights may appear on the upstream and/or downstream market. While the upstream market may include initial right owners and the broadcasters, the downstream market covers the provision of sports media services to consumers by retail operators including broadcasting companies. On the top of the value chain, concentration of valuable sports media rights in the hands of few suppliers limits their availability. Availability of sports media rights may be further reduced by contracts being concluded on an exclusive basis for a long duration. Additionally the rights are often sold in a bundle and cover whole events (for example all matches during one or several seasons). This is generally to the advantage of the largest operators, because they are the only companies that are able to bid for such large rights packages. Moreover, in Finland in most tenders it appears the number of bidders is not limited, but also tenders exist where the number of participants has been restricted. Some agreements may also include a "matching right" condition, which allows the winning bidder in the previous tender to respond to the highest bid and therefore continue the agreement for media rights.

Downstream markets are often of a national character or at least confined to linguistic regions. The Finnish pay-TV market has certain features, which distinguish it from the corresponding market in some neighbouring countries. In Finland, purchasing a channel package bundled by a distributor is not a prerequisite to purchase a broadcaster's channel package. In some other countries, channels are mainly available by "buy-through" model only: Consumers can purchase a broadcaster's channel package (so called premium package) only if they have already subscribed a package bundled by a distributor. Accordingly, this supports the view that both kind of channel packages belong to the same relevant market.

Competition effects on the upstream and downstream market of media rights may also be interrelated. Major concern in a merger case¹⁹ between two broadcasters investigated by the FCA was the potential

¹⁷ The *Finnish Copyright Act (404/1961)* was amended 30 April 2010 to implement Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007.

¹⁸ According to the *Government Degree (199/2007)* such events include for example the Olympics games, World Championships in Athletics, men's World Championships in Ice-hockey and certain games of the Football World Cup.

¹⁹ The case concerned TV4 AB's notification to the FCA of an acquisition of C More Group Ab. TV4 owned by the Swedish Bonnier media group acquired control in C More Group offering pay-TV channels under the Canal+ brand in Finland. In Finland, the Bonnier group includes MTV Oy, which offers both free and pay-TV channels to the viewers. FCA's decision on 27 November 2008. Case 579/81/2008.

harmful effects on the final product market. The overlap of the parties businesses was in the pay-TV segment and in the buying of broadcasting rights. The FCA approved the merger subject to conditions such as sub-licensing of the Finnish National Ice-hockey League (SM-League) broadcasting rights.

In Finland, especially motor sports and ice-hockey are of prime interest to sports broadcasters. Thus, the highest fees for media rights for sports events have been paid for motor sports and ice-hockey. According to studies and viewer research, the following sports are of interest to the mass audience in Finland²⁰:

Table 1. Sports of interest in Finland

Field of Sports	Event
Ice-hockey	National League (SM-League)
Ice-hockey	Games of the Finnish national team
Ice-hockey	Champions' Hockey League
Ice-hockey	NHL
Motor-sport	Formula One
Motor-sport	World Rally Championship
Motor-sport	MotoGP
Motor-sport	Formula Three
Football	Games of the Finnish national team
Football	UEFA Champions League
Football	Veikkaus-League (National Football League)
Football	(English) Premier League

The notified concentration would have occupied the media rights for nine (italicised in the table) events out of twelve. One important aspect in the FCA's analysis of the merger was the markets for broadcasting rights of key content. As certain media rights in the field of sports are expensive, in practice it is impossible to finance them solely on commercial revenues. Thus, the number of potential buyers of such rights is very limited.

4. Summary

The number of athletes who make their living from sports is still limited in Finland and the size of market is relatively low. However, the professional sports sector has been under scrutiny by the FCA in a few cases. The suspected competition infringements have mainly concerned an abuse of dominant position by sports federations.

The field of sports has some specific characteristics. For example sports events are often differentiated products that are not easily substituted. Sports fans are not consumers in the normal free market sense, but they tend to be loyal to a certain club, which they follow almost unconditionally. Also the conduct at issue may be in some manner exempt from the scope of the competition rules. Pure sporting rules may be legitimate for instance when taking into account the nature of the sport including health risks involved or the necessary regulations for organising competitions. Thus, in some sense sports may be different from other parts of the economy. However, economic activity in the field of sports is subject to competition law, and rules that go beyond what is necessary constitute an infringement of such rules.

²⁰

The information is based on the situation when the merger case was investigated in 2008.

FRANCE

1. Introduction

Il n'existe pas d'exception spécifique au sport dans l'application du droit français de la concurrence.

S'agissant des questions classiques liées aux pratiques anticoncurrentielles menées, par exemple, par les fabricants d'articles sportifs ou leurs distributeurs, la question ne fait évidemment pas débat. Ainsi, dès son quinzième avis, émis le 19 avril 1958, la commission technique française des ententes, dotée à l'époque d'un pouvoir seulement consultatif, recommandait au gouvernement de prohiber une concertation dans le secteur des guidons de vélo.

Sur des sujets plus complexes tenant, notamment, aux droits et missions des acteurs du monde sportif, des interrogations ont parfois été émises sur l'applicabilité du droit de la concurrence à ce secteur. Une ancienne ministre des sports a ainsi déclaré en mars 1999 que « *l'application au sport des règles communautaires de concurrence s'avère incompatible avec la préservation de l'éthique sportive.* »

Cette conception n'a cependant pas été retenue en droit français. Ce qui relève, notamment, de l'activité économique des opérateurs du sport, aux premiers rangs desquels les fédérations, les ligues et les clubs, est donc soumis au droit de la concurrence.¹ Logiquement, y échappe en revanche ce qui, strictement, relève de l'organisation du sport ou concourt à l'accomplissement de ses fonctions sociales.

La précédente contribution française au sein du comité du droit et de la politique de la concurrence de l'OCDE sur le thème des relations entre droit de la concurrence et sport remonte à presque 15 ans (15 octobre 1996).

Depuis, l'importance du sport dans la vie économique n'a cessé de se confirmer, ce secteur étant par ailleurs souvent considéré comme une « valeur refuge » en temps de crise.

Les dépenses sportives totales en France (entrées dans les stades, les piscines, abonnements aux clubs etc.) s'élevaient à un montant de 33 milliards d'euros en 2007, dont 18,5 milliards pour les ménages, en progression de près de 35,2 % depuis 2000. Dans le domaine de la fabrication et de la distribution d'articles de sport, le développement est constant : la consommation totale des ménages français s'établissait ainsi à 3 889 millions d'euros en 2008 et le chiffre d'affaires des fabricants d'articles sportifs a progressé en moyenne de 1,8 % par an entre 2001 et 2009.

S'agissant de l'activité des clubs sportifs professionnels, le constat est également éloquent. Dans le domaine, emblématique, du football par exemple, le chiffre d'affaires total des clubs de ligue 1 et de ligue

¹ Ainsi, le Conseil d'Etat, depuis des arrêts du 3 novembre 1997 et du 17 décembre 1997 (« Société Million et Marais » et « Ordre des avocats à la cour de Paris »), a expressément jugé que les dispositions de l'ordonnance du 1^{er} décembre 1986 faisaient partie intégrante de la légalité administrative. Les actes des fédérations sportives pris dans le cadre de l'exercice de leurs prérogatives de puissance publique, tels que les règlements fédéraux, se voient donc appliquer le droit de la concurrence. De même, la commercialisation des droits d'exploitation audiovisuelle des compétitions sportives organisées par une ligue est effectuée dans le respect des règles de concurrence (article L. 333-2 du code du sport).

2 était de 1 211 millions d'euros en 2008 (un montant néanmoins nettement inférieur à ceux générés par les clubs anglais, espagnols ou italiens), en augmentation de près de 60 % depuis 2003. En matière de droits audiovisuels, le contrat liant la Ligue de Football Professionnel à Canal Plus et Orange assure aux équipes de ligue 1 un revenu de 665 millions d'euros par an jusqu'en 2012.

L'Autorité de la concurrence française, comme le Conseil de la concurrence auquel elle a succédé le 2 mars 2009, a eu à de nombreuses reprises l'occasion de se pencher sur ce secteur en plein essor. On peut ainsi relever que, depuis la dernière contribution française, soit entre 1996 et 2009, 48 décisions et avis touchant directement ou indirectement au domaine sportif ont été rendus, soit une moyenne de 3,5 décisions/avis par an. Entre 1986, année de la création du Conseil de la concurrence, et 1995, seuls 9 décisions et avis concernant ce secteur avaient été rendus au total (soit moins de un par an en moyenne).

Il convient également de relever que si l'Autorité a plusieurs fois eu à connaître des affaires liées à l'organisation du football, elle a également été amenée à appréhender les pratiques relatives à divers sports moins médiatiques comme l'escrime, le squash, la planche à voile, la plongée sous-marine, le tir sportif, le ski ou même la pétanque.

La présente note ne mentionnera que des affaires postérieures à 1996, année de la dernière contribution. Elle n'évoquera pas non plus les dossiers qui, bien que touchant de manière directe ou indirecte le secteur des activités sportives, ne présentent aucune spécificité liée à l'organisation de l'économie de ce secteur et rejoignent des problématiques très « classiques » du droit de la concurrence.²

² Pour mémoire, ces dossiers concernent :

- Les ententes lors de marchés publics, ayant donné lieu à cinq décisions concernant indirectement le domaine du sport (décision n° 96-D-41 du 11 juin 1996 relative à des pratiques constatées lors d'un marché de construction d'un gymnase dans la commune du Tholy, décision n° 98-D-23 du 24 mars 1998 relative à des pratiques relevées dans l'aménagement d'un terrain sportif à Nice, décision n° 03-D-55 du 4 décembre 2003 relative à un marché public passé par le District Urbain du Pays de Montbéliard pour la réfection de la pelouse d'un stade de football, décision n° 04-D-15 du 28 avril 2004 relative à des pratiques relevées dans le secteur des revêtements synthétiques pour sols sportifs, décision n°06-D-13 du 6 juin 2006 relative à des pratiques mises en œuvre dans le cadre d'un marché public de travaux pour la reconstruction du stade Armand Cesari à Furiani) ;

- Les pratiques tarifaires et les accords de distribution « classiques », ayant donné lieu à cinq décisions (décision n°96-D-39 du 4 juin 1996 relative à des pratiques relevées dans le secteur de la distribution du matériel de plongée sous-marine, décision n° 02-D-26 du 9 avril 2002 relative à une saisine de la société Prieur Sports dans le secteur de la distribution des équipements d'escrime, décision n° 04-D-12 du 7 avril 2004 relative à une saisine de la société Go Sport concernant des pratiques mises en œuvre dans le secteur de la distribution d'articles de sport et de loisirs, décision n° 05-D-07 du 24 février 2005 relative à des pratiques mises en œuvre sur les marchés des armes et des munitions civiles, décision n°06-D-37 du 7 décembre 2006 relative à des pratiques mises en œuvre dans le secteur de la distribution des cycles et produits pour cyclistes) ;

- Les questions liées aux polices d'assurances, ayant donné lieu à cinq décisions (décisions 96-D-40 du 14 mai 1996 et 94-D-40 du 28 juin 1994 relatives à la situation de la concurrence dans le secteur de l'assurance ski, décision n° 00-MC-08 du 9 juin 2000 relative à une demande de mesure conservatoire présentée par la société Icare, décision n° 03-D-31 du 2 juillet 2003 relative au secteur de l'assurance ski, décision n° 09-D-01 du 12 janvier 2009 relative à des pratiques mises en œuvre par le CESAM dans le secteur de l'expertise des bateaux de plaisance).

- La commercialisation de forfaits, ayant donné lieu à quatre décisions (décision n°99-MC-10 du 16 décembre 1999 relative à une demande de mesures conservatoires de la société Agence Alp Azur concernant des pratiques mises en œuvre sur le marché des tickets et forfaits d'accès aux remontées mécaniques de la station de Pra-Loup, décision n°01-D-39 du 29 juin 2001 relative à une demande de la société Agence Azur concernant des pratiques mises en œuvre sur le marché des tickets et forfaits d'accès et remontées mécaniques

La présente note ne fera état que des dossiers traités par l'Autorité française et non, par conséquent, des importantes affaires traitées par la Commission européenne. Il convient de relever cependant que l'activité de cette dernière a été également particulièrement nourrie depuis 1996. Ainsi, plusieurs dossiers sont intervenus dans les domaines du transfert des joueurs (par exemple les plaintes concernant les anciennes règles de la FIFA sur les transferts internationaux de footballeurs), de l'accès aux compétitions (dossier du règlement de l'UEFA relatif à l'intégrité des compétitions et l'indépendance des clubs) ou à la profession d'agents de joueurs (modification des règles FIFA de 1995), de la réglementation antidopage (comme l'affaire de principe Meca Medina) etc. Les questions évoquées dans la note aux délégués adressée le 25 mars dernier par le comité de la concurrence de l'OCDE sont au cœur des problématiques auxquelles les instances communautaires ont été confrontées. Au niveau français, quelques unes de ces questions ont été tranchées, comme la question du statut des ligues par exemple.

La note ciblera donc l'approche de l'Autorité de la concurrence concernant les questions liées aux exclusivités dans le domaine sportif, problématique centrale en la matière. Ces dernières touchent essentiellement aux droits médiatiques, aux activités de parrainage et à la vente de billets. On relève à ce titre que ces trois domaines recoupent la quasi-totalité des ressources des sports les plus médiatisés. En ligue 1 de football par exemple, la répartition de l'origine du budget du championnat s'établissait pour la saison 2006/2007 à 58 %, 27,5 % et 14,5 % s'agissant respectivement des droits de retransmission, du sponsoring/merchandising et des ventes de billets.

Dans une première partie, la présente note tracera le cadre juridique et théorique de l'analyse. Les deuxième et troisième parties passeront en revue la pratique décisionnelle de l'Autorité en matière de droits médiatiques, de parrainage et de vente de billets.

2. Le cadre général de l'analyse

2.1 Le cadre juridique

Le cadre législatif et réglementaire français s'applique tant aux questions de l'attribution des droits que de leur exercice.

2.1.1 L'attribution des droits sportifs

S'agissant, premièrement, de la question de l'attribution des droits exclusifs d'exploitation, il convient tout d'abord de relever que le système sportif français est bâti sur le monopole d'organisation des compétitions confié dans chaque discipline aux différentes fédérations.

de la station de Pra-Loup, décision du 2 mai 2007 relative à des pratiques mises en œuvre par la société Transmontagne, concessionnaire des remontées mécaniques sur la station de ski de Pra-Loup, décision n° 10-D-06 du 26 février 2010 relative à des pratiques mises en œuvre par la Société des Téléphériques de la Grande Motte).

- Les délais de paiement (avis n° 09-A-23 du 25 juin 2009 relatif à un accord dérogatoire aux délais de paiement dans le secteur des armes et des munitions pour la chasse, avis n° 09-A-40 du 26 juin 2009 relatif à un accord dérogatoire aux délais de paiement dans le secteur des articles de sport).

- Et, enfin, la plupart des décisions de non-lieu (décision n° 97-D-12 du 26 février 1997 relative à une saisine présentée par la société AMME à l'encontre de la Société du Tour de France, dans le domaine du parrainage lors de manifestations sportives, décision n° 96-MC-06 du 19 juin 1996 relative à une demande de mesures conservatoires présentée par la société Intec innovations, dans le domaine de l'agrément d'équipements, décision n° 99-D-23 du 23 mars 1999 relative à une demande de mesures conservatoires présentée par la Compagnie d'Organisation des Salons des Professions (COSP) et la société Concerto Vertical, dans le domaine de l'organisation de salons).

La propriété des droits est attribuée aux fédérations par la loi (article 18-1 de la loi du 16 juillet 1984). Cette loi attribue le monopole d'organisation des compétitions à chaque fédération nationale mono disciplinaire et fait ainsi coïncider le pouvoir d'organisation et la propriété des droits. Ce titre légal assure aux fédérations reconnues par le législateur l'exclusivité du droit d'exploitation des compétitions organisées sous leur égide.

Toute fédération sportive peut toutefois céder aux sociétés sportives, à titre gratuit, la propriété de tout ou partie des droits d'exploitation audiovisuelle des compétitions organisées chaque saison par la ligue professionnelle dès lors que ces sociétés participent à ces compétitions (article L. 333-1 du code du sport). A contrario, les droits d'exploitation des manifestations ou compétitions sportives qu'ils organisent autres qu'audiovisuels restent la propriété des fédérations et organisateurs.

Par ailleurs, le principe général de droit d'exploitation exclusif doit composer avec la liberté de l'information. L'article 18-2 de la loi du 16 juillet 1984 (issu de la loi n°2003-708 du 1^{er} août 2003) prévoit en effet que les commentaires radiophoniques des manifestations sportives sont libres et gratuits. La radiodiffusion sonore comme la presse écrite échappent à la sphère du droit d'exploitation et relèvent de la seule liberté de l'information.

De plus, en application de la directive Télévision sans frontières (directive 89/552/CEE du Conseil du 3 octobre 1989), plusieurs mesures ont été prises pour que les organismes de radiodiffusion télévisuelle ne retransmettent pas de manière exclusive des événements d'importance majeure afin qu'une partie importante du public ne soit pas privée de les suivre sur une télévision à accès libre. Ainsi le décret n° 2004-1392 du 22 décembre 2004, désigne 21 événements pour lesquels l'exercice, par un éditeur de service de télévision, de droits acquis après le 23 août 1997 ne peut faire obstacle à la retransmission sur un service de télévision à accès libre. Si aucun éditeur de service à libre accès ne se manifeste, les droits exclusifs pourront s'exercer librement.

2.1.2 L'exercice des droits sportifs

L'exercice des droits d'exploitation des droits sportifs est lui aussi réglementé.

Ainsi, au-delà des questions liées à l'application par l'Autorité de la concurrence des règles édictées par le code du commerce (voir infra), les conditions de concession de droits exclusifs par une personne titulaire d'un monopole public impliquent une transparence quant à la possibilité de concourir pour en être attributaire ainsi qu'une procédure de mise en concurrence, notamment par appel d'offres. Il s'agit là de précautions contre les risques d'accaparement durable d'un avantage spécial, de déficit d'innovation dans la gestion des droits et d'extension de comportements monopolistiques dans les secteurs connexes. Ces conditions ont été précisées en termes législatifs notamment pour les délégations de service public dans la loi Sapin n° 93-122 du 29 janvier 1993 et dans la loi du 6 juillet 2000 en ce qui concerne les droits sportifs.

Aux termes de l'article 8-V de cette loi, les fédérations agréées pour le sport, peuvent conclure notamment au profit d'associations affiliées tout contrat d'intérêt collectif relatif à des opérations d'achat ou de vente de produits ou de services. Ces contrats ne peuvent être conclus sans appel préalable à la concurrence et leur durée est limitée à quatre ans.

Le décret n° 2004-550 du 14 juin 2004 a apporté des modifications importantes au contenu et à la durée de la convention entre la société sportive et l'association support. La convention doit désormais prévoir les conditions et notamment les contreparties de la concession ou de la cession de la dénomination, de la marque ou des autres signes distinctifs de l'association. Le décret prévoyait par ailleurs une durée maximale de cinq ans pour la convention, étant précisé que la fin de la convention doit coïncider avec la fin d'une saison sportive.

En matière de concentration, la loi n°2004-1366 du 15 décembre 2004 lève l'interdiction absolue pour les personnes physiques de détenir des parts dans plusieurs groupements sportifs d'une même discipline. Cette mesure offre la possibilité à un actionnaire de contrôler un club professionnel tout en participant, dans le même temps au capital d'un autre club évoluant dans la même discipline. La loi prévoit néanmoins des garde-fous puisqu'elle précise que ces participations devront rester minoritaires, nuls ne pouvant contrôler, de manière exclusive plusieurs sociétés sportives.

Sur ce point le Conseil Constitutionnel (décision n°2004-507 du 9 décembre 2004) a considéré qu'« il était loisible au législateur, dans le principe d'égalité, de faciliter le financement des sociétés sportives et de leur permettre de disposer de moyens comparables à ceux de leurs concurrents européens », estimant que le législateur avait pris des précautions suffisantes pour garantir la sincérité des compétitions sportives, respectant ainsi le principe d'égalité.

2.2 L'approche générale de l'Autorité de la concurrence française en matière d'exclusivité

Comme précédemment mentionné, en France, les organismes sportifs (fédérations ou clubs sportifs), qui organisent les compétitions auxquelles participent les équipes dont ils ont la charge, sont propriétaires exclusifs des droits commerciaux attachés à ces compétitions.

Ces droits sont pour l'essentiel constitués par les droits télévisuels, qui proviennent de la vente des droits de retransmission de leurs compétitions, des droits dits « marketing », résultant de la valorisation auprès des sponsors de l'image et des performances de leurs équipes, et, enfin des droits relatifs à la billetterie.

Ces trois principaux types de droits exclusifs et leur transfert seront successivement abordés dans les parties qui suivent, au travers des affaires traitées par l'Autorité de la concurrence.

D'une manière générale cependant, il convient de tracer brièvement les principes qui se dégagent de la pratique décisionnelle et consultative récente de l'Autorité française en la matière. Cette « doctrine » a notamment fait l'objet de développements dans une étude thématique réalisée il y a trois ans par l'Autorité sur « les exclusivités et les contrats de long terme » (rapport d'activité 2007).

Tout d'abord, l'Autorité de la concurrence considère que les obligations d'exclusivité, qu'elles soient analysées au regard du droit des ententes ou vues comme des pratiques unilatérales, ne sont en principe pas anticoncurrentielles par leur objet même. En effet, l'incidence de ces mécanismes sur la concurrence dépend des caractéristiques précises de leur environnement, en particulier de la structure des marchés concernés et de la forme des contrats en cause.

En d'autres termes, pour l'Autorité, l'effet d'éviction d'un contrat, et donc son caractère anticoncurrentiel, dépend étroitement de l'action conjuguée des différentes dispositions des contrats avec les caractéristiques du contexte concurrentiel et notamment des facteurs liés au pouvoir de marché des parties. L'Autorité examine ainsi, dans chaque cas, les obligations contractuelles dans leur ensemble, afin d'apprécier leurs effets d'exclusion, réels ou potentiels, et, le cas échéant, les gains d'efficacité qu'elles permettent de réaliser. Il accorde une attention particulière aux dispositions qui impliquent une relation d'exclusivité entre les parties et à celles qui accroissent la durée effective de l'engagement qui les lie.

Lorsqu'une obligation d'exclusivité restreint l'accès des concurrents à la demande ou aux facteurs de production, ou conduit à une augmentation de leurs coûts, elle constitue une barrière artificielle à l'entrée qui peut permettre à l'entreprise qui l'a instaurée de maintenir ou de renforcer son pouvoir de marché.

Pour caractériser une éventuelle pratique anticoncurrentielle, l'Autorité étudie ainsi dans le détail, comme il sera exposé dans les développements de la présente note, le champ et la portée de l'exclusivité, la

durée effective des engagements contractuels, la dispersion géographique et l'atomicité de la demande ou les éventuels effets cumulatifs des accords d'exclusivité.

A contrario, si des clauses d'exclusivité ou des contrats de long terme peuvent avoir des effets restrictifs, ils peuvent également être source d'efficacité et profiter ainsi à l'économie générale et aux consommateurs. En droit interne, l'article L. 420-4 du Code de commerce permet de prendre en compte les justifications apportées par les entreprises mises en cause dans des dossiers d'entente ou d'abus de position dominante. Les conditions d'application de cette disposition sont les mêmes que celles de l'article 101 § 3 du traité sur le fonctionnement de l'Union européenne.

En principe, ces pratiques nécessitent donc un examen au cas par cas, tenant compte de leur contexte et de leur portée actuelle ou potentielle sur le jeu de la concurrence et le bien-être des consommateurs. Il est cependant des cas où la multiplicité des relations d'exclusivité, tout en ne justifiant pas qu'on en déduise mécaniquement l'existence d'une atteinte à la concurrence et au bien-être des consommateurs, permet de poser légitimement la question de la meilleure façon de garantir un fonctionnement optimal du marché. La mise en œuvre des règles de concurrence au cas par cas, ou même dans certains cas les possibilités d'examen plus général données à l'Autorité de la concurrence (saisine d'initiative pour avis, étude sectorielle, etc.), pourra apparaître comme une solution utile, mais pas forcément exclusive d'un recours à une autre forme d'intervention publique, qu'elle soit de nature législative ou non. Par exemple, au moment où s'engage le déploiement massif de la fibre optique et donc du très haut débit, qui engendrera lui-même de nouveaux usages, l'Autorité, comme on le verra plus loin, s'est ainsi déclarée favorable à la mise en place d'un cadre législatif ad hoc.

3. Les droits d'exploitation audiovisuels

L'Autorité de la concurrence française a pu appréhender les questions de droits médiatiques dans le domaine sportif au travers de ses trois principaux outils, à savoir son rôle consultatif (A), le contrôle des structures, ou contrôle des concentrations (B), et le contrôle contentieux des comportements des entreprises (C).

La réforme de 2009 lui permet, par l'adjonction de nouvelles compétences, de mieux choisir à l'avenir le mode d'intervention qu'elle estime le plus appropriée au cas par cas.

3.1 *Le rôle consultatif de l'Autorité de concurrence : tracer les lignes directrices sur les questions d'exclusivité en matière de droits sportifs*

Dans un premier temps, la présente note s'attachera sous ce point à présenter les conclusions auxquelles est arrivée l'Autorité en matière de commercialisation en exclusivité des droits (1). Elle présentera ensuite les problématiques liées à la durée des contrats (2) et à la question de la double exclusivité (3).

3.1.1 *Le système français de commercialisation en exclusivité des droits d'exploitation*

En matière consultative, l'Autorité de la concurrence a eu pour la première fois l'occasion de préciser son approche des droits d'exploitation audiovisuels à l'occasion d'une demande d'avis du ministre de l'économie sur un projet de décret pris pour l'application des dispositions de la loi du 16 juillet 1984, relatives à la commercialisation par les ligues professionnelles des droits d'exploitation audiovisuelle des compétitions sportives.

Le projet de décret soumis à son examen prévoyait notamment que la ligue professionnelle commercialise à titre exclusif les droits d'exploitation audiovisuelle et de retransmission en direct ou en léger différé de tous les matchs et compétitions qu'elle organise, quel que soit le support de diffusion. Il

fixait également les modalités des appels d'offres qui devaient être mis en œuvre pour garantir le respect des principes de transparence et de non-discrimination dans la procédure d'attribution des droits.

La question de la vente centralisée peut poser problème en raison de la puissance commerciale qu'elle confère à l'organisme responsable de la vente, et du pouvoir de marché détenu également par les preneurs de licence sur les droits, généralement les chaînes de télévision en place. Cette manière de procéder est de nature à avoir une incidence négative sur les consommateurs, étant donné qu'ils paient davantage et obtiennent moins pour leur argent que si la concurrence s'exerçait. Ainsi, si les règles de vente centralisée tombent sous le coup de l'article 101 TFUE, la Commission européenne estime que, dans certaines conditions, la vente centralisée peut constituer un moyen efficace de vendre les droits de retransmission, ainsi que de garantir l'intégrité des compétitions, d'en préserver la nature et l'intérêt. Elle ne doit toutefois pas contenir de restrictions supérieures aux avantages qu'elle présente. La Commission a ainsi, par une décision d'exemption du 23 juillet 2003, autorisé le système de vente centralisée des droits commerciaux de la ligue des champions de l'UEFA. Elle est arrivée à une conclusion similaire dans sa décision du 19 janvier 2005 relative à la « Bundesliga ».

Dans son avis n° 04-A-09 du 28 mai 2004 relatif à un projet de décret sur la commercialisation par les ligues professionnelles des droits d'exploitation audiovisuelle des compétitions ou manifestations sportives, l'Autorité de la concurrence, s'agissant de l'exclusivité de commercialisation et de l'étendue des droits réservés aux ligues, a considéré, comme l'avait fait la Commission européenne dans sa décision UEFA du 23 juillet 2003, que si tout système de centralisation de la commercialisation des droits audiovisuels présentait intrinsèquement des aspects restrictifs de concurrence, il pouvait néanmoins se prévaloir de justifications économiques, telles que, notamment, la réduction de la complexité des transactions et donc du coût pour les radiodiffuseurs, et la valorisation par le vendeur de la cohérence globale de son produit. A la lumière de la jurisprudence concernant l'UEFA et la Bundesliga citée ci-avant, l'Autorité a considéré que le maintien de la vente centralisée des droits audiovisuels Internet sur le direct était conforme aux pratiques admises par la Commission.

Il faut souligner que, dans le cadre de son analyse, l'Autorité a tenu compte du fait que la vente de droits exclusifs était susceptible de laisser certains droits inexploités, entraînant ainsi une perte de surplus pour les consommateurs et pour le secteur concerné. De telles préoccupations étaient également présentes dans les décisions du 23 juillet 2003 (UEFA) et du 19 janvier 2005 (BundesLiga) de la Commission européenne. Ainsi, dans sa décision, la Commission européenne a considéré que la vente des droits commerciaux sur la Ligue des champions par l'UEFA, association européenne de clubs de football, apportait des gains d'efficacité, en permettant la création d'un point de vente unique et le développement d'une image de marque. Elle a donc accordé au système centralisé le bénéfice de l'exemption au titre du paragraphe 3 de l'article 81, mais uniquement à la condition que chaque club puisse reprendre ses prérogatives sur la commercialisation de ses droits dans l'éventualité où l'UEFA échouerait à les vendre dans les conditions et le temps prévu par l'accord : « *Le maintien de la concurrence entre l'UEFA et les clubs de football pour la commercialisation de ces droits permet d'éviter que des droits sur la Ligue des champions de l'UEFA restent inexploités, alors qu'ils peuvent trouver preneur.* »

3.1.2 La problématique de la durée des contrats et du partage des lots

D'une manière générale, des investissements importants peuvent n'être rentables qu'à la condition que l'investisseur ait une visibilité sur une période suffisamment longue, lui permettant d'espérer un retour sur investissement dans des conditions économiquement raisonnables. Dans de telles situations, des durées contractuelles relativement longues peuvent être un moyen d'assurer une telle visibilité. Cela peut notamment être le cas lorsque l'investissement est spécifique à une relation commerciale particulière et que l'investisseur fait face à un risque d'opportunisme de la part de son partenaire.

L'Autorité suit cette logique, notamment dans son activité consultative, lorsqu'elle traite de la durée des contrats de cession de droits de retransmission d'événements sportifs. L'Autorité prend en considération la nécessité pour les entreprises qui les acquièrent de rentabiliser l'achat de ces droits.

Ainsi, à la suite du mauvais fonctionnement de l'appel d'offres pour l'acquisition des droits de rediffusion du championnat de France de football de 2002, qui a abouti à une suspension de l'attribution des droits par l'Autorité de la concurrence (décision 03-MC-01 du 23 janvier 2003 TPS contre Canal Plus, voir infra), le législateur, puis le pouvoir réglementaire, ont entendu fixer des règles relatives aux conditions de déroulement de la procédure d'attribution dans le cadre d'une loi du 1er août 2003 et d'un décret du 15 juillet 2004, pris après avis de l'Autorité (avis 04-A-09 du 28 mai 2004, ci-dessus évoqué).

Faisant valoir les profondes modifications des conditions de la concurrence sur le marché des droits sportifs consécutives à la fusion de Canal Plus et TPS, la Ligue de football professionnel (LFP) a demandé au gouvernement, en octobre 2006, d'envisager la suppression de l'article 3 du décret du 15 juillet 2004 qui fixe les modalités des appels d'offres relatifs à la commercialisation des droits sportifs et plus spécialement la suppression de l'article qui limite à trois ans les contrats.

Avant d'examiner cette demande, le ministre de l'économie, lui-même sollicité par le ministre des sports, a saisi pour avis l'Autorité de la concurrence, d'une part, sur la capacité du droit commun de la concurrence à remédier, à lui seul, aux défauts des marchés de commercialisation des droits sportifs, et d'autre part, sur les justifications possibles d'un allègement de la réglementation sectorielle qui encadre plus spécifiquement la commercialisation des droits du football et notamment la durée de cession des droits audiovisuels.

Dans son avis n°07-A-07 du 25 juillet 2007 relatif aux conditions de l'exercice de la concurrence dans la commercialisation des droits sportifs et son avis n° 07-A-15 du 9 novembre 2007 portant sur le projet de décret modifiant le décret 2004-699 relatif à la commercialisation par les ligues professionnelles des droits d'exploitation audiovisuelle des compétitions ou manifestations sportives, l'Autorité s'est interrogée sur l'impact concurrentiel du projet de porter de trois à quatre ans la durée maximale de ces contrats. La durée maximale de trois ans était motivée par la volonté d'éviter que ces droits ne soient monopolisés par l'acheteur pendant une trop longue période, ce qui aurait risqué d'entraîner la disparition d'opérateurs concurrents, trop longtemps privés de l'accès à des contenus jugés essentiels par leurs abonnés. En effet, dans le secteur de la télévision payante, l'opérateur se finance par les abonnements et toute perte importante d'abonnés consécutive à un échec sur le marché de l'acquisition des droits audiovisuels peut mettre en cause sa survie à moyen terme.

L'Autorité a estimé que l'allongement à quatre ans permettait, en théorie, de réduire les hésitations d'un nouvel opérateur à acquérir ces droits exclusifs, en lui donnant plus de temps pour attirer suffisamment d'abonnés afin de rentabiliser son investissement. Il a, toutefois, remarqué que les opérateurs intéressés, s'ils exprimaient leur intérêt pour cet allongement, étaient aussi particulièrement désireux que le vendeur des droits procède à un découpage plus fin des lots mis en vente.

L'Autorité a de plus constaté que certains droits sportifs mettant en jeu des exclusivités (droits de l'équipe de France de football, droits du championnat de France de rugby) étaient vendus de manière centralisée pour une durée de quatre ans et qu'elle n'avait pas connaissance de résultats théoriques ou empiriques suggérant que des contrats exclusifs de droits sportifs d'une durée de quatre ans étaient significativement plus restrictifs que ceux d'une durée de trois ans. En définitive, l'Autorité ne s'est pas opposée à l'augmentation de la durée des droits, tout en indiquant « *que c'est essentiellement dans la constitution des lots et l'innovation dans le déroulement de l'appel d'offres que se situent les conditions d'un rééquilibrage qui permettrait à la Ligue de bénéficier d'une concurrence renforcée sur le marché de l'acquisition des droits* ».

La Commission européenne, dans ses décisions du 23 juillet 2003 et 19 janvier 2005, avait également considéré que le partage des droits en plusieurs lots était de nature à décourager les tendances à la concentration sur le marché des médias.

La position particulière de l'opérateur dominant du secteur vis-à-vis de ce dispositif mérite attention. L'allongement de la durée des droits ne pourrait en effet s'appliquer au groupe Canal Plus, qui s'était engagé, dans le cadre de la prise de contrôle du bouquet TPS, à ne pas signer avec les détenteurs de droits sportifs des contrats de plus de trois ans.

Cette situation a donné l'opportunité à l'Autorité de la concurrence de rappeler qu'il n'était pas exclu qu'une régulation asymétrique de la durée des droits puisse avoir des effets proconcurrentiels : *« Au cas d'espèce, la préservation d'une concurrence à long terme sur le marché de l'acquisition des droits pourrait justifier la mise en œuvre, pour les nouveaux entrants, d'une mesure correctrice relative à la durée s'il était démontré qu'elle les inciterait concrètement à investir dans ce marché sans provoquer d'autres inconvénients dans son fonctionnement concurrentiel. »*

3.1.3 La « double exclusivité » et ses implications concurrentielles

Enfin, dans son avis 09-A-42 du 7 juillet 2009 sur les relations d'exclusivité entre activités d'opérateurs de communications électroniques et activités de distribution de contenus et de services, l'Autorité de la concurrence, à la demande de la ministre de l'économie, a été amenée à se pencher, notamment, sur une question nouvelle, celle de la « double exclusivité ». Cet avis, qui fixe la doctrine récente de l'Autorité en matière de droits sportifs mérite que l'on y consacre quelques développements.

Comme le prévoyait le plan gouvernemental « France Numérique 2012 », la ministre interrogeait l'Autorité sur la compatibilité avec les règles de concurrence des exclusivités d'accès par lesquelles certains fournisseurs d'accès à Internet (FAI) réservent à leurs abonnés des contenus très attractifs. Elle l'interrogeait également sur l'opportunité d'instaurer un cadre juridique spécifique, destiné à prévenir les risques de telles exclusivités.

L'Autorité a constaté que si les exclusivités étaient fréquentes dans le secteur de la télévision payante, celles mises en place par Orange à la suite de l'acquisition de contenus premium du type sport relevaient d'un modèle nouveau, appelé à se généraliser à d'autres contenus et à s'étendre à d'autres supports, comme l'ADSL ou la fibre. Ce modèle est celui de la double exclusivité : exclusivité de distribution, d'une part, donnant lieu à un abonnement au service télévisuel lui-même et, d'autre part, exclusivité de transport et d'accès, qui impose, pour accéder aux contenus, d'acquitter un abonnement à l'offre triple-play du fournisseur d'accès Internet.

Ce sont les opportunités et les risques nés de ce modèle récent qu'a examinés l'Autorité dans son avis : ouverture possible du marché de la télévision payante, qui apparaît souhaitable ; fermeture probable du marché du haut et du très haut débit, qui se révèle très préoccupante - surtout si un tel modèle est imité par d'autres opérateurs et se généralise, dans la perspective du déploiement de la fibre optique.

Dans son avis, l'Autorité a relevé que la situation actuelle du secteur de la télévision payante rendait souhaitable l'entrée de nouveaux acteurs sur ce marché : la plupart des FAI ne sont en effet pas en mesure de constituer des bouquets attractifs, principalement du fait des exclusivités de distribution dont dispose Canal Plus, et sont souvent cantonnés à un rôle de simple transporteur, en permettant à leurs clients de souscrire directement aux offres de Canal Plus France sur l'ADSL.

L'Autorité a par ailleurs constaté qu'un nouvel entrant sur le marché de la télévision payante se heurterait à plusieurs difficultés pour acquérir les droits de nouvelles chaînes : le marché manque de transparence sur les dates auxquelles expirent les exclusivités ; le coût d'entrée peut être important puisque

les détenteurs des droits lui demanderont de compenser la perte de rémunération qu'entraîne une distribution non exclusive.

Aussi, l'Autorité a-t-elle considéré que toutes les incitations qui peuvent favoriser l'entrée de nouveaux acteurs sur le marché de la télévision payante ont a priori un effet positif, notamment pour les consommateurs, qui peuvent en attendre une baisse des prix, un accroissement de la diversité des contenus proposés, ainsi que l'accès à de nouvelles offres intermédiaires, plus accessibles en terme de prix que les offres premium haut de gamme de Canal + aujourd'hui proposées.

Mais l'Autorité a estimé que la réponse devait être recherchée ailleurs que dans le modèle économique – contestable – de la double exclusivité revendiquée par Orange et cela pour trois raisons :

- il existe d'autres propositions pour inciter à investir dans les contenus, moins dommageables pour la concurrence ;
- la bonne réponse à une insuffisance de compétition en amont n'est pas d'encourager une stratégie qui peut avoir pour effet potentiel le verrouillage de la concurrence en aval ;
- enfin et surtout parce que l'imitation et la généralisation du modèle de la double exclusivité comportent des risques sérieux pour l'intensité de la concurrence et la liberté des consommateurs sur les marchés du haut débit et – demain - du très haut débit.

Dans son avis, l'Autorité a conclu que la double exclusivité entraînait une restriction des possibilités de choix pour le consommateur, qui ne peut plus avoir accès à tous les contenus attractifs, ou est obligé de payer beaucoup plus cher pour avoir un accès universel aux contenus : à terme, on peut redouter, si le modèle économique de la double exclusivité s'étendait à d'autres contenus attractifs ou était repris par d'autres opérateurs, un enfermement du consommateur au sein d'un « écosystème fermé ». Le consommateur resterait alors chez un opérateur télécoms uniquement ou principalement pour les contenus que celui-ci a acquis à titre exclusif.

Par ailleurs, l'Autorité a relevé qu'en faisant l'acquisition de contenus premium et en les réservant à ses seuls abonnés Internet, la stratégie d'Orange comportait aussi le risque de déstabiliser le marché du haut débit au détriment des opérateurs concurrents. Si cette stratégie n'a pas eu pour l'instant pour effet concret de reprendre des abonnés à ses concurrents, elle a du moins pour objectif de fidéliser ses propres abonnés puisqu'ils ne peuvent plus faire jouer la concurrence des autres fournisseurs d'accès Internet sans perdre les contenus auxquels ils sont attachés.

Si le modèle économique de double exclusivité se généralisait, il pourrait conduire à terme à un duopole tant sur le marché de la télévision payante que sur le marché du haut débit. Les opérateurs télécoms ne souhaitant pas, ou n'ayant pas les moyens de s'intégrer verticalement, ne pourraient se maintenir sur le marché du haut débit. Le risque serait alors grand que se confrontent deux opérateurs intégrés : Canal Plus/SFR, après la fin des engagements souscrits lors des récentes fusions, d'un côté, et Orange de l'autre.

Pour l'Autorité, l'exclusivité d'accès doit ainsi rester une solution exceptionnelle, strictement limitée dans sa durée et dans son champ : s'il est nécessaire de maintenir, pour les opérateurs télécoms, les incitations à investir dans les contenus et à développer des services associés et interactifs, il est souhaitable de limiter la durée d'exclusivité à un ou deux ans et d'en restreindre le champ aux véritables innovations de nature technique (services interactifs associés aux flux linéaires) ou commerciale (programmes innovants en linéaire venant enrichir la gamme des offres intermédiaires) pour lesquelles il y a lieu de faciliter l'apprentissage par les abonnés ou de tester le marché.

L'Autorité de la concurrence a également noté qu'il semble compréhensible que le FAI ne souhaite pas rendre disponibles ses chaînes sur le marché de gros, et les voir intégrées aux bouquets propriétaires des autres fournisseurs d'accès : les incitations à investir dans les contenus seraient alors trop faibles pour un acteur non dominant de la télévision payante, puisque les autres distributeurs pourraient, sans prendre de risque industriel, intégrer directement les chaînes dans leurs bouquets propriétaires. L'auto-distribution permettrait en revanche à un FAI comme Orange de maîtriser la relation commerciale avec l'abonné et de développer son parc potentiel d'abonnés pour la diffusion la plus large, et donc la plus rentable, des chaînes. Pour les consommateurs, cette solution leur permettrait d'avoir accès à tous les contenus les plus attractifs sans être enfermés chez un FAI.

Enfin, l'Autorité a souligné que la régulation du marché de gros des chaînes payantes restait un complément indispensable : un partage inéquitable de la valeur entre distributeurs de contenus et opérateurs de réseaux peut nuire à l'investissement, qui est nécessaire pour développer des services interactifs et déployer la fibre optique. Or cette question ne trouvera une solution satisfaisante sur le long terme qu'en développant la concurrence sur les marchés de la TV payante et non en limitant la fluidité des marchés du haut débit et du très haut débit. C'est pourquoi, dans son avis, l'Autorité a appelé de ses vœux une évolution sensible des conditions actuelles de fonctionnement du marché de gros des chaînes payantes, en complément des limitations strictes qui doivent être imposées au modèle de la double exclusivité revendiqué par Orange.

L'Autorité a estimé qu'il est nécessaire de fixer des règles du jeu claires pour, d'une part, définir les conditions très strictes de durée – un ou deux ans maximum – pendant laquelle pourrait être tolérée une exclusivité d'accès réservée à des services innovants et, d'autre part, pour permettre une ouverture suffisante du marché de gros des chaînes payantes, notamment dans le domaine du sport et du cinéma, qui exigerait la régulation des montants et du champ des clauses d'exclusivité du distributeur dominant, ainsi que la pérennisation et l'extension des engagements qu'il a souscrits.

3.2 *Le contrôle des concentrations : garantir le maintien d'une structure concurrentielle pérenne*

Comme on l'a vu, l'Autorité de la concurrence peut ordonner des mesures conservatoires ou utiliser la procédure d'engagements prévue à l'article L. 464-2 du Code de commerce afin de créer des conditions favorables à l'entrée de nouveaux concurrents.

Une logique similaire prévaut en contrôle des concentrations : lorsqu'une fusion crée un acteur puissant ou porte atteinte sensible à la concurrence, des engagements comportementaux peuvent permettre de restaurer ou de préserver la concurrence à long terme. D'une manière générale, on note un rapprochement des concepts et des instruments utilisés dans les domaines du contentieux et du contrôle des concentrations, s'agissant de la surveillance des comportements des acteurs puissants.

L'Autorité a été amenée à traiter plusieurs dossiers de concentration impliquant la question des droits sportifs.

Dans son avis n° 98-A-14 du 31 août 1998 relatif à la fusion-absorption de la société Havas par la Compagnie Générale des Eaux, l'Autorité a précisé son approche, retenant notamment que le négoce de droits de diffusion d'événements sportifs constituant des activités distinctes de celle des services télévisuels, il ne relevait pas exclusivement de la compétence du Conseil supérieur de l'audiovisuel et se situait donc dans le champ du contrôle des concentrations. Dans son analyse, qui a conclu que la concentration ne portait pas atteinte au jeu de la concurrence, l'Autorité a pris en compte le fait que TF1, actionnaire de TPS, avait également des participations dans la chaîne Eurosport, qui détenait les droits de retransmission de plusieurs épreuves sportives notoires.

Dans son avis n° 00-A-04 du 29 février 2000 relatif à l'acquisition par la société Vivendi de la participation de 15 % détenue par le groupe Richemont dans la société Canal Plus, l'Autorité a également examiné en détail le marché de l'achat et du négoce de droits sportifs (droits de télévision en clair, droits de télévision à péage et paiement à la séance), notamment au regard d'éventuels effets coordonnés (entrée de Vivendi dans le capital de BskyB.)

Dans son avis n° 06-A-13 du 13 juillet 2006 relatif au rapprochement des deux bouquets français de télévision par satellite, CanalSat et TPS, l'Autorité a suggéré de nombreux engagements comportementaux visant à éviter que la nouvelle entité n'utilise sa puissance d'achat pour imposer des relations exclusives à ses partenaires commerciaux, éditeurs de chaînes et détenteurs de droits. Elle a souligné le risque que la nouvelle entité ne verrouille l'accès aux contenus les plus attractifs, qui sont des *inputs* stratégiques pour le développement d'offres concurrentes sur les marchés de la télévision payante. L'Autorité a considéré que « *du fait de [la] maîtrise quasi totale [de la nouvelle entité] des contenus les plus attractifs (notamment [] sports) et des positions fortes, voire dominantes, sur les différents marchés amont, intermédiaire et aval, et de leur interaction, il existe un risque de verrouillage de l'ensemble des marchés de la télévision à accès payant* ».

L'Autorité s'est alors interrogée sur les conditions de l'émergence d'opérateurs alternatifs (par exemple les fournisseurs d'accès à internet) capables d'exercer une pression concurrentielle sur la nouvelle entité : « *La réussite d'une offre de télévision payante repose en effet sur la détention de contenus attractifs, généralement coûteux (dont les coûts sont en inflation), rares et même parfois rendus indisponibles par les exclusivités : les premiers entrants, du fait de l'importance des sommes à mobiliser pour les acquérir et de la durée d'exploitation de ces contenus (contrats pluriannuels), sont dès lors en position de s'assurer les droits des programmes les plus demandés.* » S'agissant des droits sportifs, le groupe Canal Plus a pris l'engagement suivant : « *Pour les contrats futurs portant sur des événements sportifs annuels réguliers, limiter la durée des contrats avec les détenteurs de droits à trois ans et, dans l'hypothèse où les droits seraient vendus pour une durée supérieure, offrir aux détenteurs de droits la faculté de résilier le contrat unilatéralement et sans pénalités à l'expiration d'une durée de trois ans.* »

Enfin, dans sa décision n° 10-DCC-11 du 26 janvier 2010 relative à la prise de contrôle exclusif par le groupe TF1 de la société NT1 et Monte-Carlo Participations (groupe AB), l'Autorité a également examiné, de manière très détaillée, les marchés des droits sportifs en fonction du mode de diffusion et du type de contenu concernés tant du point de vue de l'analyse des marchés pertinents (segmentation en fonction des modes de diffusion, en fonction du contenu sportif) que de l'analyse concurrentielle proprement dite. A ce titre, l'Autorité a constaté que le nouvel ensemble TF1/TMC/NT1, auquel il convient d'ajouter Eurosport et Eurosport 2, disposerait d'une situation unique en matière d'exploitation de droits sportifs : « *Il pourra en effet répartir la diffusion des droits acquis sur tous les types de chaînes et de supports : chaîne généraliste hertzienne historique (leader du marché) / chaînes de la TNT en clair (dont TMC, leader de cet univers) / chaîne thématique sportive présente sur le câble, le satellite et la TNT payante. M6, qui n'édite pas de chaîne thématique sportive, disposera d'une surface de diffusion en clair moins importante. Quant au groupe France Télévisions, qui a la surface en clair la plus large sur le marché, ses ressources budgétaires sont susceptibles de diminuer à l'avenir. Enfin, les groupes Canal+ et Orange sont, respectivement, peu présent et absent sur le marché s'agissant de la diffusion en clair. Cette configuration inédite représente un avantage concurrentiel certain dans les négociations avec les fédérations sportives. Ce déséquilibre dans le jeu concurrentiel porte d'autant plus à conséquence que l'opération est de nature à inciter le groupe TF1 à acquérir des compétitions qui auparavant ne l'intéressaient pas, faute d'une capacité de diffusion suffisante. Ainsi, certaines compétitions comportant de nombreuses épreuves ou de nombreux matches réclamaient auparavant des temps de diffusion trop importants pour le groupe, qui disposera après l'opération des créneaux nécessaires en répartissant la diffusion de ces programmes sportifs sur les cinq chaînes précitées. En outre, si tous les matches d'une compétition, notamment les matches de poule, ne présentent pas forcément un intérêt suffisant pour être diffusée sur TF1, il est en*

revanche probable que ces derniers attirent un public suffisant sur TMC ou NT1. ». L'Autorité a conclu que l'opération envisagée était de nature à renforcer la présence du groupe TF1 au bénéfice de TMC et NT1 sur les marchés de droits sportifs, essentiellement non premium, avec pour effet de restreindre l'accès de ces droits rares à ses concurrents : *« Le transfert au profit de ces deux chaînes d'une ou deux compétitions suffirait ainsi à changer la donne concurrentielle sans que soient bouleversées pour autant leurs lignes éditoriales. »*

Afin de lever les préoccupations de l'Autorité sur ces points et ainsi limiter le renforcement de la puissance d'achat du groupe TF1 sur les marchés des droits sportifs, TF1 s'est notamment engagé à ne pas répondre à un même appel d'offres pour l'acquisition de droits de diffusion d'événements sportifs pour plus de deux chaînes en clair du groupe.

3.3 *Le contrôle des comportements : restaurer et dynamiser le jeu concurrentiel dans l'économie des droits médiatiques sportifs*

Dans leur rôle contentieux, les autorités de concurrence peuvent ainsi être amenées à se pencher sur certaines exclusivités dont bénéficie l'opérateur dominant et à les remettre en cause en cas de comportement anticoncurrentiel; elles peuvent également, de manière symétrique, permettre à des nouveaux entrants de bénéficier d'une exclusivité.

C'est d'ailleurs ce qu'avait admis la Commission européenne, dans une décision du 3 mars 1999, en considérant que l'exclusivité de diffusion en mode numérique de certaines chaînes généralistes françaises au profit de TPS pour une période totale de cinq ans pouvait se justifier par la prise en compte des investissements nécessaires au lancement de ce nouveau bouquet, des prévisions relatives aux pertes cumulées, de la date vraisemblable d'arrivée à l'équilibre financier et du nombre d'abonnés nécessaires pour l'atteindre. Garantir au nouvel entrant un avantage pendant une période de cinq ans était de nature à dynamiser le jeu concurrentiel dans le long terme. *« Dans une situation de marché monopolistique, le droit de la concurrence autorise la mise en place de solutions asymétriques destinées à faciliter l'entrée d'opérateurs concurrents sur un marché. Pour équilibrer les forces concurrentielles en présence, les petits opérateurs peuvent disposer de facilités plus grandes que celles qui sont laissées à l'entreprise dominante. »*

L'Autorité de la concurrence doit ainsi constamment procéder à des arbitrages. D'un côté, des contrats de long terme, incluant le cas échéant des clauses d'exclusivité, peuvent être utiles pour garantir l'approvisionnement des opérateurs alternatifs sur une période suffisamment longue et dynamiser la concurrence dans la longue durée. D'un autre côté et *a contrario*, de tels contrats peuvent nuire, à court terme, au processus de rivalité et à la nécessaire incertitude du jeu concurrentiel.

Lorsqu'elle constate que les marchés sont verrouillés par des contrats de long terme ou des clauses d'exclusivité, l'Autorité intervient pour restaurer, sans délai, le fonctionnement normal de la concurrence. Elle le fait en ordonnant des mesures conservatoires, sans préjudice de la décision à intervenir sur le fond, mais aussi en acceptant et en rendant contraignants des engagements proposés par les entreprises.

Ainsi, dans sa décision n°02-MC-06, du 30 avril 2002 relative à la saisine de RMC info, l'Autorité de la concurrence a été amenée à prononcer des mesures d'urgence.

RMC info avait conclu avec la société KirschMédia, qui détenait les droits radiophoniques exclusifs sur les matchs de la coupe du monde de football 2002, un contrat lui assurant l'exclusivité de ces droits pour la diffusion radiophonique sur le territoire français. Ce contrat lui imposant de chercher par tous moyens à couvrir toute l'étendue du territoire national, RMC info, qui ne couvrait que 66 % du territoire a cherché à passer avec d'autres opérateurs de radio des accords de sous licence en vue de s'acquitter de ses

obligations contractuelles. Quelques jours après la signature du contrat entre RMC info et KirschMédia, les principales radios françaises se sont regroupées au sein du GIE Sport libre, en s'engageant statutairement à refuser toute négociation avec RMC info pour des accords de sous licence. En se regroupant ainsi, les radios témoignaient de leur refus de toute possibilité d'acquisition des droits exclusifs de retransmission radiophonique d'évènements sportifs. L'Autorité de la concurrence, confortée par la Cour d'appel de Paris (CA Paris, 4 juin 2002) a partiellement fait droit à la demande de mesures conservatoires de RMC info et a enjoint au GIE Sport libre de suspendre, en ce qui concerne l'acquisition des droits radiophoniques pour les matchs de la coupe du monde 2002 de football, les clauses de son contrat constitutif de son règlement intérieur qui visaient à limiter la liberté de ses membres de négocier à titre individuel tout accord relatif à la retransmission d'évènements sportifs.

De même, dans sa décision n° 03-MC-01 du 23 janvier 2003 relative à une saisine de la société TPS, déjà évoquée, l'Autorité a également prononcé des mesures conservatoires.

La plainte de la société TPS, opérateur de télévision payante se situait dans le contexte de la consultation lancée par la Ligue de football professionnel en vue de la vente des droits de diffusion télévisuelle des matchs du Championnat de France de football (Ligues 1 et 2) pour les saisons 2004 à 2007 et de l'attribution de la totalité de ces droits à la société Canal Plus. Dans sa décision, l'Autorité a demandé à la Ligue et à Canal Plus de suspendre les effets de la décision d'attribution des droits en cause jusqu'à l'intervention de la décision sur le fond. En effet, elle a estimé que les comportements de la Ligue et l'offre de Canal Plus étaient susceptibles d'être qualifiés, aux termes d'une analyse au fond, d'abus de position dominante et que ces pratiques anticoncurrentielles portaient une atteinte grave et immédiate à l'intérêt du secteur en cause, aux consommateurs et à l'entreprise plaignante. Il convient de noter que la consultation de la Ligue se présentait sous forme d'une procédure de vente par lots (7 lots), la Ligue ayant souhaité se conformer aux consignes données par la Commission dans sa communication aux tiers du 17 août 2002 relative à la vente centralisée des droits UEFA, seule jurisprudence disponible sur le sujet en 2002. Cette procédure de vente par lots avait déjà été adoptée par la Ligue lors de son précédent appel d'offres de 2002 (9 lots). Dans sa décision, l'Autorité a constaté que « *la volonté de la Ligue de procéder par allotissement s'était effectivement traduite dans le règlement de la consultation puisque celui-ci exigeait la remise d'offres individualisées, lot par lot* ». Le Règlement précisait notamment que « *dans le cas d'une offre portant sur plusieurs lots, une proposition distincte devra être formulée par la chaîne pour chacun des lots qui l'intéresse* ». Toutefois, après avoir examiné le règlement de la consultation dans son ensemble d'une part, et la mise en œuvre de ces règles d'autre part, l'Autorité a considéré que le manque de clarté des dispositions de ce Règlement, notamment sur le point de savoir si les offres globales étaient ou non interdites, et le comportement des responsables de la Ligue durant l'appel d'offres, ont pu permettre à la Ligue d'exercer une discrimination entre les soumissionnaires, ayant eu pour objet et pour effet de favoriser Canal Plus au détriment de TPS. S'agissant du comportement de Canal Plus, l'Autorité a considéré que le fait pour une entreprise en position dominante d'offreur sur le marché de la TV à péage, dans le cadre d'une consultation par lots d'une part, de sous-estimer la valeur de chacun des lots et d'autre part, de faire une offre assortie d'une prime d'exclusivité égale à 150 % de l'offre de base, pouvait s'analyser comme une offre ayant pour objet et pour effet d'évincer le seul concurrent du marché ; l'Autorité a également relevé, qu'en égard notamment aux liens existants entre la Ligue et Canal Plus, il pouvait exister une concertation anticoncurrentielle entre ces deux opérateurs afin de favoriser les offres de Canal Plus.

Sur recours en annulation de La Ligue et de Canal Plus contre cette décision, la Cour d'Appel a, par un arrêt du 25 février 2003, considéré que l'affaire pouvait faire l'objet d'une médiation entre la Ligue, Canal Plus et TPS. Par un arrêt du 29 avril 2003, elle a homologué le protocole d'accord par lequel les parties sont parvenues à trouver une solution au conflit qui les opposait. La transaction a consisté à reconduire pour une année supplémentaire (saison 2004/2005) les contrats conclus entre la Ligue et TPS d'une part, et la Ligue et Canal Plus d'autre part, lors du dernier appel d'offres de 1999.

L'Autorité n'a finalement pas eu à se prononcer au fond sur cette affaire, dans la mesure où le protocole d'accord prévoyait que la Ligue et Canal Plus s'engagent à se désister de leur recours devant la Cour d'appel et TPS s'engage à renoncer à sa saisine du Conseil de la concurrence.

En revanche, dans sa décision n°08-D-10 du 7 mai 2008 relative à des pratiques mises en œuvre par les sociétés France Télécom et France Télévisions dans le secteur de la télévision de rattrapage, l'Autorité de la concurrence a estimé qu'il n'y avait pas, en l'état du dossier, suffisamment d'éléments probants pour démontrer que l'accord de partenariat exclusif signé entre France Télévision et France Télécom constituait une entente anticoncurrentielle. Ce partenariat permettait au groupe France Télécom de distribuer en exclusivité certains programmes du groupe France Télévisions, sous forme de « télévision de rattrapage », services permettant de regarder en différé et à la demande, les programmes qui ont préalablement été diffusés en linéaire par les chaînes de télévision.

L'Autorité était saisie par l'Association française des opérateurs de réseaux et de services de télécommunications alléguant que ce partenariat exclusif pouvait constituer non seulement un abus de position dominante de France Télécom sur le marché de la fourniture d'accès haut débit aux offres multiservices des opérateurs ADSL et de France Télévisions sur le marché des services de télévision de rattrapage, mais aussi une entente verticale entre les deux partenaires qui aurait pour objet et pour effet de restreindre l'exercice d'une concurrence effective entre les fournisseurs d'accès Internet et de porter atteinte aux intérêts des consommateurs.

Analysant les éléments du partenariat litigieux, l'Autorité a conclu que le champ de l'exclusivité était restreint, le partenariat ne portant que sur certains programmes de France Télévision de la tranche 18-24 heures et excluant le cinéma, l'information mais également le sport, donc les programmes de type « premium » les plus attractifs.

4. Le parrainage et la billetterie

Au-delà des droits médiatiques, les questions liées aux contrats d'exclusivité dans le secteur du parrainage, ou sponsoring, (A) et de la billetterie (B) ont également donné lieu à une pratique décisionnelle fournie.

4.1 *Le sponsoring : les différentes facettes des exclusivités*

Les domaines dans lesquels les problématiques d'exclusivité liées au parrainage sont nombreux (agrément des équipements sportifs, organisation des salons etc.). La présente note fera état de la pratique décisionnelle suivie en matière de fourniture des équipements (1), de publicité sur le lieu des manifestations sportives (2), de gestion des droits marketing (3) et de l'accès aux compétitions (4).

4.1.1 *Exclusivité de fourniture des équipements*

Dans sa décision n° 97-D-71 du 21 octobre 1997 relative à une saisine présentée par les sociétés Asics France, Uhlsport France, LJO International, Le Roc Sport, VIP France, Puma France, Mizuno France, ABM Sport France, W. Pabisch, Lotto France, Nike France et Noël France, d'une part, et par la société Reebok France, d'autre part l'Autorité de la concurrence a condamné le fait pour la ligue nationale de football (LNF) d'attribuer à Adidas une exclusivité de cinq ans sans appel à la concurrence au détriment des autres fabricants sportifs. En 1995, le fabricant d'articles de sport avait conclu avec la LNF (organisme chargé de l'organisation et de la gestion du football professionnel), un protocole d'accord par lequel la société Adidas devait fournir à titre exclusif les équipements de l'ensemble des équipes engagées dans les championnats professionnels de football. En contrepartie de cette exclusivité, conclue pour cinq ans renouvelables, la firme versait à la LNF soixante millions de francs. Suite à cet accord, le conseil d'administration de la LNF modifia le règlement des championnats qui prévoyait désormais que « *les clubs*

participants aux championnats de France de première et deuxième division nationales (étaient) tenues de faire porter à leurs joueurs les équipements fournis par la LNF ».

Dans cette affaire, la LNF comme la société Adidas ont été condamnées pour entente illicite et abus de position dominante du fait de cet accord de parrainage. En effet, l'exclusivité de la fourniture des maillots sur lesquels devait être apposée la marque du fabricant qui en elle-même n'était pas illicite, avait été concédée sans faire l'objet d'un appel d'offre préalable. En outre, le champ d'application et la durée de cinq ans de l'exclusivité ont été jugés excessifs. La LNF et Adidas ont été condamnées respectivement à 800 000 francs et 16 millions de francs d'amendes alors même que l'accord n'avait pas été exécuté. L'Autorité de la concurrence n'a pas sanctionné les exclusivités en elles-mêmes, mais les conditions de leur octroi lorsqu'elles manifestent une opacité et une confusion des intérêts contraires aux règles de concurrence.

Dans sa décision n° 97-D-72 du 7 octobre 1997 relative à une saisine présentée par la société Reebok France à l'encontre des sociétés Adidas Sarragan France et Uhlsport, était en cause une clause d'un accord conclu entre les sociétés Adidas et la société Uhlsport. Cette dernière société, qui traditionnellement équipe un grand nombre de gardiens de but, était, par ailleurs, le « sponsor » du club de football de l'AJ Auxerre, évoluant en première division du championnat de France, en vertu d'une convention du 12 octobre 1994. La société Adidas, qui, compte tenu des résultats de cette équipe, souhaitait en devenir le « sponsor », avait engagé des discussions au début de l'année 1996, qui s'étaient conclues par la signature d'un contrat de parrainage. Dans ce cadre, une convention avait également été signée le 29 mai 1996, entre la société Adidas et la société Uhlsport, comportant un paragraphe aux termes duquel : *« Les parties profitent de la présente convention pour rappeler que la société Uhlsport équipe depuis plusieurs années la plupart des gardiens de but des clubs de D1 et D2. La société Adidas, qui connaît cette situation, accepte cet état de fait et s'engage à ne pas le remettre en cause ».*

L'Autorité a considéré que cet accord, qui ne se limitait pas, contrairement à ce que soutenait la société Adidas, à un constat de la situation présente, mais comportait un engagement de sa part de ne pas remettre en cause pour l'avenir les contrats de parrainage obtenus par la société Uhlsport auprès des gardiens de but, constituait une convention organisant une répartition de marché entre ces deux sociétés. Elle n'a pas retenu les arguments de la société Adidas, qui soutenait que la chronologie des événements suffisait à montrer que l'accord avec la société Uhlsport ne pouvait constituer une contrepartie de la renonciation par cette dernière de son droit à parrainer l'AJ Auxerre, cet accord ne faisant que constater la nouvelle situation issue des accords entre Adidas et ce club de football. L'Autorité a relevé que cet accord comportait bien un engagement de la société Adidas de ne pas contester les accords individuels que la société Uhlsport pouvait avoir conclu avec de nombreux gardiens, alors même qu'en tant que « sponsor » de telle ou telle équipe, la société Adidas aurait pu les remettre en cause.

Adidas et Uhlsport ont été condamnées respectivement à 500 000 francs et 50 000 francs d'amendes et il a été enjoint à la société Adidas de supprimer la clause lui conférant un droit de préférence à l'échéance du contrat de parrainage conclu avec l'A.J. Auxerre.

Enfin, dans sa décision 98-D-31 du 13 mai 1998 relative à des pratiques mises en œuvre dans le secteur de l'escrime, l'Autorité de la concurrence a estimé que l'accord par lequel la Fédération française d'escrime avait consenti une exclusivité à deux fabricants d'équipements, avait été conclu pour une durée « anormalement longue » de quatre ans. Il a enjoint la fédération de la limiter à deux ans et de procéder à une mise en concurrence des différents fournisseurs d'équipements d'escrime lorsque le contrat viendrait à échéance.

4.1.2 *Exclusivité de publicité sur le lieu des manifestations sportives*

Dans sa décision 97-D-90 du 9 décembre 1997, l'Autorité a considéré que le contrat par lequel la fédération française du sport-boule avait accordé à un fabricant de boules l'exclusivité de la publicité sur toutes les compétitions nationales officielles était constitutif d'une entente anticoncurrentielle. En effet, le contrat n'avait pas été précédé d'un appel d'offres qui aurait permis aux fabricants concurrents de faire des propositions, le domaine de l'exclusivité étant lui-même excessif dans la mesure où toute concurrence en matière de publicité était de ce fait éliminée pour l'ensemble des compétitions fédérales. Le Conseil de la concurrence a condamné un accord par lequel la fédération française des sports de boule avait consenti à un fabricant une exclusivité de promotion publicitaire sur le lieu des compétitions officielles qu'elle organisait, sans appel à la concurrence. Il a estimé que le champ d'application de l'exclusivité était excessif d'autant que l'entreprise bénéficiait d'une clause de reconduction tacite annuelle. La Cour d'Appel de Paris a confirmé cette décision.

4.1.3 *Exclusivité sur la gestion des droits marketing*

Dans sa récente décision n°09-D-31 du 30 septembre 2009 relative à des pratiques mises en œuvre dans le secteur de la gestion et de la commercialisation des droits sportifs de la Fédération française de football, l'Autorité de la concurrence a sanctionné la Fédération française de football et la société Sportfive à hauteur de 6,9 millions d'euros pour s'être entendues afin d'éliminer toute concurrence dans la commercialisation des droits marketing de la Fédération.

Dans cette décision, l'Autorité a constaté que la FFF et Sportfive avaient noué des accords exclusifs de très longue durée sans faire appel à la concurrence pour la gestion des droits marketing de l'Equipe de France et de la Coupe de France. L'Autorité a considéré que la combinaison de clauses d'exclusivité, de clauses de tacite reconduction et d'indemnité de fin de contrat ainsi que d'avenants de prolongation signés plusieurs années avant l'échéance théorique des contrats présentait un caractère anticoncurrentiel dans la mesure où elle a soustrait pendant une très longue période - de 1985 à 2002 pour certains contrats - la commercialisation de ces droits au libre jeu de la concurrence. L'organisation de l'appel d'offres de 2001 pour l'attribution de la totalité des droits marketing de la FFF montrait que la FFF et Sportfive se sont ensuite concertées pour éliminer toute concurrence

La FFF a en effet finalement organisé un appel d'offres en 2001. A cette occasion, l'Autorité a établi que les deux parties en cause se sont concertées, notamment en empêchant un concurrent (Havas Sports) d'obtenir les informations nécessaires au chiffrage de sa proposition, et en négociant, avant et après l'attribution du marché à Sportfive, des modifications substantielles du marché tel qu'initialement prévu. Ces pratiques ont faussé l'appel à la concurrence organisé par la FFF en confortant les droits exclusifs de l'opérateur en place et en fermant le marché à toute concurrence extérieure.

Les pratiques d'éviction mises en œuvre dans le cadre de conventions passées sur une longue durée sans appel à la concurrence ou dans un appel d'offres détourné de son objet ont eu pour conséquence de restreindre le jeu de la concurrence sur le marché des services de gestion et de commercialisation des droits marketing du sport et particulièrement sur un segment très en vue de ce marché : le marketing du football en France, à une époque où celui-ci était particulièrement attractif, du fait des succès de l'Equipe de France. Elles ont limité l'accès à ce marché d'autres intermédiaires et diminué les ressources que la FFF aurait pu consacrer à ses missions, notamment en faveur du développement du football amateur.

L'Autorité de la concurrence a souligné que, première fédération sportive en nombre de licenciés comme en recettes marketing et audiovisuelles, la FFF a en outre donné un mauvais exemple aux autres fédérations sportives moins riches, sans tenir compte des observations de la Cour des comptes qui avait

critiqué l'absence de mise en concurrence dans les marchés passés avec les sociétés du groupe Darmon, devenu la société Sportfive.

La FFF n'a pas contesté ce grief d'entente et a pris des engagements pour l'avenir. Elle s'est notamment engagée à mettre en place une procédure de mise en concurrence pour les contrats relatifs au choix de l'équipementier sportif, à l'acquisition des droits audiovisuels, ainsi que pour les contrats d'intermédiation, sans que, pour ces deux dernières catégories, la durée des contrats puisse dépasser quatre ans (ou six ans dans certains cas particuliers). Elle a en contrepartie bénéficié d'une réfaction de sanction de 40 %. L'amende qui lui a été infligée est de 900 000 euros. Celle infligée à la société Sportfive s'élève à 6 millions d'euros.

4.1.4 L'accès aux compétitions

Dans sa décision n°98-MC-07 du 15 juillet 1998 relative à une demande de mesures conservatoires, l'Autorité de la concurrence a accueilli la demande de la société Arenis Leo, entreprise ayant pour activité la production d'événements sportifs, notamment l'organisation de compétitions de planche à voile en salle.

Arenis Leo reprochait notamment à l'association des véliplanchistes professionnels (Professional Windsurfers Association - PWA) et aux sociétés Williwaw et Sese du groupe Canal Plus d'avoir conclu un contrat ayant pour objet l'organisation de compétitions en salle donnant lieu à un classement dans le cadre du « PWA World Tour ». Or, ce contrat contenait une clause d'exclusivité « *ayant pour effet d'interdire à tous les sportifs adhérant à cette association de participer à des manifestations de planche à voile en salle qui ne seraient pas organisées directement ou indirectement par Canal Plus ou l'une de ses filiales* ». La société Arenis Leo soutenait que ce contrat assurait de facto à Canal Plus ou à ses filiales le monopole de l'organisation et de l'exploitation par son réseau télévisé des événements de planche à voile en salle au moins jusqu'à la fin de l'année 1998.

Ayant constaté que la PWA, en tant que seule organisation professionnelle de véliplanchistes établissant un classement de ces sportifs et dont les membres se seraient engagés à ne participer qu'aux compétitions ayant obtenu son agrément, était susceptible de disposer d'une position dominante sur le marché de l'organisation des manifestations de planche à voile, l'Autorité de la concurrence, après avoir rappelé que des relations d'exclusivité n'étaient pas prohibées en soi, a estimé qu'il ne pouvait être exclu que les conditions dans lesquelles pouvait être mise en œuvre l'exclusivité conférée aux sociétés du groupe Canal Plus concernées soient anticoncurrentielles.

S'agissant de la demande de mesures conservatoires, l'Autorité a considéré que les conditions dans lesquelles le contrat d'exclusivité en cause était susceptible d'être renouvelé, permettant à un opérateur de conserver le bénéfice de droits exclusifs sans remise en concurrence ou dans des conditions ne permettant pas le plein exercice de la concurrence, représentait un danger grave et immédiat pour le secteur intéressé. Elle a donc enjoint aux sociétés du groupe Canal Plus concernées, d'une part, et à la PWA et à son agent commercial, d'autre part, de renoncer, dans l'attente d'une décision au fond, à l'application de la clause de renouvellement du contrat en cause, pour les événements organisés en France au cours des années 1999 à 2001.

4.2 Les questions liées à la billetterie

Ces questions ne seront évoquées que très brièvement, les décisions rendues en la matière depuis 1996 ayant conclu à un non-lieu ou une irrecevabilité.

4.2.1 La commercialisation de billets

Dans la décision n° 00-D-83 relative à des pratiques mises en œuvre par la Fédération Internationale de Football Association (FIFA) et le Comité Français d'Organisation France 98 (CFO) à l'occasion de la Coupe du monde de football 1998, qui a abouti à un non-lieu, l'Autorité a examiné de manière

particulièrement détaillée la conformité au droit communautaire de la concurrence des pratiques mises en œuvre par la Fédération Internationale de Football Association (FIFA) et le Comité français d'organisation France 98 (CFO) à l'occasion de la Coupe du monde de football 1998.

Dans sa décision n°04-D-66 du 1er décembre 2004 relative à des pratiques mises en œuvre par des salles et stades parisiens sur le secteur de la billetterie, l'Autorité a retenu le marché parisien des salles de spectacle et stades comme marché pertinent. Il a considéré que les différences d'événements proposés, de prix, de capacité, d'équipements, d'image ainsi que la distinction que font les producteurs, gérants, artistes et public, entre les salles et stades parisiens et de province justifiait cette différenciation. Il a en revanche noté une substituabilité certaine, quoiqu'imparfaite, à l'intérieur du marché parisien.

Dans cette affaire, l'Autorité de la concurrence a exclu que l'effet cumulatif des contrats parallèles de location conclus entre les gérants des salles de spectacles et les organisateurs de spectacles contenant des clauses imposant la vente conjointe de la prestation de billetterie ait pu avoir des effets anticoncurrentiels par la fermeture de l'accès au marché de la billetterie. L'Autorité a en effet relevé que la part de marché des salles liées par ces clauses était de 49,2 % et que les sociétés de billetterie concurrentes n'étaient pas privées de débouchés par ces clauses, certaines ayant même considérablement étendu leurs activités de billetterie.

4.2.2 *Les logiciels de billetterie*

Enfin, dans sa décision n°98-D-09 du 27 janvier 1998 (affaire Datasport), prenant acte de la décision du Tribunal des conflits en date du 4 novembre 1996, l'Autorité a constaté que la délibération du conseil d'administration de la Ligue nationale de football d'unifier la billetterie des compétitions qu'elle organise par un logiciel acquis auprès de la société Monacosoft ne constituait pas une activité de service au sens de l'article 53 de l'ordonnance, mais une décision de nature administrative dont il ne lui appartenait pas de connaître.

5. Conclusion

La précédente contribution française, en 1996, insistait sur la nécessité de veiller aux conséquences concurrentielles de l'arrivée des fédérations sportives dans le domaine économique par le biais de leurs prérogatives de puissance publique.

La veille exercée par l'Autorité de la concurrence a non seulement été soutenue, mais s'est aussi également accompagnée, au-delà des cas individuels traités au contentieux ou en matière de contrôle des concentrations, de plusieurs avis, qui ont eu notamment pour objectifs de tracer le cadre des conditions de l'exercice d'une pleine concurrence en matière d'exclusivité afin de donner des signaux aux acteurs et, quand c'est apparu nécessaire, d'inciter les autorités publiques à faire évoluer le cadre réglementaire vers une plus grande transparence.

Nul doute que les prochaines années devraient encore fournir l'occasion d'aborder encore de nouvelles problématiques liées au domaine sportif. Le développement de technologies innovantes de diffusion, comme la télévision mobile personnelle, en constituera certainement l'une des sources.

La question la plus immédiate en France semble résider dans l'impact de la libéralisation des jeux d'argent en ligne et paris sportifs dans le paysage concurrentiel du financement de l'activité sportive. En effet, si, d'un côté, cette ouverture devrait permettre aux clubs d'attirer de nouveaux parrainages, elle posera inévitablement la question, entre autres, de l'équilibre à trouver entre les droits détenus par les fédérations et ceux des nouveaux acteurs du pari.

GERMANY

1. Introduction

The issue of applying competition law to professional sports has gained notable significance in Germany since the 1990s. The attention paid to professional sports by competition law enforcement and the wider competition law community has developed along with the increase in economic significance of professional sports teams, the relevant sports events, and other business activities linked to sports. In Germany, the competition law debate with regard to sports has focused, not surprisingly, on the sport that attracts the greatest attention from stadium audiences and TV viewers, namely football. The particular popularity of this sport has led, among other things, to the considerable economic significance of TV broadcasting rights.

Consequently, this contribution focuses on competition issues raised by TV broadcasting rights for football events, more specifically the central marketing of broadcasting rights.

2. Competition law enforcement in the football sector – the European Cup case

A key issue in the debate on competition enforcement in the sports sector, in Germany, has been the question of whether the commercial marketing of TV rights for sports events is actually subject to competition law in the first place. The issue was raised in the early 1990s, when the *Bundeskartellamt* examined a practice whereby the TV broadcasting rights to the home matches of German clubs competing in the European Cup were centrally marketed by the German Football Association, DFB (*Deutscher Fussball-Bund*).¹ The *Bundeskartellamt* maintained that each individual club, since it bore the principal economic risk of the matches held on its own football ground, was the relevant host of these home matches and the owner of the TV broadcasting rights. The *Bundeskartellamt* found, in its decision of September 1994, that the practice of having the TV rights centrally marketed by the DFB infringed competition in the market for TV broadcasting rights to sports events and therefore violated the ban on cartels. The *Bundeskartellamt* found further that there was no basis in German competition law for exempting the practice from the ban.² This was confirmed³ by the Berlin Higher Regional Court (*Kammergericht*) in November 1995, as well as by the Federal Court of Justice (*Bundesgerichtshof*) in December 1997 in a final ruling on the matter.⁴ It should be noted that the *Bundeskartellamt*'s proceedings related strictly to the European Cup events, and not to other football competitions.

3. Legislative measures

In the wake of this case, the German Parliament debated and finally introduced, with the 6th Amendment to the Act against Restraints of Competition (ARC), a special provision exempting the central

¹ *Bundeskartellamt, Tätigkeitsbericht (Activity Report) 1993/94*, p. 125.

² *Bundeskartellamt, Decisions of 2 September 1994*, B6-105/02, B6-60/94.

³ *Kammergericht, Decision of 8 November 1995 (Kart 21/94)*, see also: *Bundeskartellamt, Activity Report, 1995/1996*, p. 154.

⁴ *Bundesgerichtshof, Decision of 11 December 1997 (KVR 7/96 (KG))*, see also: *Bundeskartellamt, Activity Report, 1997/1998*, p. 165.

marketing of TV broadcasting rights for sports events from the ban on cartel agreements under certain conditions.⁵ A key aspect in this respect was the argument that central marketing by the football association was necessary to ensure a re-distributive mechanism among football clubs which served to set aside the financial means to promote youth and amateur sports activities. The special provision introduced into German competition law did not, however, preclude the application of European law.

The special provision in the ARC was eliminated with the 7th Amendment to the Act against Restraints of Competition in 2005.⁶ The reason given in the legislative intent of the amendment was that with the introduction of Regulation 1/2003 into European law, the application of European competition law was mandatory for cases that had an effect on trade between Member States.⁷ This was to be assumed for issues concerning TV broadcasting rights, and therefore there was no scope for a provision in national law that diverged from European law.

4. Central marketing of TV rights in the present legal framework

Given the competition law framework in place, professional sports and related functions, as far as they are business activities, are within the realm of competition law. Non-business activities, which are sport-related, pursued by sports associations and which may be regarded as social policy, *e.g.* the establishment of revenue re-distribution mechanisms for the purpose of financing amateur and youth sports activities, do not justify a sweeping exemption of this sector from competition law.

Thus, in the practice of the *Bundeskartellamt*, the marketing of TV broadcasting rights for sports events is generally subject to the relevant provisions of the ARC as well as European competition law. However, this does not mean that central marketing is generally prohibited. Depending on the modalities of the specific central marketing scheme implemented, a system that fulfils the conditions of Art. 101 Sect. 1 TFEU [ex Art. 81 EU Treaty] – *i.e.* that constitutes an agreement or concerted practice which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the internal market – as well as the conditions of Section 1 ARC, may still be exempted from the ban on cartels by the provisions of Art. 101 Sect. 3 TFEU or Section 3 ARC, respectively, if the conditions stated there are fulfilled.

5. Joint selling of *Bundesliga* media rights

In the run-up to deciding on the marketing of TV broadcasting rights for the matches of the *Bundesliga* (the top league/ division of football clubs in Germany) for the period of 2009-2015, the German Football League DFL (*DFL Deutsche Fußball Liga GmbH*)⁸ presented to the *Bundeskartellamt* the model that it intended to implement. The *Bundeskartellamt* gave a preliminary non-formal assessment which led the DFL to abandon the specific marketing model it had favoured. However, the DFL turned to the Düsseldorf Higher Regional Court for a review of the *Bundeskartellamt's* material assessment and its mode of proceeding in this matter.

⁵ Section 31 of the ARC in the version promulgated 26 August 1998, *Bundesgesetzblatt* (Federal Gazette) BGBl. I 2546.

⁶ ARC in the version promulgated 15 July 2005, *Bundesgesetzblatt* (Federal Gazette) BGBl. I 2114.

⁷ *Deutscher Bundestag, Drucks. 15/3640, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, 12 August 2004, pp. 32-33.

⁸ The DFL is a daughter company of the League Association (*Ligaverband*), which is the association of all professional football clubs in Germany. The DFL conducts the operative business for the League Association.

The case received considerable attention in the media and in the political sphere in Germany. In the summer of 2008, the Federal Ministry of Economics and Technology and the Federal Ministry of the Interior – being in charge of the sports portfolio – were requested by the Federal Government to examine the issue of legal certainty in the complex matter of applying antitrust law to sports, and how the interests of the sports sector could be adequately considered. Germany suggested to the European Commission and the EU Member States to have a discussion on this issue at the level of the sports ministers. The questions raised were whether there were any specific points of discussion in other Member States regarding the application of competition law to sports and whether a need was perceived for creating more clarity in this area throughout the EU (for example by issuing guidelines). The discussion is ongoing and is being led in the context of the application of the new Article 165 TFEU and the sports agenda of the European Commission.

5.1 *The central marketing model presented to the Bundeskartellamt*

The system proposed by the DFL for marketing TV rights was a central marketing model. Broadcasting rights were to be awarded not by the individual club for its individual home matches, but as a package of matches exclusively marketed by DFL.

The actual marketing would have been conducted by the TV marketing agency Sirius SportMedia GmbH (a company of the Kirch group) on behalf of the DFL with a guaranteed revenue to DFL of 500 million Euros per season. This amount considerably exceeded the revenue per season which the DFL achieved during the previous football seasons.

A key element of the marketing model presented was that Sirius was to produce the reports for pay TV itself. For this purpose DFL and Sirius intended to set up a joint venture company producing television footage of the football games. Pay TV providers and operators of technical infrastructure such as cable, DSL or mobile telephony were supposed to submit bids on the right to feed in the DFL/Sirius broadcast. Under the model presented, pay TV providers had no scope for their own editorial processing of live coverage. Only free TV broadcasting channels would continue to submit bids for the right to process coverage from the stadium (the so-called basic signal). Furthermore, under the marketing model the broadcasting rights packages were to be put out to tender separately for each transmission path (the most important ones being satellite and cable).

In general, *Bundesliga* matches take place on three days: Friday evening, Saturday afternoon, and Sunday afternoon, the core match day with the majority of games being Saturday. Under the marketing model, each of these days was to be put out to tender as a separate package, separately for each of the different transmission channels. Almost all packages for live coverage were to be offered alternatively to pay TV or free TV operators. However, the packages were only to be awarded once, *i.e.* either to the free TV or the pay TV sector.

Each package included live coverage of the matches. However, there were no provisions in place that would have ruled out the bundling of all live broadcasts of matches in the hands of one bidder.

5.2 *Central marketing: Restriction of competition vs. Benefits to consumers*

The *Bundeskartellamt* concluded that the central marketing scheme fell under the provisions on anti-competitive agreements in German (Section 1 ARC) and European competition law (Art. 101 Sect. 1 TFEU). However, the scheme could conceivably qualify for an exemption (Section 3 ARC and Art. 101 Sect. 3 TFEU), in particular if the key criterion that consumers would be given “a fair share of the resulting benefit” was satisfied.

The *Bundeskartellamt* assessed the central marketing model as being a cartel agreement. Each football club is to be seen at least as a co-owner of the TV rights to its home matches along with the League Association (*Ligaverband*) which is also a co-owner.⁹ If each club transfers its broadcasting rights to the League Association which decides on how the broadcasting rights of all clubs are to be marketed collectively, the clubs give up their scope for making independent business decisions.

The *Bundeskartellamt* concluded that the cartel would lead to a reduction in the supply of marketing rights. The central marketing model would lead to a situation where it was impossible to purchase the rights to broadcast individual matches or matches of one single club. Instead, rights were to be offered as packages whose content was not predictable. However, it was to be expected that the packages would likely include matches which, under market conditions, the TV stations – as purchasers – would not be able to market economically because of a lack of viewer interest.

As important countervailing factors the *Bundeskartellamt* took into account the following possible advantages of central marketing, as compared with the individual marketing of TV rights by each club:

- Less bilateral negotiations for acquiring broadcasting rights to a broad range of matches would be required (“one-stop shop”), which would reduce transaction costs.
- It would be significantly easier to have highlights coverage of all matches, because, again, the number of bilateral negotiations and thus transaction costs would be significantly reduced.

5.3 *The scope for an exemption from the ban on cartel agreements*

In its examination the *Bundeskartellamt* identified several points in the proposed marketing model which gave rise to concerns. In the *Bundeskartellamt's* view the most important reason for a critical evaluation of the proposed marketing model was the fact that the consumers' share of the benefit resulting from central marketing was inadequate.

A possible and even probable outcome of the central marketing model presented by the DFL would be one bidder acquiring all rights to live TV broadcasting of the matches. It was conceivable that a TV station would spend a considerable sum of money on buying the exclusive rights for all match days while many competitors would lose out. There would be a strong incentive to do this as overall exclusivity would lead to the substantial added value of being the only channel offering *Bundesliga* coverage. Ultimately, the channel's high expenses for exclusive rights would have to be borne by pay TV subscribers via high subscription fees.

On the other hand, of course, there was the possibility of different channels buying the rights for individual days. In this case it would not be ensured that the pay TV viewer, via his pay TV subscription, would be able to enjoy live coverage of all top matches or all matches of his club. In an extreme case, due to a fragmentation of the packages, a TV viewer would be forced to enter into subscription contracts with several pay TV providers, with considerable costs and other disadvantages.

The *Bundeskartellamt* saw several options for limiting the pay TV providers' scope for setting prices and for mitigating the negative effects of these two possible outcomes. One option would be the guarantee of prompt free-to-air highlights coverage. This would provide consumers with an opportunity, though not optimal, to switch to alternative providers if pay TV became too expensive. Another option would be to put the pay TV packages, or at least some of them, out to tender on a non-exclusive basis only. Also,

⁹ See: *Bundesgerichtshof*, Decision of 8 November 2005 (KZR 37/03 „Hörfunkrechte“).

precautions could be taken to ensure that on each of the distribution channels a different bidder would be successful. In these cases consumers would have options for switching.

The marketing model presented to the *Bundeskartellamt* failed to include such binding precautions which could limit the pay TV channels' scope for setting prices in the interest of consumers.

Highlights coverage of as many matches as possible is a key advantage of central marketing. The *Bundeskartellamt* therefore considered highlights coverage (if it is broadcast free-to-air) to be a particularly suitable measure for limiting the scope for setting prices. Only then can the large group of free TV viewers benefit as well.

In the *Bundeskartellamt's* view, taking into account the market conditions at the time, a fair share of the benefit of central marketing would only be guaranteed for consumers if highlights coverage included an essential part of the match day and was broadcast shortly following the games and at a time when a wide section of the population could have access. This required that the core match day, *i.e.* the Saturday matches, could be broadcast in a free-to-air TV round-up in a broadcasting slot before 8.00 p.m. The model presented by the DFL, however, envisaged highlights coverage on Saturdays starting only at 10.00 p.m. which, given typical consumer preferences in the German market, was not adequate.

5.4 *Assessment*

The *Bundeskartellamt* concluded that the marketing model presented was not suited to adequately balance the interests of the DFL and those of consumers. The DFL model was designed to maximize revenue on the broadcasting rights that were monopolized in the hands of the DFL by limiting alternative options for consumers. Bidders would have to pay correspondingly high prices, and the design of the broadcasting scheme made sure that consumers – especially football fans intent on watching their game – had to pay accordingly to have access to the broadcasts. Therefore it was virtually ruled out that “a fair share of the resulting benefit” would be passed on to consumers. The *Bundeskartellamt* gave its assessment of the marketing model as non-formal guidance to the parties and did not take a formal decision.

5.5 *Further steps by the DFL*

Following the – informal – assessment by the *Bundeskartellamt*, the DFL sold the broadcasting rights for the seasons 2009/2010 to 2012/13 in a bidding process on its own, without the cooperation of Sirius. In this process it was ensured that there was close-to-the-match highlights coverage. This took due account of the *Bundeskartellamt's* key objection to the original model presented, since highlights coverage which is attractive for viewers limits the pricing leverage of TV rights sellers and TV stations.

Furthermore, in April 2009, the DFL brought proceedings against the *Bundeskartellamt* before the Düsseldorf Higher Regional Court (*Oberlandesgericht*). The DFL sought preliminary relief in the case of a potential prohibition decision by the *Bundeskartellamt* in a future round of central marketing. Additionally, the DFL requested clarification from the court regarding the *Bundeskartellamt's* proceedings in the matter, namely the fact that the *Bundeskartellamt* had not issued a formal decision, but only a non-formal recommendation.

The court, implying that it could not rule on the legality of a future marketing model the content of which was yet to be determined, dismissed the DFL's claims as inadmissible.¹⁰ It held that the DFL could not request a precautionary measure against future *Bundeskartellamt* decisions since the DFL had no qualified interest which would be necessary to justify such a claim. According to the Court it was possible for the DFL to obtain effective legal protection by an ex post court review of a future *Bundeskartellamt* decision.

¹⁰ *Oberlandesgericht Düsseldorf*, Decision of 16 September 2009 (VI-Kart 1/09 (V)).

ITALY

1. Introduction

The economic dimension of professional sports has become increasingly relevant in Italy, especially with the development of media industries and increasing commercialisation of sport broadcasting rights. Sport is not any longer just a social or cultural phenomenon but also an important economic activity estimated to constitute 3% of Italian GDP.

In Italy there is no general legislative exemption in the application of competition law to sports and economic activities related to professional sports fall within the scope of competition law and policy. Rules that concern merely organisational aspects of sports, in general, go beyond the scope of the application of competition law. However, the Italian Competition Authority, in line with the case law of the European Commission and European Court of Justice, can assess, on a case by case basis, whether sport rules contain restrictions of competition and, if they do, whether the restrictions are proportionate to pursuing their objectives.¹

Box 1.

In May 2008 the Authority concluded an investigation into the Italian Federation of Equestrian Sports (FISE) in order to determine whether FISE had restricted competition in the market for the organisation of equestrian shows and events and other activities involving the use of horses. Several provisions of FISE's statute forbid members, upon penalty of disciplinary sanctions and exclusion from the federation, from joining other associations or national organisations for recreational or sports activities in the equestrian field. These restrictions did not appear justified by the role of FISE as the regulatory body for equestrian sports in charge of ranking and awarding official titles.

After the opening of the investigation, FISE proposed commitments involving modifications of its statute that would limit restrictions to purely agonistic activities involving its own members and affiliates. FISE undertook to modify its Federal Statute, eliminating the reference to its exclusive jurisdiction over sporting and/or recreational activities. Furthermore, after the changes, FISE members would be allowed to take part in events organised by other competing entities and/or associations, where prizes and/or trophies of a symbolic nature may be won, so long as no ranking was involved nor titles awarded

2. Competition issues in commercialisation of sport broadcasting rights

The Italian Competition Authority, in recent years has focused on competition problems involved in the commercialisation of sport broadcasting rights to major sport events, in particular those related to events attracting large audiences, like football. Professional football is one of the most important industrial sectors in Italy and the most popular of professional sports. Revenues from sale of broadcasting rights rose from around 814 million Euros in 1998 to 1,386 million Euros in 2003. They represent 40% of teams' revenues.

The increased value of sport broadcasting rights made competition issues concerning their commercialisation particularly relevant for two main reasons: a) sport broadcasting rights are a key factor in the development of the downstream television markets and distortions in the market for the acquisition

¹ See the introduction to Italian Competition Authority's market study on Professional Football, December 2006.

of the rights might reflect in distortions in the television market; b) sport broadcasting, over the last few years, has become a very important area economically.

The main competition issues related to the selling of broadcasting rights are horizontal and vertical agreements that might restrict competition both on the market for sport broadcasting rights and on the television market.

Collective selling of the rights by leagues or federations can be viewed as a horizontal agreement leading to higher prices than would prevail with individual selling; collective selling of the rights may restrict output and bundle the products offered. There are, however, special characteristics of sport that have to be taken into account when applying competition law. These should include the need to ensure “solidarity” between weaker and stronger economic actors. This position might result in competition authorities considering collective agreements restrictive but granting exemption to specific agreements and the analysis should therefore be conducted on a case by case basis.²

Competition problems related to vertical agreements are linked to the fact that sport rights are usually sold on an exclusive basis. Exclusivity is partly linked to the peculiarity of the product: the transmission of sport events is valuable only for a very short time, since audiences are primarily interested in the live broadcasting of sport events. For this reason exclusivity is a common commercial practice in the broadcasting sector.³ However, competition problems can arise when exclusive agreements have a long duration or they concern a wide range of rights. In these cases exclusive agreements might create market foreclosure, especially when the acquiring subject is in a dominant position in the downstream market. Exclusive agreements must therefore be examined on a case by case basis and assessed considering their duration, the range of rights concerned, and upstream and downstream market power. However, problems raised by an excessive duration of exclusive agreements can also be assessed with regulatory intervention.

3. The interventions of the Italian competition authority

The Authority issued a number of decisions concerning all aspects of the competition problems arising from the commercialisation of the rights.

3.1 *Collective selling of football broadcasting rights*

In Italy, like in other European countries, collective selling of television broadcasting rights by the National Football League was a long standing practice. The Italian Football League is an association, constituted under private law, to which the football clubs taking part in the Italian First and second Division League (championships Serie A and Serie B) are affiliated. The teams affiliated to the League employ professional players who belong to the Italian Football Federation (Federazione Italiana Gioco Calcio - FIGC).⁴ The League institutional function is the organisation of the First and Second division championships, the Coppa Italia Tournament, the League Supercup and other junior championships.

² For a discussion of the merits of individual vs. collective selling of football broadcasting rights see Sonia Falconieri, Frederic Palomino and Jozsef Sakovics, *La vendita dei diritti televisivi nel calcio: centralizzazione vs decentralizzazione* [Rivista di Diritto ed Economia dello Sport](#), 2005, vol. 1, issue 3, pages 67-88.

³ The assessment of exclusivity for competition for minor sports can be rather different, since in this case exclusivity might be asked by the broadcaster that is bearing the risk of the investment in a product with an uncertain audience. Exclusivity would be therefore a mean to assure that it is the broadcaster acquiring the rights to receive the returns on the investment.

⁴ The Federation promotes, regulates and govern football in accordance with the guidelines laid down by international federations (FIFA and UEFA). Its function also involves the creation of sport associations among the football clubs (the leagues).

Box 2.

In 1999 the Authority issued a decision banning collective marketing of broadcasting rights of the main national matches by the Italian football League . The Authority deemed that the agreement on the collective sale of the television rights to the League A and B football championship and the Coppa Italia, for the periods 1993/96 and 1996/99, constituted a violation of Article 2 of Law no. 287/1990. The Authority considered that the central marketing of the rights by the League had enabled the football clubs to engage in concerted price fixing and in the determination of the quantity of rights to be sold. Moreover, in view of the specific nature of football rights, collective selling could lead to their allocation to a single broadcaster and thus contribute to the foreclosure of the pay-TV market. In March 1999, after the preliminary inquiry had been opened, the Lega Calcio notified the Authority that it had amended its regulations, to the effect that individual teams could now sell the television rights for the A and B League Championship, and that it had drawn up new criteria for the distribution of revenues among the member teams. In view of the amendments introduced by the Lega Calcio to its Organisational Regulations, the Authority concluded that there were no grounds for imposing a fine under Article 15.1 of Law no. 287/1990.

In defining the relevant market it was analysed whether there was substitutability on the demand side (for advertisers and viewers) among different sports. The analysis led to the identification of a separate relevant market. for premium broadcasting sports rights, made by a group of events with strong popular appeal and with a large share of audience, including broadcasting rights to national football events (First and Second Division League matches, as well as matches played by the national teams), and to the main international football events like Champion's League, UEFA (when Italian teams or the national teams are playing).

Finally, it was questioned whether a separate market at the upstream level for free and pay-TV rights could be identified (reflecting the two separate markets of free to air and pay-TV at the downstream level), since on the demand side both free to air and pay-TV broadcasters compete for the acquisition of the rights. Although the question was left open for the purpose of the decision, the characteristics of the commercialisation of the rights, that are sold on an exclusive basis, alternatively to either free or pay-TV broadcasters, seemed to delineate a single market for broadcasting rights . The relevant geographic market was restricted to the Italian territory, due to the fact that broadcasting rights are usually sold on an exclusive national basis and because of the language and cultural differences that characterise consumer preferences for sports in different countries.

In the decision the specificity of the sport sector was recognised, and the relationship between competitive balance and uncertainty was acknowledged, recognising the relevance of a redistribution mechanism granting the maintenance of competitive balance. It was pointed out, however, that there was no necessary correlation among the collective selling and redistribution, while it was possible to find a redistribution system compatible with the individual selling of the broadcasting rights. The mechanism for the redistribution of the revenues coming from the rights sold individually (pay-TV and pay-per-view) was rather simple, similar to the one already experienced for gateways revenues, granting to the guest team 18% of the revenues coming from the selling of the rights.

In March 1999 a law was approved (Law n. 78/1999) prohibiting any one broadcaster from holding more than 60% of rights to football on pay TV. The Law also expressly provided that "*each First and Second Division football club owns the rights to encrypted television broadcasts.*"⁵

Since 1999 football broadcasting rights were sold by teams on an individual basis. Until the 2002/2003 season the two pay-tv broadcasters (Stream and Telepiù) competed for the acquisition of the rights, each acquiring the rights for some teams, respecting the 60% limit provided for in Law 78/99. In 2003 the two pay-tv broadcasters merged into Sky.⁶ In the following seasons Sky acquired the pay-tv rights from all the Serie A teams, while difficulties were experienced by Serie B teams in selling their rights.

⁵ Italian Civil Courts had already stated in several decisions that the single club organising the match was entitled to its commercial exploitation.

⁶ See European Commission COMP/M. 2876 Newscorp/Telepiù, of April 2, 2003.

Doubts were raised on whether the system could really grant competitive balance. Weaker teams experienced difficulties in selling their rights.

In 2006 the ICA conducted an extensive market study into the professional football sector in Italy, aimed at identifying issues that could have a direct effect on competition. In the study it analysed, among other things, the problems experienced with the individual selling of broadcasting rights.⁷

Box 3.

With respect to the economic and financial situation of Italy's professional football sector, the market study outlined that while total revenues were growing steadily, clubs were also reporting high debt levels, due to the erroneous assessment of the growth potential of revenues from the sale of TV rights and the high salaries of players, which accounted for about 80% of total costs. With particular reference to the sale of broadcasting rights (the most important revenue stream for the A Series Clubs representing over 40% of their income), the market study stressed that the individual sale of these rights had widened the gap in revenue distribution between clubs with greater negotiating power and a wider user base, and smaller clubs. The study showed that individual selling of broadcasting rights had, in fact, deepened the distance in revenues among the group of most important and successful teams (such as Inter, Milan, Juventus) and minor teams. The redistribution system did not seem sufficient to compensate the gap. The unequal distribution of resources seemed to have increased the technical disparities between teams, lowering the uncertainty of match results and the quality of games. In its conclusions the Italian Competition Authority observed that:

- Professional football presents characteristics requiring a certain degree of interdependence and solidarity among competitors;
- In order for matches to be attractive a certain number of teams must be able to participate in the Championship so there is a collective incentive in maintaining as many teams as possible in good financial conditions;
- Uncertainty on the outcome of the matches is important in maintaining the audience's interest alive;
- Economic balance is necessary in order to maintain competitive balance.

The authority therefore indicated that the redistribution mechanism had to be set in such a way as to not hinder competitive balance.

In 2008 a law (Legislative Decree n. 9/2008) was approved envisaging the shared ownership of television rights between the League and the teams and a centralised system for their sale. The new law further stipulated that television rights must be sold "via procedures aimed at guaranteeing competition among media operators", in ways that "ensure, when possible, the involvement of several media operators in the distribution of audiovisual products for sporting events", and that sales contracts should have a "reasonable duration". The provisions on redistribution required that a part of the revenues coming from the sale of rights must be divided in equal parts among all clubs, while the remaining resources be distributed "taking into account the popularity of the clubs and their rankings in terms of results achieved".

On the occasion of the conclusion of the market study the Authority had made some remarks on the proposed law reintroducing collective selling of broadcasting rights. In particular, the Authority had observed that the sharing of the revenues coming from the sale of broadcasting rights should reflect, at least to some extent, the relative rankings in terms of results achieved by the teams. More generally, the Authority pointed out that the law should allow a certain degree of discretion regarding the rules of redistribution of resources back to the clubs. Rather than to the Leagues, the task of deciding on how to

⁷ Italian Competition Authority, Professional Football Sector, December 2006 (the text in Italian is available at www.agcm.it.)

share revenues coming from the collective sale should be given to a third party, able to safeguard the interests of smaller clubs and the entire sector.

The contracts for the Serie A rights expired only in 2010, making the new provisions on centralised selling effective only from 2009, where negotiations for the new contracts begun.⁸ The first auction for the assignment of the rights raised some competitive concerns and the Italian Competition Authority conducted an investigation.

Box 4.

In January 2010, the Italian Competition Authority concluded an investigation opened in order to ascertain an alleged abuse of dominant position by the League in its centralised marketing of broadcasting rights. The investigation focused on the assignment of television rights for Serie A and Serie B games in the 2010-2011 and 2011-2012 Championships. In the Authority's view, the League's chosen method for organising the "bundles" of rights to be auctioned could restrict competition in the television markets, because they seemed to be 'custom-made' for the main pay-TV operators, thus not ensuring a truly competitive procedure and hindering the entry and growth of other businesses. More specifically, the League seemed to have preferred to limit competition among the pay-TV operators over the rights in order to ensure its own expected revenues and avoid the uncertainty linked to the results of open tendering. In the Authority's view, the tendering process defined by the League did not ensure fair, transparent and non-discriminatory conditions for participants in the competitive procedures. The League offered commitments in order to overcome the competitive concerns raised by the Authority, that deemed that they eliminated restrictions in the TV rights acquisition phase enhancing competition in the pay-TV market, both between different platforms (satellite and digital) and within individual platforms. The decision of the Italian Competition Authority was overturned by the Administrative Tribunal. The decision in front of the Council of State is still pending.

3.2 *Exclusivity clauses of broadcasting agreements*

Vertical aspects related to of the acquisition of exclusive rights were examined in two cases. In both cases the competitive concerns pertained to the duration and the scope of exclusivity clauses when the party acquiring the broadcasting rights held a dominant position in the downstream television market.

Box 5.

The competitive concerns raised by the acquisition of the majority of football and film broadcasting rights by the incumbent pay-TV broadcaster Telepiù on a long exclusive basis were examined in the case Stream/Telepiù. The Authority concluded that Telepiù had violated Article 82 of the Treaty, by signing long-term contracts (for periods longer than three years) for exclusive broadcasting rights for a significant portion of Italian A and B League soccer matches, including the home matches of the most popular teams. The acquisition of exclusive rights for premium sports events for a lengthy period, just at the time when the conditions for effective competition in pay TV were being established, reinforced its dominant position and raised the already high barriers to entry into the relevant market. The Authority also deemed Article 82 of the Treaty to be violated by the clause according a right of pre-emption to Telepiù or its subsidiaries for acquisition of exclusive rights for the period following the expire of the initial rights, as this would enable the dominant firm to further prevent competitors from access to the most important television content.

⁸ More complex was the situation for the Serie B teams. During the transition from individual to centralised selling some teams had attempted to sale the rights individually but the League prevented them from doing so. The Antitrust Authority found the League's conduct to constitute a competition-restricting agreement punishable by a 102,000 Euros fine (Case A403 Lega Calcio/Chievo Verona, decision n. 20575 of 16 December 2009).

Box 6.

In June 2006 the Authority concluded an investigation into the Mediaset group, establishing an abuse of dominance in violation of Article 82 in the TV advertising sales market. The investigation examined the impact on the competitive dynamics of the television market of long-term license contracts and private agreements featuring exclusivity clauses, drawn up by the Mediaset group for the purchase of broadcasting rights for football matches.

The Authority did not impose any fines in light of the practices adopted by the group during the investigation, aimed at making available, from 2007 onwards, the football matches acquired in a way that would not compromise the competitive dynamics of the sector. In particular, in exercising its right of first negotiation ahead of time, the company concluded agreements with Juventus, Inter, Milan, Roma, Lazio and Livorno in which the duration of the acquired rights from 2007 onwards was significantly reduced to a maximum of two years, with the inclusion of an option on one additional sporting season. Accordingly, the duration of the license agreements, which were originally to be valid until 2016, was limited to 2009. The company also sold to Sky the TV broadcasting rights of home football games featuring Juventus, Inter, Roma and Lazio. These rights were sold to Sky on an exclusive basis for satellite broadcasting, and on a non-exclusive basis for other platforms, in particular broadband internet and IPTV (Internet Protocol Television). This was also to enable other operators to acquire content, which was crucial to being sufficiently attractive to advertisers and thereby competing in the TV advertising sales market. Finally, the Mediaset group entered into similar agreements with mobile phone operators TIM, H3G and Vodafone, enabling the development of new broadcasting technologies and the inclusion of diverse actors on alternative platforms.

3.3 *Other aspects of professional football examined in the market study*

Other issues in the organisation of professional football that raised competitive concerns were analysed in the sector market study. The Authority advocated for regulatory changes aimed at eliminating the restrictions identified in the study.

3.3.1 *Rules governing relationships between professional players and clubs*

The market study outlined that Italy's regulatory framework is characterised by several anomalies that might alter competitive relations between football clubs, in particular with respect to the rules regarding players' transfers. Currently players can sign up with a new club in two fixed periods (one while the championship is still undergoing and the other after it is over) and, as a result, while the championship's season is still going on a player can already have a contract signed up with the new club. This creates opportunities for collusion between the teams. The Authority accordingly suggested a series of amendments to the current rules, including: *i*) establishing the principle whereby the signing period that falls during the playing season (usually in January), is exploited only by teams belonging to different divisions and only on an exceptional basis for transfers between competing clubs (for example to replace injured players); *ii*) limiting the obligation of clubs to give written notice to the club of a player with whom they want to hold transfer talks and whose contract is about to expire, to those cases where the contract actually expires during the season; *iii*) assigning the task of drawing up the model lending and transfer agreements to the Italian Football Association (FIGC) and not to the League. Similar considerations were made with reference to the lending of players, a common practice of professional football clubs to exchange players during the football season.

3.3.2 *Analysis of the organisation and duties of the Italian Football Association (FIGC) and the League*

The market study highlighted the system's functional shortcoming due to the increasingly important role played by associative bodies, i.e. the Leagues, within the federal structure, which go well beyond what should be their only function of organising sporting events. The Authority advocated for the Leagues to be relieved of all control functions vis-à-vis football clubs, to be entrusted instead to designated federal

bodies. In particular, the Authority took the view that it was necessary: *i*) to give FIGC the responsibility of approving contracts between clubs and players and drawing up model transfer agreements, and *ii*) to assign all the clubs' economic and financial control activities to an independent body within FIGC.

3.3.3 Rules on the activities of football agents contained in the FIGC's "Agents' regulation"

The Authority stressed that some of the rules contained in the Agents' Regulation might significantly restrict competition. As for access to the profession, the obligation to enrol in the Register of agents appeared not to be in line with FIFA Regulation and not to respond to any necessity or proportionality requirement. The Authority also found that the standardisation of contractual relations between agents and players, through the obligation to use the same standardised forms, might restrict competition in agents' services market. The Authority also pointed out the restrictive scope of rules that: *i*) oblige players to pay their agents in all cases, even when the agent had played no role in obtaining the engagement; *ii*) oblige players to sign up with only one agent; and finally *iii*) forbid agents from contacting players to persuade them to change agent. Following the observations made by the Italian Competition Authority the Agents' Regulation was emended removing some of the restrictions outlined in the market study, in particular with reference to access to the profession.

JAPAN

1. Introduction

It can be said that, among professional sports in Japan, professional baseball is an especially popular team sports.

With regard to the relationship between professional sports in Japan and competition, this contribution paper presents (i) general ideas about the application of the Antimonopoly Act (AMA) to professional sports, and then, (ii) general ideas about the possible impediment of new entries to professional baseball with regard to the issue of the realignment of professional baseball leagues that took place in 2004, as described below.

2. Application of the AMA to professional sports

The AMA stipulates that the actors in prohibited acts such as cartels are “entrepreneurs” and Article 2, paragraph (1) of the Act defines an “entrepreneur” as follows.

The term “entrepreneur” as used in this Act means a person who operates a commercial, industrial, financial or any other business. (Snip)

This means that teams are entrepreneurs when their entertainment activities are concerned. Therefore, if they establish an agreement over admission fees, for example, the act will be illegal.

3. Issue of realignment of professional baseball leagues

At the top of professional baseball in Japan is an organisation named Nippon Professional Baseball (NPB). Under NPB, two leagues, the Central League and Pacific League, are set up, each consisting of six teams.

In 2004, two of the teams belonging to the Pacific League announced that they were planning to merge with each other.

With regard to the realignment issue of the professional baseball league, the possible points of controversy are thought to be the following:

- Whether or not new entries are inhibited without justifiable grounds, and
- Whether or not new entries are impeded by the large amount of membership or entry fees

For professional baseball to function as a business one team is not enough; that is, the existence of multiple teams is essential. Therefore, it is deemed reasonable to a certain degree that multiple teams establish (conclude agreements over) the basic framework of games (such as the number of teams, number of games per year, and game schedules) to enable professional baseball to function as a business. Therefore, it is thought that this act is not immediately deemed problematic in light of the AMA.

It is thought that an act of establishing requirements for joining the NPB in a reasonable manner – requiring the team to have its own baseball field, for example – is not, in itself, immediately deemed problematic in light of the AMA.

It is not problematic for NPB to refuse the entry of a party without the sufficient infrastructure required of a professional baseball team. However, rejection of entry of a party without justifiable grounds is likely to impede competition to attract fans, increase the number of spectators, and increase sales of related goods, etc., and could therefore be problematic in light of the AMA.

With respect to large membership or entry fees, the guidelines of the trade association stipulate that “collecting an excessive amount of entry fees or contributions that are not reasonable under normal social conventions” is “very likely to be illegal where business activities are difficult to undertake without belonging to the trade association, because the act is very likely to fall under acts which unreasonably restrain the entry of entrepreneurs to the trade association.” Therefore, where the amount of fees, etc. is deemed unreasonable in light of the purpose of collecting the money and where the amount, etc. is a major impediment to entry into NPB, it will be deemed problematic as a factor impeding the entry.

With regard to this issue, new entries were admitted and the two-league system has been retained ever since.

MEXICO

1. Introduction

This document analyses the major Mexican football league (first division league) from the perspective of economic competition. Sections II and III describe the structure and functioning of the Mexican Football Federation (MFF or federation) and the first division league. Section IV identifies the most relevant economic features of this league and Section V discusses the sale of transmission rights for matches. Finally, Section VI presents some conclusions.

2. The Mexican Football Federation

The MFF is the entity that administers the Mexican professional football leagues and the corresponding national teams. It sets operating rules for the leagues; administers a system for the sale and exchange of players among teams; and undertakes football promotion activities. The federation does not own, administer or operate any of its member teams.

The General Assembly is the federation's governing body, comprising representatives of the four professional leagues and the amateur sector, with the following voting shares:

- First Division: 55%
- Ascending League: 5%
- Second division: 18%
- Third division: 13%
- Amateur sector: 9%

The MFF is the only Mexican federation affiliated to the International Federation of Football Association (FIFA), which is essential for participating in international matches and tournaments with FIFA related teams.

The MFF is a private not-for-profit association; it does not own teams or facilities (stadiums, etc), except for those required for its own management and that of national teams. It does not intervene in the administration of member teams or in negotiations regarding the sale of broadcasting rights, sponsorships or advertising, all of which are directly carried out by team owners.

The federation is financed through member fees and income yielded by national teams¹ including broadcasting rights, advertising, sponsorships, merchandising and proceeds. According to MFF officials, the major national team (national team) is by far its most important source of income. For instance, during the 2006 FIFA World Cup it produced over 100 million dollars mostly from sponsorships.² Earnings

¹ There are five national teams: Major; Olympic; under 17; under 20; and Women.

² Interview by Luis Ousset, MFF marketing director, to Reforma Newspaper (2006).

estimated for the 2010 World Cup exceed 200 million dollars.³ In regular times the national team produces additional income from selling broadcasting rights and tickets for the qualifying tournament, other international competitions and friendly matches (Broadcasting rights to the World Cup are sold by FIFA, who only apportions a small amount of these to national federations).⁴ Although there is no public information on the contracted value of these rights, the frequency and popularity of the matches suggest that the amounts are important. For instance, during 2006-2009, the national team played 67 non World Cup matches, with ratings of 25-35% in Mexican television. It is estimated that the combined market value of the national team players amount to 95 million Euros.⁵

The federation's income generally exceeds its operating expenses. The remaining income is generally spent by the federation in activities for the development of the sport, the amateur sector, and the other national teams (under 17, etc.).

3. The First division league

Currently, the league comprises 18 teams. Three cities in Mexico have more than one team: Mexico City: 3; Guadalajara, 2; and Monterrey, 2.

Each year a team is replaced from the first division according to relegation and promotion rules. The team with the lowest ratio of points earned to matches played during the previous three years is relegated to the "promotion division", while the champion of the "promotion division" is promoted to the first division. Twenty seven teams have played in first division from 2000 to 2010, but only 13 have participated throughout the whole period.⁶

Table 1. First Division Teams, 2010

Team	City	Team	City
1. América	México, D.F.	10. Puebla	Puebla, Pue.
2. Atlante	Cancún, Q. Roo	11. Querétaro	Querétaro, Qro.
3. Atlas	Guadalajara, Jal.	12. Monterrey	Monterrey, N.L.
4. Cruz Azul	México, D.F.	13. San Luis	San Luis Potosí, S.L.P.
5. Guadalajara	Guadalajara, Jal.	14. Santos	Torreón, Coah.
6. Necaxa	Aguascalientes, Ags.	15. Tigres	Monterrey, N.L.
7. Jaguares	Tuxtla Gutiérrez, Chis.	16. Toluca	Toluca, Edomex.
8. Monarcas	Morelia, Mich.	17. UAG	Guadalajara, Jal.
9. Pachuca	Pachuca, Pach.	18. UNAM	México, D.F.

Source: MFF.

Since 1996 the league plays two tournaments a year, namely "opening" and "closing". Each is divided in two phases: "qualifying" and "Liguilla", roughly equivalent to the American "regular season" and "playoffs", respectively. During the 17 weeks of the qualifying phase, each team plays once against the other teams, earning three points for winning and one for tying. At the end of the qualifying phase, eight

³ Source: several newspapers and estimations by El Economista, neither have been confirmed by the MFF.

⁴ For South Africa 2010, the national team will receive about 10 million dollars if reaches only the group stage, and up to 32 million dollars if it wins the cup (FIFA, 2009 financial report).

⁵ See: www.futebolfinance.com.

⁶ América, Atlante, Pachuca, Atlas, Santos, Cruz Azul, Tigres, Guadalajara, Toluca, Monterrey, UAG, Morelia y UNAM.

teams play the “liguilla”: the best two in each of the three groups and the two with highest scores among the remaining teams. The “liguilla” is an elimination tournament with quarter-final, semi-final and final rounds. A team is eliminated after losing against its opponent in the combined score of two games (home and away).

The “liguilla” aims at spurring interest among fans by restoring uncertainty and providing eight teams equal chance to win the championship. Uncertainty is not dissipated until the end of the last match.

3.1 Team owners

A high percentage of teams belong to organisations or corporations outside the football business. For instance, five teams belong to TV broadcasters; three to universities (two public, one private); two to cement producers; and two to beer brewers.

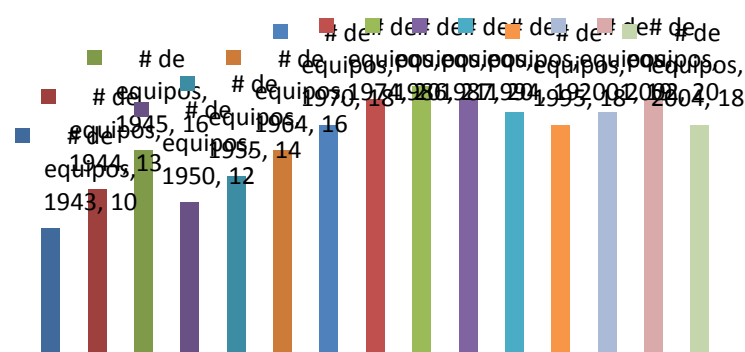
Table 2. Team Ownership, 2010

Team	Owner	Team	Owner
1. América	Televisa	10. Puebla	Private
2. Atlante	Private	11. Querétaro	Private
3. Atlas	Non-profit O.	12. Monterrey	FEMSA
4. Cruz Azul	Cruz Azul	13. San Luis	Televisa
5. Guadalajara	Private	14. Santos	Modelo
6. Necaxa	Televisa	15. Tigres	UANL/Cemex
7. Jaguares	TV Azteca	16. Toluca	Private
8. Monarcas	TV Azteca	17. UAG	UAG
9. Pachuca	Private	18. UNAM	UNAM

Source: MFF and newspapers.

The number of teams in the first division has ranged between 10 and 21. The last change took place in 2004 when the federation bought two franchises and cancelled them.

Graph 1. Evolution in the Number of Teams in the First Division



Source: MFF.

3.2 Team Incomes and Expenses

There is no public information on teams operating income/expenses. According to information provided by MFF officials the average income structure is estimated as follows: broadcasting rights, 50-

60%; sponsorships and merchandising, 25-35%; and stadium attendance, 5 -15%. On the expenses side, the payroll accounts for around 80%, while the rest is spent on organisation, logistics, administration, and contributions to MFF.

15. It is hard to know whether teams produce net operating earnings or losses for their owners, especially because some owners view their teams as generating indirect benefits accruing to their corporations. For instance, five teams belong to TV Broadcasters which have interest in football as a source of contents; four teams belong to cement and beer companies probably interested in positioning their brands among the public; three teams belong to universities, which may try to achieve certain goals like increasing enthusiasm for sports. In these circumstances, the vice-president of Cruz Azul has declared “we [Cruz Azul Cement Company] do not lose money on the club, because we consider it part of our advertising vehicle, we simply allocate an amount and keep the team going”.⁷

4. The economics of leagues

Professional sport leagues exhibit network economies and require large investments in developing rivalry among teams, fan loyalty and brand recognition.⁸ These characteristics favour the creation and maintenance of single national leagues for each sport. While there are international examples of the creation of competing leagues, they generally end up disappearing or merging with the incumbent league.⁹

Generally competition authorities are not concerned by the existence of leagues. As far as we know, no authority has proposed structural separation or blocked a merger between two national leagues of the same sport. However, competition agencies are concerned about the risks of the leagues using their bargaining power to undertake anticompetitive conducts and the need to prevent and sanction them.

A league may be regarded as a “joint venture” among teams to offer a valuable product in a more efficient way. The organisation of matches within a league tournament creates a different entertainment product from those available in its absence. The league seems to create suspense, rivalry and controversy, which are valued by consumers. At the same time, leagues stimulate balanced competitions where non-favourite teams have always a chance to win. Fans interest in the league depends in part on matches being unpredictable, even if big teams tend to win more often.

The league is a platform with several interacting agents, in which several cross-market effects take place.¹⁰

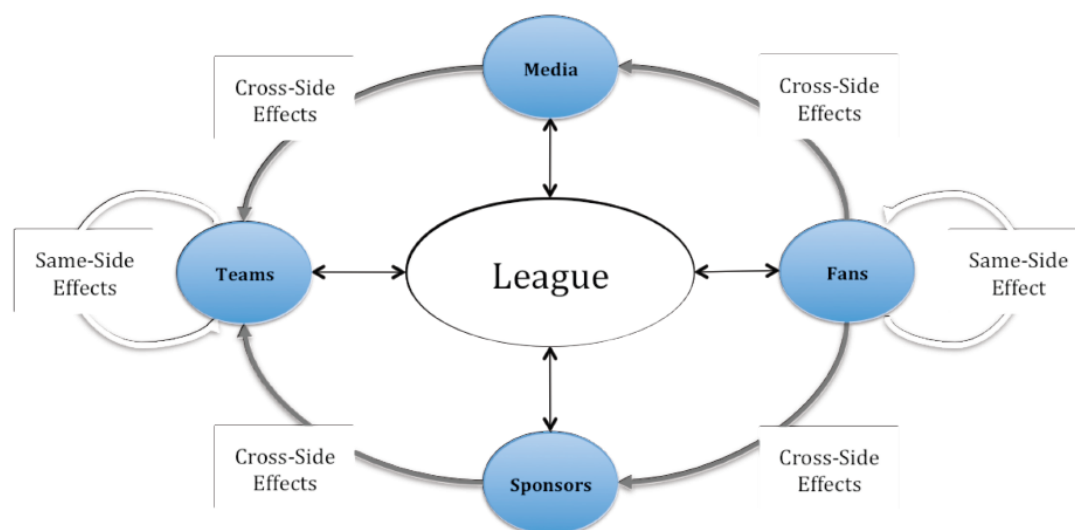
- Clubs offer entertainment to fans
- Clubs attract more clubs (network effects)
- Fans attract more fans that create “ambience”
- Fans demand broadcasting of matches and other types of coverage
- Broadcasters buy media rights from teams and sell advertising space to sponsors

⁷ El Universal newspaper, 2009.

⁸ Antitrust Analysis of Sports Leagues, Pelnar, Gregory. 12 octubre 2007: <http://mpira.ub.uni-muenchen.de/5382/>.

⁹ For example, Super League of Australia; the merger in 1966 that created the NFL, plus the subsequent entry attempts by new leagues: WFL, USFL, WLAF, XFL.

¹⁰ See for instance: Dietl, H and Duschl, T. "The Organization of Professional Sports Leagues: A Comparison of European and North-American Leagues from the Perspective of Platform Organization, working paper, 2009.

Graph 2. The League as a Platform

The league as a platform makes the value of teams dependent upon the value of other teams and upon the value of the league as a whole. For instance, one of the main rules of the MFF is that income from a match (broadcasting rights, stadium attendance) belongs to the home team. This rule may create cross subsidies that favour the less popular teams, thus levelling the playing field for competition, and ultimately benefiting the league.

While the level of investment, performance and team popularity are correlated in the Mexican first division, there is no clear long run tendency for a team or teams to become preponderant. Particularly, teams with the highest popularity and investment in players do not seem to perform extraordinarily well.

Table 3. Factors Related to the Value of a Team

Club	Market value ^{1,2}	Popularity ³	Performance ⁴	Championships since 1996 ⁵	Stadium Seats (1000s)	City Population (million) ⁶
América	49.8	2	42%	2	105	19.2
Cruz Azul	41.0	3	43%	1	35	19.2
Santos	36.9	8	34%	3	28	1.1
Monterrey	34.0	7	34%	2	33	3.7
Chivas	33.8	1	41%	2	57	4.1
Tigres	31.2	5	33%	0	42	3.7
Monarcas	30.5	10	33%	1	41	0.7
Toluca	29.9	9	40%	6	27	1.6
Pachuca	29.7	11	36%	5	30	0.4
Jaguars	27.4	15	32%	0	26	0.6
UNAM	27.3	4	39%	3	62	19.2
Atlas	27.3	6	36%	0	57	4.1
Atlante	26.4	13	36%	1	20	0.6
San Luis	24.5	14	n/d	0	25	0.9
Puebla	21.9	12	34%	0	43	2.5
UAG	20.9	16	34%	0	22	4.1
Necaxa	n/d	n/d	34%	1	25	834.5
Querétaro	14.6	n/d	n/d	0	34	950.8

(1) Source: www.transfermarkt.de; (2) Unit: thousands of Euros; (3) Reforma newspaper poll, February/2010; (4) Number of matches won over number of matches played during regular season; (5) Year the current two tournament system was adopted; (6) Population from metro area.

Source INEGI.

5. Broadcasting rights and advertising

The sale of broadcasting rights is the main source of income for the federation and its member teams. The federation sells only rights to the national team, while first division teams negotiate their own rights without any intervention from the federation.

Teams individually sell rights for broadcasting matches played at home, rights for advertising in stadiums and uniforms, as well as sponsorships and merchandising. In these negotiations, teams are in a position of relative weakness, especially the least popular of them. On the one hand, each team negotiates separately with broadcasters. On the other, their main source of income is TV advertising, which is controlled by two companies: Televisa and TV Azteca, with 69% and 29% of the market respectively. In addition, broadcasters own five teams (Televisa three teams and TV Azteca two teams), which may give them some influence over decisions at the federation.

Unlike other jurisdictions where joint marketing of broadcasting rights by leagues is identified as a potential risk for competition, in Mexico there seems to be the opposite problem: TV companies have a high bargaining power derived from the industry's duopolistic structure and their ownership of teams. For instance, they may use their votes to influence the federation regarding decisions to market broadcasting rights jointly.

The low bargaining power of teams is apparently reflected in the contracts terms. For example, Mexican TV firms buy all national and international broadcasting rights from individual teams and later license bundled international broadcasting rights to US TV firms. It is reasonable to think teams could sell their individual rights to broadcast separately in both countries to increase their profits. The federation currently follows this strategy regarding the sale of broadcasting rights of the national team and yields higher incomes from US sales than from national ones.

Currently, Televisa has the rights to 9 teams and TV Azteca to 9.

Table 4. Exclusive broadcasting rights

Televisa		TV Azteca	
1. América	6. San Luis	1. Cruz Azul	6. Querétaro
2. Atlante	7. Tigres	2. Jaguares	7. Santos
3. Atlas	8. Toluca	3. Morelia	8. UAG
4. Guadalajara	9. UNAM	4. Pachuca	9. Necaxa ¹¹
5. Monterrey		5. Puebla	

The market structure in the free-over-the-air TV industry seems to translate into the distribution of the broadcasting rights for matches. For instance, Televisa has the rights to the six teams with the highest audience; to six out of the seven most popular teams; and broadcasted 16 of the 20 highest rated regular season matches during 2008 and 2009.¹² Overall, Televisa has contracted transmission rights that represent 64.3% of stadium attendance and 61.4% of team value, while the rest is with TV Azteca. Furthermore, MFF officials recently referred to an agreement between Televisa and TV Azteca for each broadcaster to keep the current numbers of teams.¹³

¹¹ Necaxa was promoted to first division starting next season; although this team is owned by Televisa, MFF officials recently announced that its matches will be transmitted by TV Azteca (El Universal Newspaper, May 26, 2010).

¹² Source: Neo magazine, with data from IBOPE.

¹³ El Universal Newspaper. May 26, 2010.

Although there is no public information on the value of broadcasting rights contracts, there is some isolated information that suggests that these sums are important. For example, according to officials of the most popular league team, Chivas, the team's 2003-2008 broadcasting rights were sold for an average of 12.5 million dollars per year. Since then, newspapers have indicated that the 2008 contract more than double that amount. Contracts of less popular teams are estimated to amount to around 3 million dollars.¹⁴ Remarkably, Televisa revenues from reselling broadcasting right to U.S. Networks in 2006 amounted to 98 million dollars.¹⁵

6. Final remarks

International experience shows that competition authorities are generally not concerned by the existence of leagues acting as private regulators of sports or as redistributors of income among teams. However, the same competition authorities have challenged particular conducts of the leagues such as the joint selling of broadcasting rights to TV companies, which is their main source of income. In the case of the Mexican football federation, this does not appear to be a problem, because teams sell their broadcasting rights individually. The problem is more likely the opposite: broadcasters have excessive bargaining power in negotiations with teams, partly because they have control of the advertising market and partly because they own of 5 the 18 league teams.

¹⁴ Source: El Siglo de Torreon 2009.

¹⁵ Televisa annual report 2009.

NORWAY

1. Introduction

Over the past decade there has been substantial regulatory interest in the sale of broadcasting rights to national and international football leagues. Both the European Commission as well as a number of national competition authorities have been formally or informally involved in these processes. The main competition issues has been whether the broadcast rights to football leagues could be sold collectively by football associations and whether the rights could be sold exclusively to one operator, or if this was in violation of competition law. In several cases the outcome has been an approval of collective sale, normally with a set of conditions intended to limit exclusive sale and protect competition between broadcasters and distributors downstream.

The broadcasting rights to Norwegian football are jointly managed by the Norwegian Football Association (“NFF”) and the association for the top football clubs in Norway (“NTF”). These rights have therefore historically been sold collectively rather than individually by the clubs. In 2005, all significant broadcasting rights for the period 2006-2008 were bought jointly and exclusively by TV2 - the major commercial public broadcaster in Norway, and Telenor - the incumbent telecom operator in Norway.

The Norwegian Competition Authority (“the Authority”) was concerned about possible anti-competitive effects of exclusive sale for the contract period 2009-2011. As a result, the Authority initiated and maintained a close dialogue with NFF and NTF throughout the process of formulating and negotiating new contracts. The Authority held several meetings with the parties and provided guidance in order to stimulate competition both within and across platforms, as well as to facilitate technological progress that may benefit the consumer in the long run. The authority did however not intervene formally in the sales process.

The new agreements cover the period 2009-2011, and were unique in the sense that the distribution rights were spread non-exclusively across a number of different operators on different distribution platforms. This paper briefly evaluates the outcome of the first year of the new agreements using a set of indicators of competition and consumer welfare; accessibility, end user prices, product innovation and process innovation.

2. Accessibility

For the period 2009-2011, the media rights to Norwegian football were spread between different operators on different distribution platforms. Live games on traditional TV were sold to the two public broadcasters in Norway –TV2 and NRK – and three of the eight games per round were shown on TV-channels included in the basic channel packages of all operators on traditional distribution platforms.¹ In contrast, under the previous contract only two matches per round were shown on channels in the basic channel packages. The remaining games were accessible through subscription to a pay-TV offering by TV2 similar to the previous period.

¹ Cable, DTH and DTT.

Perhaps more significant was the fact that all eight games per round were shown live on both IP-TV and web-TV² by different operators than traditional TV. Altibox, an IP-TV operator, offered all eight games per round in their basic channel package to approximately 100 000 households³ in Norway. On the web-TV platform, TV2 offered pay-TV products in competition with Schibsted, which purchased the rights on behalf of one national and thirteen regional newspapers. The newspapers competed head to head with TV2 in being the preferred choice for access to football on the web.

In 2009 all 240 games in the Norwegian Premier League were shown live on traditional TV, as well as on web-TV and IP-TV. This has challenged the hegemony of traditional distribution platforms. Fans of Norwegian football now have unprecedented access to football on a variety of platforms.

3. End user prices and production innovation

Data gathered by the Authority indicate that the number of viewers on both pay-TV⁴ and free-to-air increased in 2009 compared to previous years. This reflects in part the increased accessibility of Norwegian football on various platforms and operators, but may also be contributed to increased price competition and product innovation that tends to appear when different companies compete to attract the same customers.

As regards end-user prices on pay-TV, there were two significant changes in 2009. Firstly, the introduction of competition on the web-TV platform gave consumers access to football at lower prices compared with 2008. For some products, the price reductions came in the form of an increase in the amount of content offered for the same price. To illustrate this, in 2008 the price for an individual match on TV2's web-TV portal was 99 NOK while in 2009 the same 99 NOK gave access to all 8 matches in a round. Alternatively, some products were offered at a lower price for the same content. An example of this was the price for a monthly subscription to all matches which dropped approximately 20 % in 2009. Schibsted, the challenger in the market, also offered campaigns throughout the year with significant rebates, something that was absent when TV2 had exclusive rights under the previous contract period.

Secondly, consumers had more products to choose from in 2009. In 2008 consumers could only choose between buying access to an individual match and a monthly or a yearly subscription. In 2009, it was possible to also buy access to all 8 matches in a round, three and six months subscription, as well as a more limited product which offered near real-time highlights of all eight matches. It is likely that this contributed to increase the market overall, because consumers who previously had found the prices too high or the product selection too limited now entered the market.

Beyond the fact that consumers experienced lower prices and more product choices, IP-TV and web-TV also offered new technology that extended beyond the traditional TV offering. For example, customers on these platforms were able to follow multiple games live at the same time, the games could be accessed on-demand, and these platforms offered the possibility of providing the viewer with interactive services. Web-TV and IP-TV also offered the ability to access archived clips and matches. This type of product innovation introduced the viewer to a new way of consuming content firmly breaking with the traditional linear model of broadcasting.

² IP-TV in this context means distribution with "quality of service" in contrast to web-TV which is distributed as "best effort" over the top (OTT) on the open internet.

³ Approximately 5 percent of households in Norway.

⁴ Both traditional TV and web-TV.

4. Process innovation

Football is a type of content that normally generates high willingness to pay among the viewers. This is partly due to the fact that broadcasting rights are unique in the sense that there is only one Norwegian Premier League. In addition, football and perhaps sports in general, is a type of content that the viewer normally wants to see live. The combination of these features also makes the product attractive to advertisers. As mentioned earlier, this type of content has normally been sold collectively by the football associations, and often exclusively to one operator who have been able to extract some form of monopoly rents from the product. However, under the new contracts in Norway, where several operators across different platforms are competing to attract the viewer, we observe both price competition and product innovation.

In addition, there is also an increased pressure to operate efficiently. This implies a focus on reducing cost of producing and distributing the content. Given the fact that web-TV is distributed on the open internet, there is also a challenge for the web-TV operators to produce content that can compete with the quality of traditional linear TV. This is further complicated by the fact that football is a demanding product to produce, both because of the rapid movement on the screen, and because the live factor of sport content suggest a high number of simultaneous viewers.

To face this challenge, the web-TV operators made two significant changes to their production process; firstly, they both implemented adaptive streaming technology. This means that the signal that the viewer received was adapted to the available broadband capacity in the network so as to reduce buffering. From a viewer's perspective, this improved the viewing experience because the picture quality was automatically adjusted instead of the picture freezing when available broadband capacity was reduced.

Secondly, in order to distribute efficiently to a large number of users, the web-TV operators used content delivery networks⁵ (CDN) which allowed them to cache content on local servers strategically located at various places in Norway. This contributed to both a reduction in costs as well as more efficient utilisation of the underlying network infrastructure. Also, the potential for bottlenecks in the distribution network were reduced. In sum, these changes contributed to improve the quality of the transmission and may prove to be a key driver for the convergence between web-TV and traditional television.

Football content also has the potential to be a key driver for switching consumers to the IP-TV platform, and as such it may very well contribute to the continued expansion of high speed fibre networks across Norway. This in turn could facilitate dynamic competition between traditional distribution platforms such as cable and satellite and the IP-TV platform.

5. Summary

There are a number of positive experiences from the non-exclusive sale of broadcasting rights to Norwegian football. Prices have fallen, access has increased, new products have been introduced, new technology has been implemented and operators have been forced to take cost reducing measures.

The Norwegian Competition Authority also welcomes the dynamic competition which has emerged between traditional distribution platforms and distribution of content over the open internet. Due to the

⁵ A content delivery network or content distribution network (CDN) is a system of computers containing copies of data, placed at various points in a network so as to maximise bandwidth for access to the data from clients throughout the network. A client accesses a copy of the data near to the client, as opposed to all clients accessing the same central server, so as to avoid bottleneck near that server. http://en.wikipedia.org/wiki/Content_delivery_network.

technological challenges related to distribution of football on the web, it is likely that the experience gained by these operators will give future benefits as the delivery of content over the internet is expanded to new areas.

This case is an example of constructive dialogue between the Norwegian Competition Authority and the parties. Achieving a good solution for the consumers without formal intervention significantly reduced the regulatory costs for the Authority as well as the costs and regulatory uncertainty for the owners of the broadcasting rights.

POLAND

1. Introduction

The economic importance of sport in Poland is growing noticeably. The increasing number of operators occurring in sport and relationship between them suggest that we are dealing with the creation of a new market in Poland. The rapid development of the sports market is caused by many factors, namely: rising number of people watching the sports performances, the increasing interest of the media to broadcast the sporting events, higher turnover and profits generated in the sports market, the development of sports sponsorship and, of course, the globalization of sport. Primarily sport has become important business as a consequence of the increasing value of broadcasting rights, especially television rights to sports events.

Due to the growing importance of the economic activities connected with sport, its significant social and cultural role and the fact that the illegal agreements concluded in relation to sport, as any other business agreements, might emerge and be harmful for consumers and the state economy, the Office of Competition and Consumer Protection observes and reacts to any symptoms of competition infringements in the sport sector.

2. Case study

The increasing demand for sports media rights and its restriction to very few sports federations brings the reduction of their availability. Such market circumstances are very likely to cause anticompetitive behaviours, therefore harm consumers in terms of higher prices and limited access to the services.

The interdependence between sport and television may be easily spotted. The most notable cases investigated by the Office of Competition and Consumer Protection concerning the issues of sport and competition impediment regarded the trading of sports media rights.

One of the decisions adopted on 29 May 2006 involved the Polish Football Association (PZPN) and TV Broadcast of Canal +.¹ The President of UOKiK found that the entities concluded an anticompetitive agreement consisting in granting Canal + a privileged position (*priority rights*) in respect of obtaining the exclusive broadcast license for football league matches from PZPN. Canal+ was imposed a fine amounting to PLN 7.37 million and the fine for PZPN exceeded PLN 440 000. The serious nature of the breach of antimonopoly law was taken into account when fixing the amount of the penalties.

The current model of marketing of the rights to broadcast football matches in the Polish league is characterised by three essential features. First of all, licenses for broadcasting are joint (cumulative). Football clubs, which are the original owners of the property and intangible rights to all of the played games, do not grant licenses on their own, but jointly through the Association. Consequently, the market on the supply side is highly concentrated and the competition herein significantly restricted. Secondly, granted licence is exclusive. The purchaser is entitled to exercise the licensed rights excluding any other entities, because neither the vendor of license nor the buyer may grant additional licenses to third parties without the consent of the contractor. Thus, the competition on the demand side is also impeded, as only

¹ Decision Nr DOK-49/2006 of May 29, 2006.

one entity can be the purchaser of the rights. Only the potential competition for the acquisition of exclusive rights for further periods under the license remains unaffected. Third feature is that the media rights contracts are concluded for a long duration.

The President of UOKiK decided that the Polish Football Association had an exclusive right to grant the license for the broadcast of football matches. Any TV station which wanted to broadcast the matches of the national 1st and 2nd league and the Polish Cup or their parts had to take part in a tender organised by the Association. What is important, the right for live broadcast of the league matches (which is the most attractive for the TV audience) was granted by PZPN as an *exclusive license* to the broadcaster which submitted the best bid in terms of finance. In 2000 PZPN signed a contract on the broadcast of football matches with Canal+ (formerly Polska Korporacja Telewizyjna). The contract was valid until 2004/2005 season and it contained a clause which granted Canal+ the priority to obtain the exclusive license for broadcasting the matches from 2005/06 to 2008/09. Pursuant to this provision the Association was obliged to inform the station about the conditions of the bids submitted by its competitors. According to the contract, Canal+ obtained the license automatically if within 30 days it presented the conditions equal to the bid considered by the Association to be the most favourable. The participants of the tender announced in November 2004 were informed about the *right of pre-emption* concerning the exclusive license for the live broadcast of club matches which was granted to Canal+. The relevant provisions which secured the interests of Canal+ were also included in the tender regulations. According to UOKiK's information, at least one TV station resigned from the bid to obtain the license due to unequal competition. The tender (resolved in March 2005) was finally won by Canal+ whose offer received the highest rating.

The key issue was the concept of market definition, with an emphasis on determining the relevant market - whether the market should be narrowly defined as the broadcasts of the Polish league football matches, or more broadly including other matches or even other sporting events on TV.

The President of the Office found that in this case the national market for rights to broadcast football matches of the Polish league was the relevant market. The territory of Poland was adopted as a relevant geographic market, due to the geographical scope of the license granted to the area covering the whole country. In determining the market, the President of the Office took into account the jurisprudence of the European Commission and varying degrees of popularity concerning particular football games in Poland.

UOKiK has concluded that the broadcasts of the football games play lead role for the TV operators, because they are particularly distinguished by the viewers, resulting in the lack of substitutability of these broadcasts with any other sporting events coverage. It stems from the fact that in Poland, as in the majority of European countries, football is regarded as a "national" sport and is very popular not only among those generally interested in sport. The characteristic features of all sports broadcasts, are their "short life" - viewers are usually interested only in "live" broadcasts - and explicitly limited substitutability of sporting events - viewers want to watch a specific sporting event, and rarely can be satisfied with a TV transmission of other games and competitions. Even within the discipline, which as mentioned, is of greater popularity than any other sports, a clear division in terms of attractiveness for audiences between particular football games is noticeable. Broadcasts of the football matches of the national team attract more viewers than the matches of the foreign league or European cup-ties.

Both PZPN and Canal+ appealed the decision to the Court of Competition and Consumer Protection. In the decision of 14 February 2007 the Court upheld the decision of the President of UOKiK, reducing however the fine imposed on PZPN by half. The case reached the Supreme Court, which in the judgement of January 7, 2009, dismissed the cassation filed by Canal +.

Another case concerned antitrust proceedings against TV broadcaster Cyfrowy Polsat.² In 2009 following the analysis of data found on the company's website and complaints lodged to the Office, UOKiK initiated the investigation. The complaints regarded the sale of rights to public screening of Euro 2008, to which Cyfrowy Polsat had exclusive rights. If pub or restaurant owners wanted to transmit the championship, they had to conclude an agreement with the TV operator.

The President of UOKiK established that the company made the acquisition of rights to public screening of championship subject to the purchase of decoder and technical support service. Therefore, the undertakings had to incur additional costs by paying for the offer they could use only on the occasion. UOKiK has reservations about the offers in which a dominant undertaking makes the conclusion of an agreement subject to fulfilment of additional conditions by the purchaser (e.g. obligatory purchase of other products).

In the course of proceedings Cyfrowy Polsat undertook *inter alia* to repurchase decoders from the undertakings, which required it, and to reimburse the costs of technical support to all entrepreneurs – irrespective of the fact whether or not they still have the decoder. Furthermore, the company undertook to refrain in the future from applying the clause contested by the President of UOKiK and to report on the fulfilment of the commitments during next three sports events for which it will acquire exclusive rights to the sale of rights to public broadcasting. In the case of remaining obligations – within 120 days of the issuance of the decision. The President of UOKiK defined the relevant market as the national market of the sale of rights to public broadcasting of Euro 2008.

Consequently, the President of UOKiK did not impose on the undertaking any financial penalty, which could amount up to 10% of the revenue earned in the preceding year. However, the financial sanctions might be applied when a company obliged to cease unlawful practice fails to fulfil the commitments. Then, the fine may amount up to EUR 10,000 per day of delay in execution of commitment decision.

Another area where competition rules are applied to sports is the M&A cases. Private investment in sport continues to rise, and frequently clubs are becoming the property of business entities. In the year 2004 the President of UOKiK gave consent for a transaction consisting in taking over Legia Warszawa SSA Sport Club by International Trading and Investments Holdings S.A. (ITI).³ The latter acquired 80% of Legia's shares.

Purchase of 80% of shares of the football club Legia Warszawa SSA had a commercial nature. ITI-the buyer believed that in reasonable term, is able to lead the club to the expected profitability through the effective use of existing resources, knowledge and skilful management of finances, thus to improve the athletic performance of the club and increase its market value.

The notified concentration did not affect the market horizontally. It was not possible to define the product market, which involved two undertakings participating in the concentration (common market) and where the concentration would lead to a combined share in geographic market exceeding 20%. The merger did not affect the market vertically either. It was not possible to extract the product market, in which at least one of the undertakings participating in concentration operated, and which would be the buying or selling market for the second one. Furthermore, the individual or combined market share of undertakings participating in the concentration in these markets did not exceed 30%. The only market regarded as a possible relevant market was the market of the sale of sports media rights.

² Decision Nr DOK 1/2010 of February 12, 2010.

³ Decision Nr RWA-5/2004, February 2004.

Having the above in mind, the President of the Office of Competition and Consumer Protection stated that the merger would not result in significant impediments to competition in the market, in particular, by the creation or strengthening of a dominant position in the market.

3. Conclusion

The interaction between sport and competition law is undisputable. Sport has become an industry subject to commercialisation and therefore competition rules should be applied. It is important for competition agencies to monitor and regulate the behaviour of stakeholders and participants involved in the sport sector, especially because of sports' social significance. So far, the Polish Office of Competition and Consumer Protection has tackled a small number of cases in this respect, almost exclusively regarding coverage of sports events, but given that the market is developing, it can be foreseen that several other matters (e.g. sponsorships, transfers of players, competition between leagues) in the field will certainly attract UOKiK's attention in the future.

SPAIN

1. Introduction

When discussing the relationship between sports and competition law in Spain, the first thing to take into account is that sports always mean football (soccer) in Spain.

Many sports are played in Spain, some of them have a significant number of supportive fans and with the proliferation of free terrestrial digital TV channels, and there are more opportunities for them to be broadcasted.

Moreover, some events, like the Olympic Games, can attract wide audiences for a significant number of sports. Even so, Olympic Games take place once every four years, for just fifteen days. And people only want to watch those minority sports during the Olympic Games in case a medal is won.

Notwithstanding, in Spain there is only one sport that can attract a huge fan base of avid viewers that are ready to pay important sums just to watch one game of its home team or its main rivals. And that is football.

The economic sums that surround football do not cease to increase every year, climbing to even more astronomical heights. Last year, a team was ready to pay 96 million euro for a player. This record will only hold for a few years. Football teams are huge machines for making (and losing) money, and one of their main feeders are TV broadcasters.

The increasing economic importance of football has gone hand to hand with the introduction and development of pay TV and a huge array of TV channels. Mutual dependence between football teams and TV broadcasters has grown over the years.

For pay TV broadcasters, football was from the start the mainline for attracting a wide base of subscribers with a high ARPU (average revenue per user). Therefore, competition for football broadcasting rights has always been a symptom of intense competition in the pay TV market.

This competition, which on occasions has been fierce, has created the so-called “football wars”, where competition authorities have played an important part, although many times in uncharted waters, where it was difficult to assess the possible effects of a decision.

The number of competition issues raised in those cases is elevated. However, this written submission will only discuss the most interesting.

Firstly, a brief summary on the evolution of football and competition cases during the last 20 years in Spain will help to give some background. Secondly, we will provide a more detailed assessment of some interesting themes:

- Relevant markets definition
- Effects of exclusive broadcasting rights on consumers
- Effects of individual sales of broadcasting rights by football teams
- Effects of pooling agreements on competition

2. Evolution of football and competition cases in Spain

The first major case involving football in which competition law was applied took place in 1990, just after the introduction of the first private national TV broadcasters in Spain.

This case started after a complaint from two private TV broadcasters, Antena 3 and Telecinco, who were unable to broadcast matches and summaries of those football league matches played in Spain because the owner of these rights, the Spanish Football League, had sold them in exclusivity to Canal+ (the third private national TV broadcaster in Spain, in terrestrial pay TV) and FORTA (an association of regional public TV broadcasters in Spain), for eight years and with English clauses at the end of the contracts.

The Spanish Competition Authority issued a decision¹ declaring:

- The Spanish Football League had committed an abuse of dominant position in the wholesale market of football broadcasting rights, by impeding the access of Antena 3 and Telecinco to the broadcasting rights of summaries of Spanish League matches.
- The agreements between the Spanish Football League on the one hand, and Canal+ and FORTA on the other, were anticompetitive and void due to their excessive duration and their English clauses.

In 1996 Spanish League broadcasting rights in Spain suffered a major transformation. In particular, the joint selling system that existed before was changed into an individual sales system, where each team sold individually its own broadcasting rights for the Spanish Football League.

This change had an immediate effect on the market, because several TV operators (Sogecable/Canal+, Antena 3 and TV Cataluña) bought the broadcasting rights of different football teams. That caused inflation in the prices paid by each TV operator for the broadcasting rights of each team, and allowed a spectacular rise in the expenditures of football teams in Spain in acquisition and salaries of football players.

The confluence of different buyers raised some doubts, mainly because it was unknown whether you needed the broadcasting rights of both teams to show a match, or just those of the home team (arena system). Moreover, if there was no co-ordination between the different buyers when setting the day and time of matches, there was a risk of not recouping what was paid to football teams.

At the same time, in 1997 both Sogecable and Telefónica were launching their pay TV satellite platforms, so there was an opportunity to broadcast all Spanish League matches (on PPV or on different channels), and use those Spanish League matches to attract subscribers.

This controversy was solved by the creation in December 1996 of AVS, a joint venture used to pool the Spanish League broadcasting rights bought by Sogecable, Antena 3 and TV Cataluña, in exchange of shares (40%, 40% and 20% respectively). Within AVS an agreement was reached (AVS I) in order to establish a system that allowed to assign the matches broadcasted by each operator in each competition day of the Spanish League: 2 on free TV (one by FORTA, where TV Cataluña participated, and the other by Antena 3), 1 on pay TV (by Sogecable), and 7 on PPV (initially only by Sogecable on its pay TV satellite platform).

¹ See case 319/92: http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=33091&Command=Core_Download&Method=attachment.

In 1997 Telefónica bought Antena 3 shares in AVS, and in 1998 the AVS agreement was changed (AVS II) in order to accommodate Telefónica: 1 match of each Spanish League competition day would be broadcasted on free TV (FORTA), 1 on pay TV (by Sogecable), and 8 on PPV (by Sogecable and Telefónica in their satellite pay TV platforms).

The AVS I and AVS II agreements were notified to the European Commission. After the objections raised by the European Commission against AVS II, the broadcasting on PPV matches was open in 1999 to all pay TV operators (mainly, regional cable operators).

In 2002, Telefónica decided to sell its satellite pay TV platform to Sogecable, a merger which was initially notified to the European Commission, but later referred to the Spanish Competition authorities. Within this operation, Sogecable also acquired Telefónica's shares in AVS.

The merger Sogecable / Vía Digital was authorised with conditions by the Spanish Competition authorities.² Among the conditions imposed, in force for five years, some addressed competition problems detected concerning football broadcasting rights. In particular, Sogecable and AVS could not acquire Spanish League broadcasting rights from teams for more than three years, could not use English clauses of prior contracts, and at least should maintain the existing access to Spanish League broadcasting rights by free TV and PPV operators.

In 2006, when Sogecable / Vía Digital conditions were still in force, Mediapro started to acquire Spanish League broadcasting rights from teams for five years, benefiting from the limits Sogecable had, which did not allow this company to match Mediapro's offers. In July 2006, Sogecable, Mediapro and TV Cataluña signed a new pooling agreement, within AVS, of Spanish League broadcasting rights acquired by Mediapro and Sogecable (AVS III). This agreement also stated that Sogecable would acquire sole control of AVS (by modifying voting rules within AVS) and that Mediapro would acquire 25% of AVS's shares (including TV Cataluña's 20%). Moreover, Sogecable, Mediapro and TV Cataluña signed a non-competition clause in the acquisition of Spanish League broadcasting rights from teams.

AVS III gave place to a merger (Sogecable/AVS), which was examined by the Spanish Competition authorities and subject to some conditions.³ In particular, Sogecable had to ensure access to Spanish League broadcasting rights by TV operators following objective, transparent and non-discriminatory conditions, with contracts of no more than three years.

This agreement was also examined under an antitrust investigation, which covered not only AVS III, but also the contracts between football teams and media operators (like Mediapro and Sogecable) for the sale of Spanish League broadcasting rights, and other joint pooling agreements of Spanish League broadcasting rights between Mediapro and regional Spanish TV operators.

In April 2010, the Spanish Competition Authority issued a decision⁴ on this investigation that declared:

² See case N-280 and report C-74/02 http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=26684&Command=Core_Download&Method=attachment and http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=34583&Command=Core_Download&Method=attachment.

³ See case N-06094 and report C/102/06 http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=26490&Command=Core_Download&Method=attachment and http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=33708&Command=Core_Download&Method=attachment.

⁴ See case S/0006/07 http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=36085&Command=Core_Download&Method=attachment.

- Acquisition contracts of Spanish League broadcasting rights between football teams and media operators can only have a maximum term of three seasons from the signing date, although exceptionally, those contracts were allowed until the end of season 2011/2012. English clauses and automatic extensions are not allowed.
- Joint pooling agreements of Spanish League broadcasting rights are only allowed for a maximum of three seasons.
- Non competition clauses for the acquisition of Spanish League broadcasting rights from teams are prohibited.

Prior to this decision, the Spanish Competition Authority published a market study⁵ about Spanish League broadcasting rights, which examined the competitive effects of the existing framework of agreements between football teams and media operators, and of its possible alternatives. Downstream agreements between media operators for the broadcasting of Spanish League football matches in different windows were also studied.

The conclusions of this study issued several non-binding voluntary recommendations, which could help to configure a framework for the commercialisation of Spanish League football media rights, fully respectful of competition law.

Finally, there is an on-going investigation (case S/0153/09), which was opened in September 2009 and analyses whether Mediapro's commercial activity with TV operators in Spain, involving Spanish League broadcasting rights, has violated competition law.

3. Relevant market definition

A central element in the above mentioned competition cases is the definition of the relevant markets, in particular, relevant product markets. In the case of the relevant geographical markets, it is evident that sport and TV preferences, among others for linguistic and cultural reasons, are national.

Although a proper relevant product market definition should start the other way round, in order to facilitate the exposition we will start from a wide market definition, analysing the reasons from a demand side substitutability point of view that justify the narrower market definition used in the above mentioned cases.

The widest product market definition in this kind of cases would cover the whole array of media contents that can be broadcasted by a TV operator. Films, TV series, documentaries, news programs, shows and sports are some of the candidates.

However, sports have a particular characteristic that differentiates them from other TV contents. People want to watch them live, and a difference of minutes in its broadcasting greatly reduces their value. Another particularity is that the most attractive sports (*i.e.* football), are able to attract an audience which is usually much higher than the average audience of the TV channel. These reasons, among others, justify a narrower definition.

The second question is whether football broadcasting rights have clear substitutes among other sports from the point of view of TV operators and final consumers.

If we take into account audiences, many sports (basketball, tennis, golf, handball, etc.) have reduced audiences that cannot be compared with football's audiences. Nevertheless, there are some sports or

⁵ See http://www.encompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=34755&Command=Core_Download&Method=attachment.

sporting events (Formula 1, Motorcycle races, Olympic Games, etc.) that are able to attract wide audiences, although they are usually not as high as football.

Even so, we have to keep in mind that those events are episodic (*i.e.* Olympic Games) or do not have enough appeal, as to attract enough paying customers.

From the point of view of a pay TV operator in Spain, football is an essential element of its offer in order to attract or retain subscribers. Moreover, past experience in Spain shows that a pay TV channel (like Canal+ since the early 90's; Gol TV or Canal+Liga since 2009) can attract a significant number of subscribers thanks to the appeal of football, which is not equalled by any other TV content.

Once we reach the conclusion that football does not have substitutes among other sports from the point of view of pay TV operators, we have to analyse if all football events are within the same market.

In this case, we have to analyse the differences between Spanish League and King's Cup matches, concerning Spanish teams, and other football matches, whether matches of the European competitions (Champions League; European League) or matches of the Spanish national team (World Cup, European Cup, classificatory rounds and friendly matches).

The particularity of Spanish League and King's Cup matches is that they take place almost once a week during nearly ten months, include a huge number of matches (more than 400 a year) and always involve Spanish teams. These characteristics allow pay TV operators to develop significant commercial strategies to attract and retain subscribers.

European competitions also involve a significant number of matches, although the number of those concerning Spanish teams is much lower. In addition, there is an uncertainty about what will be the exact number of matches played by each Spanish team, because they could be eliminated in the early stages of the European competition. Those issues make those matches less attractive for pay TV operators.

In the case of matches involving the Spanish national team, they are quite episodic and their number is reduced during the year. Moreover, the national team may not qualify to the international competition, aggravating the uncertainty for the pay TV operator, which would have problems to develop a commercial strategy using broadcasting rights for those matches.

Another point to take into account is that the Spanish law states, since 1997, that a certain number of football matches are of general interest and should be broadcasted on free TV. In particular, during the 2009/2010 season the following football matches were declared of general interest:⁶

- One match per competition day in the First Spanish Football League
- Official and friendly matches of the Spanish national team
- King's Cup Final
- One match per competition day or round involving Spanish teams since eighth finals round of the Champions League, and the final in any case
- Europa League Final involving a Spanish team

⁶ <http://www.csd.gob.es/csd/documentacion/01GabPr/Noticias/aprobado-el-catalogo-de-acontecimientos-deportivos-de-interes-general-22-07-2009>.

All those limitations significantly decrease the value of the matches of the Spanish national team or of the Champions League for a pay TV operator. In the case of the Spanish Football League this detriment is less important, because there are other nine matches within the same competition round.

Finally, we have to underline supply side differences between the broadcasting rights of the Spanish League and the King's Cup, which are sold individually by each team, and broadcasting rights of matches of the Spanish national team (sold by the Spanish Football Federation or by International Football Federations) or of the Champions League / European League (mostly sold by UEFA).

In conclusion, there are several reasons that justify a narrow product market definition in Spain, which would be limited to broadcasting rights of the Spanish Football League and King's Cup.

In addition, within this definition we have to differentiate two vertically related markets.

- An upstream market, where football teams are suppliers and media operators are buyers. This market does not exist in countries where broadcasting rights are sold by the Leagues themselves.
- A downstream market, where the pooling agreement or the media operator who has directly or indirectly acquired the broadcasting rights of the Spanish Football League and King's Cup of all teams (nowadays Mediapro), is the seller, and TV operators are the buyers.

It can also be possible to differentiate an emerging market for new modalities of commercialisation of Spanish Football League and King's Cup media rights (mobile phone, Internet, cinema, etc.). However, this issue has not been really explored by the Spanish Competition Authorities.

Other sports' fields where Spanish Competition Authorities lack as much experience defining relevant product markets and where interesting questions are raised are:

- Spanish national team football matches: are all its matches within the same product market, or each competition is a relevant market? Other matches played by other national teams are in the same product market?
- Other regular sports events: is each sport a different product market, or could they be included within the same product market if they share the same sector (*i.e.* motor sports, like Formula 1 and Motorbike championships) or they have similar audiences?

4. Effects of exclusive agreements on consumers

One of the most important debates when assessing the above mentioned cases was deciding if downstream exclusive agreements, especially those involving pay TV, which give exclusive broadcasting rights of some football matches to just one TV operator, are positive or harmful for final consumers.

On the one hand, exclusive agreements generate incentives among pay TV operators to compete between them, and reduce the probability of tacit co-operation in the pay TV market.

However, the risks are:

- The confluence of several exclusive agreements involving different pay TV operators will force consumers to subscribe several pay TV offers if they want to watch all matches played by their favourite team.

- The existence of one pay TV operator with exclusive access to all Spanish League football matches broadcasted on pay TV does not allow other pay TV operators to compete effectively, as Spanish League football is an essential driver to gain and maintain subscribers on pay TV.

Spanish Competition authorities have reached a tentative equilibrium on this issue, by:

- Allowing a pay TV operator to exclusively acquire one match per competition day of the Spanish League and the King's Cup.
- Establishing the obligation of giving access to other pay TV operators, following transparent, objective and non-discriminatory conditions, to other matches of the Spanish League and the King's Cup broadcasted on pay TV.

With this solution, incentives remain to compete in the differentiation of pay TV offers and consumers may subscribe with one pay TV operator to have access to all Spanish League and the King's Cup matches. At the same time, a minimum access to those broadcasting rights is ensured for other pay TV operators, allowing them to exert a competitive pressure on the pay TV operator who has exclusive rights on some matches.

5. Effects of individual sale of broadcasting rights by football teams

One particularity of Spanish Football League and King's Cup broadcasting rights is that they are sold individually by football teams.

Apparently, this characteristic is pro-competitive, because it offers TV operators several alternatives when acquiring broadcasting rights.

Even so, there are several issues that significantly reduce the possible pro-competitive effects:

- The most attractive teams are Real Madrid and Barcelona, who have a huge following in Spain, in comparison to other Spanish football teams.
- Football teams have an agreement within the Spanish Football League, which requires TV operators to have broadcasting rights of both teams in order to broadcast a match.
- Consumers risk not having access to all Spanish League and King's Cup matches, or all matches played by their favourite team, by subscribing with just one pay TV operator.
- For the same reasons, national sales of broadcasting rights of summaries of matches and international sales of Spanish League matches are put in risk.

These characteristics may generate competition problems, among others:

- Giving an unfair advantage to the media operator who has the broadcasting rights of the majority of the Spanish League teams, especially Real Madrid and Barcelona.
- Making pooling agreements unavoidable, in order to define (at least) the time and day when each match is played and broadcasted.
- Risking foreclosure of the minor teams, whose rights are only attractive to the media operator who holds the broadcasting rights of the majority of the Spanish League teams, and who may decide not to acquire them until the last minute, in order to obtain better economic conditions when buying those rights.

Moreover, as a way to compensate their reduced negotiation power, several minor teams have reached a joint selling agreement of their broadcasting rights, which reduces the apparent wide offer of the Spanish system.

6. Effects of pooling agreements

As stated above, pooling agreements between acquirers of football teams' Spanish League broadcasting rights may be unavoidable in order to ensure an efficient exploitation of those rights.

Nevertheless, we cannot forget that those acquirers are usually vertically integrated, so they have incentives to define a downstream broadcasting windows system that unduly favours them, impeding a downstream access by pay TV operators outside the pooling agreement following transparent, objective and non-discriminatory conditions.

Moreover, those pooling agreements may produce significant anticompetitive effects, by generating co-ordinated effects in the upstream market between the parties of the pooling agreement.

In order to minimise those negative effects, the Spanish Competition authority has limited to three years the duration of pooling agreements, has prohibited any non-competition clauses in the upstream market, and has established an obligation of access by third parties to a significant part of the broadcasting rights in the downstream market, following transparent, objective and non-discriminatory conditions.

SWEDEN

In this contribution the Swedish Competition Authority (SCA) focuses on two issues:

- Exclusive broadcasting rights
- Barriers to entry

1. Exclusive broadcasting rights

The SCA has dealt with the issue regarding exclusive broadcasting rights to sporting events in a case regarding a notified acquisition. During the year prior to the acquisition the two companies involved had acquired nearly 50% of all the broadcasting rights to sporting events sold in Sweden during that year. The SCA investigated the potential effects on competition on the market for acquisition of broadcasting rights to sporting events.

1.1 *TV4 AB's acquisition of C more group AB*

1.1.1 *Observed problems for competition*

When TV4 AB (TV4) acquired C More Group Entertainment AB (C More) it meant that two companies controlling a major part of the broadcasting rights to sporting events on the Swedish market became one. The SCA investigated whether TV4's strong position that would follow the acquisition could have any negative effects on competition. The two companies involved in the acquisition were considered to be competitors, not only on the upstream market but also on the downstream market. The fact that TV4 primarily offers free TV channels and C More primarily offers premium pay TV channels did not affect the SCA's assessment since the SCA found that the substitutability between TV channels depends on the content and not on the form.

1.1.2 *Facts of the case*

In July 2008 the SCA received a notification regarding TV4's acquisition of C More. The SCA decided to carry out a second phase investigation of the concentration (one plus three months). The acquisition was also notified to the Norwegian and Finnish competition authorities.

TV4 is the leading TV company in Sweden. It is active on the programme channel market with a number of specialised channels alongside Sweden's biggest television channel TV4. The TV4 channel is provided to consumers through distributors and financed by advertisements.

C More is one of the leading premium pay TV providers in the Nordic region. C More provides premium Pay TV under the brand CANAL+ and the concept builds on exclusive premium rights for sports, movies and series. CANAL+ is provided to subscribers through distributors for a monthly fee.

1.1.3 Relevant markets

Both companies were active on the market for acquisition of broadcasting rights (the upstream market), as well as the market for offering channel packages to distributors (the downstream market). The upstream market is in relation to the downstream market a vertical market and the two markets are closely interlinked.

The SCA defined the relevant geographic market to be the territory of Sweden.

1.1.4 The market for acquisition of broadcasting rights to sporting events (Upstream market)

The upstream market may be divided into several markets, for example the acquisition of broadcasting rights for premium films, different football and sporting events and TV series.

According to the SCA's investigation the acquisition did however neither seem to reinforce nor create a dominant position on any of the markets for acquisition of broadcasting rights for older films and series or the market for acquisition of broadcasting rights for premium films. However, since both companies were considerable customers on the market for acquisition of broadcasting rights to sporting events, the SCA chose to investigate the effects of the concentration on that specific market.

Broadcasting rights for sporting events represent a so-called "key right" for existing and potential programme companies. The European Commission (Commission) has particularly emphasised that important football events makes it possible to create and develop a strong trademark for a TV channel. The Commission has, moreover, defined the relevant market for acquisition of broadcasting rights to football events with respect to different types of events, for example continuous season long events like national football leagues and recurring events like the World Cup.

According to a survey the most popular sports in Sweden are football and ice hockey. The broadcasting rights to the Swedish national football league (Allsvenskan) and Swedish national ice hockey league (Elitserien) are two "key rights" since they are two of the most attractive and expensive broadcasting rights on the Swedish market. On basis of the Swedish viewers' preferences and the criteria the Commission has developed and adopted in previous cases the acquisition of broadcasting rights to football and ice hockey could be defined as two separate relevant markets.

1.1.5 The market for offering channel packages to distributors (The downstream market)

The companies involved in the acquisition argued that their activities on the downstream market were not overlapping since they regarded themselves active on different relevant product markets. According to their arguments premium pay TV channels should be considered as complimentary to free TV channels rather than substitutable. The SCA's analysis did not however support such arguments. On the contrary, the SCA considered that TV channels are substitutes, both from a consumer's and a distributor's point of view, depending on the contents. According to the SCA's investigation the companies involved in the acquisition consequently competed on the downstream market for offering channel packages to distributors.

1.1.6 Dominant position and competition test

During 2007 TV4 and C More acquired nearly 50% of all the broadcasting rights to sporting events sold in Sweden. The two companies owned some of the most attractive and expensive broadcasting rights to sporting events, for example Allsvenskan, Elitserien and the English Premier League. The SCA's investigation showed that there was an actual barrier to entry since it would be necessary for a potential customer of broadcasting rights to sporting events to have a well established position on the downstream market.

TV4 and C More argued that the market for acquisition of broadcasting rights to sporting events is a so called “bidding market”. Historical market shares will therefore not have any effects on future bidding procedures. The SCA’s investigation did, however, indicate the opposite. The owner of broadcasting rights could have an advantage in future tenders since they had built a customer network together with the distributors. Moreover, customer mobility is limited due to lengthy subscription deals. Existing market shares is therefore an indication of future market positions since the evaluation of the broadcasting rights depends on the customers’ possibilities to commercialise the broadcasting rights on the downstream market.

The SCA found that TV4 would probably be in a dominant position following the acquisition on the basis of market shares, distribution of the most attractive and expensive broadcasting rights and the barrier to entry.

1.2 Conclusion

Nevertheless, even if TV4 could enjoy advantages in future tenders because of the present allocation of broadcasting rights, the SCA concluded that the number of strong competitors downstream on the Swedish market would be enough to neutralise any restrictions of competition on the upstream market. The downstream market is not only characterised by strong selling companies but also by strong distributors as customers. In addition, a programme company does not only offer sports in their channels. Popular films and TV series are examples of alternatives to sports. Taking this into account, the SCA found that TV4’s negotiating position would not change to such an extent, as a result of the acquisition, that TV4 could shut out competitors or increase consumer prices. The remaining competition power on the market was accordingly considered to be sufficient to maintain an effective competition even after the acquisition.

1.3 Postscript

The broadcasting rights to the English Premier League, which the SCA considers to be a so-called key right, were sold again last year. TV4, which had acquired the broadcasting rights through the acquisition of C More, then lost the rights to one of its main competitors.

2. Barriers to entry

The SCA is currently investigating whether the rules and statutes of organisers of motor sports events restrict competition in a way that cannot be justified. The restriction of competition consists of hindering competing races. In practice it may be difficult for newcomers to organise racing competitions because it can be hard to get access to officials, drivers and racing tracks which can result in an entry barrier.

2.1 The Motorsport case

2.1.1 Facts of the case

The motorsport case was initiated after a complaint concerning the Swedish Automobile Sports Federation (SBF) and the Swedish Motorcycle and Snowmobile Federation (SVEMO).

The conducts at issue are as follows:

- Withdrawing officials’ licenses
- Withdrawing drivers' licenses
- Hindering organisers and owners of racing tracks

2.1.2 *Relevant background to the case*

The Swedish Sports Confederation (RF) is the nationwide umbrella organisation for Swedish sports. For each specific sport there is a so-called Specialised Sports Federation (SF) and in the field of motorsport the SFs are SBF and SVEMO. All SFs are non-profit organisations and they grant permits to organise competitions, including the Swedish Championships.

According to the statutes of SBF and SVEMO, in order to be permitted to organise or participate in competitions there is a requirement to hold a license issued by SF. Such licenses are sold to drivers and to owners of motorsport racing tracks by SBF and SVEMO. An important part of the license is that it automatically gives the licensee an insurance policy. In addition, SBF and SVEMO amongst other things organise courses for drivers and also officials who are also required to hold a license issued by SBF or SVEMO.

SBF and SVEMO, respectively, are in their capacity as SFs part of the pyramidal structure of sports through which they are also connected to the Fédération Internationale de l'Automobile (FIA) and the Fédération Internationale de motorcyclisme (FIM).

SBF's¹ and SVEMO's² members are motor clubs, in which drivers and officials are members. Motor sport competitions are organised by the motor clubs.

The membership in a motor club is voluntary and any member may at any time choose to terminate his or her membership. But as long as you are a member of the organisation, you must comply with the statutes and competition rules which exist within the SBF and SVEMO organisations.

SBF and SVEMO require their members to remain loyal to the organisation. The so-called loyalty rule is expressed in their respective sets of rules which also refer to RF's statutes. According to the loyalty rule a member can only participate in events organised by other actors, other than SBF or SVEMO, if SBF or SVEMO approve such participation. If a member participates in an event organised by another actor without previous approval from SBF or SVEMO, he or she may risk being punished.

2.1.3 *Competition law issues*

The Swedish Competition Act prohibits restrictive agreements between competitors and abuse of a dominant position. The SCA also applies the competition rules of the European Union.

In this particular case, both Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) seem to be applicable.

The case law of the European Court of Justice has established that competition law also applies to sports, to the extent it constitutes an economic activity. According to the Meca-Medina³ ruling, a restriction to competition may not be incompatible with competition law as long as it has a legitimate objective. However, it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them on a case-by-case basis.

The Commission has indicated some examples of rules that are likely to infringe the rules of competition. The Commission adds that it is however not possible to establish an exhaustive list of

1 SBF has 450 motor clubs which altogether have 110 000 members.

2 SVEMO has 600 motor clubs which altogether have 140 000-150 000 members.

3 Case C-519/04, David Meca-Medina and Igor Majcen v. Commission, REG 2006 s. I-6991.

examples of such rules which can be justified by legitimate objectives.⁴ One of the examples of rules likely to infringe competition law is rules that protect organisations from competition.

The SCA's preliminary assessment is that the loyalty rule impedes the possibility to compete and should be considered to be a restriction of competition. It could be difficult for newcomers to gain access to officials, participants and courses, which mean an entry barrier. The members have no real option to leave SBF or SVEMO since it will not be possible to participate in the majority of events held in Sweden, including national championship races.

Further the SCA has noticed that according to the rules of appeals that SBF and SVEMO apply, a member is restricted to an internal procedure. The rules consequently prevent members to turn to courts of law with their appeals. The Commission has also identified such rules likely to constitute an infringement of competition law.⁵

One of the main issues the SCA is currently dealing with is the application of the Meca-Medina test. The SCA has to decide whether the objectives we have identified are legitimate or not.

The SCA has identified two possible objectives that also could be legitimate. The first legitimate objective is to maintain a high level of security and the second legitimate objective is to ensure good order and uniform rules, both nationally and internationally. However, it remains to consider whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.

2.2 *Conclusions*

A key issue in the SCA investigation is the assessment of legitimate objectives which could outweigh the restrictions of competition identified. The case law within the European Union is furthermore rather limited. Should the SCA come to the conclusion that the rules of these two motor sport organisations, and the way in which they are applied, violate the EC competition rules, this could have an impact on rules on loyalty etc in other areas of sports as well. However, it is still too early to tell whether or not that will be the final position of the SCA.

- What experiences have other countries to determine what constitutes legitimate objectives in the field of sports?
- Loyalty clauses seem to be a general problem in several different sports in Sweden. Are such loyalty clauses commonly used in other countries?

4 The European Commission's staff working document, The EU and Sport: Background and context, accompanying document to the White Paper on Sport, SEC (2007) 935.

5 The European Commission's staff working document, The EU and Sport: Background and context, accompanying document to the White Paper on Sport, SEC (2007) 935.

TURKEY

The experience of the Turkish Competition Authority (TCA) with respect to the application of competition law to professional sports has been confined to the issue of broadcasting rights in football. In Turkey, for any given sport there is a national federation that has complete authority in terms of regulating that sport. That federation acts as a subordinate to international associations like UEFA.

The Turkish Football Federation (TFF) is the relevant body for the regulation of football and Law No. 5894¹ sets out the principles and procedures regarding the establishment, organisational structure, duties and powers of the TFF. According to Article 13, the TFF Executive Board is exclusively entitled to broadcast all the football matches in Turkey regardless of the medium. With the second paragraph of the mentioned article the TFF assumes the power to market broadcasting rights centrally and to distribute the proceeds derived from such rights to Member Clubs in such manner as may be decided by the relevant bodies of the TFF.

In Statutes of the TFF, issued by the General Council as stipulated by Law No. 5894, two paragraphs of Article 74 (Authorisation for Broadcasting) are of importance for the subject matter:

6 Any agreement signed between a club and a broadcasting company shall be subject to the TFF's supervision and approval. Any such agreement not approved by the TFF shall not be binding on the TFF. No match shall be broadcast on TV, radio, the Internet and all other similar sound and data carriers, unless the required license therefore has been received from the TFF.

9 The TFF shall be entitled to draw up specifications, hold tenders and sign agreements on behalf of clubs with regard to licenses for broadcasting league matches on TV and radio. The TFF may consult with the Clubs' Union regarding the broadcasting rights of the Super Lig.

Consequently, TFF is given a legal monopoly status not only for the technical regulation of football, but also for the economic activities involved. The legal classification for selling of football media rights is sale by a single entity holding exclusive rights rather than a joint selling action. It should be mentioned that the Statutes and the Regulations adopted by the relevant organs of the TFF do not explain the way by which TFF will use above mentioned rights in terms of scope and duration.

When cases that are brought to the TCA are assessed, it is seen that all three tenders of TFF for live broadcasting rights of Turkish First Division Football League ("Super Lig") have been challenged. Apart from that there have been applications for exemption or clearance with regard to the sale/licensing of media rights.

The TCA's approach to these cases has been consistent in terms of considering TFF as an undertaking with respect to competition law notwithstanding the fact that the body is designated as the sole authority for the regulation of football. Also, the relevant market definition has been stable. It is broadly defined as the market for broadcasting rights of Turkish First Division Football League implying that as a valuable premium content, football broadcasting rights are considered not substitutable by any other content for TV operators.

¹ Law on the Establishment and Duties of the Turkish Football Federation.

The practice of exclusive selling of broadcasting rights by TFF to a single broadcaster has not been questioned in any of the decisions taken by the TCA. It is asserted that TFF is entitled to design the sale in any manner because of the recognition of the conduct as use of a public authority granted by legislation.

Another point asserted in the TCA's decisions is that the auction terms are based on the Statutes which are powered by the Law and the Broadcasting Regulations which are powered by the Statutes. But it should be stressed that as those pieces of legislation are acts of TFF as an enterprise subject to private law, the rules adopted in them should not be in violation of principles of competition law.

The durations of exclusive contracts between TFF and the broadcasters have consecutively been 3 years in the agreement signed with the broadcaster named Cine5, 2 years in the agreement signed with the broadcaster named Teleon, 3 years in the first agreement signed with the broadcaster named Digiturk, 4+2 years in the second one, and 4+1 years in the latest auction won by Digiturk.² In the second agreement with Digiturk, one of the two digital platforms in Turkey, the contract was covering years 2004-2008 and in 2005 the parties' application for an extension of two years between 2008 and 2010 was cleared by the TCA. The justification for the clearance was on the facts that i) Digiturk had failed to achieve the critical subscriber base ii) the competitors lacked interest iii) the clubs supported the extension.

The latest initiative of the TCA for exclusive selling of broadcasting rights has been issuing of an opinion for the 2010 auction on the conditions of the contract as proposed by TFF. In the opinion it is stated that TFF should consider the competitive concerns with regard to the duration of contract (4+1 years).

On the broadcasting rights a final remark should be made that the TCA has been sensitive on two issues: Assuring delivery of deferred highlights to TVs in a timely and non-discriminating manner and not selling the highlights as a whole but individually for each game. Following the related decisions taken by the TCA, these principles are embedded by the TFF in the terms of the contract list that must be agreed upon by potential bidders before tender. This is considered to be an effective way of removing at least some of the possible competitive concerns arising from the practice of selling media rights exclusively.

A different discussion point which has not been a subject for a competition case is the nationality restriction in Turkey. In case of football there is a rule of 6+2, meaning that a football team can field 6 foreign players and bench 2 others in a given match. There could be at least four arguments against this rule. Firstly, the rule distorts competition between clubs by hindering the functioning of supply and demand mechanism for player services. Second, it could be suggested that Turkish clubs are put at a competitive disadvantage against clubs coming from countries where there is not such a restriction, with regard to international competitions. Thirdly, the rule results in an artificial increase in the price for professional service of Turkish players. And finally, the consumers are worse-off because of the fact that the clubs are impeded from signing the best players with the money available; hence the quality of the product deteriorates. As that rule is not a legal stipulation but a regulation of the TFF, arguably it can be challenged before the TCA. Although it generally is a subject of labour law, the rule can be considered to have a competition law dimension as it concerns player services and player recruitment markets.

² 1996-1999 Cine5, 1999-2001 Teleon, 2001-2004 Digiturk, 2004-2010 Digiturk, 2010-2014 Digiturk.

UNITED KINGDOM

1. Introduction

The purpose of this paper is to provide an overview of the competition enforcement work of the Office of Fair Trading (OFT) in the area of sports and competition.

Sports necessarily require agreed rules of the game, which are unlikely to give rise to competition law issues. However, EC and UK law (including Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the Chapter I and II of the Competition Act 1998) may apply to sport insofar as the conduct in question constitutes an economic activity rather than a 'purely sporting' activity. This principle is established in EU case law on sports and competition. By way of example, when a sport's governing body imposes rules on its members which go beyond the rules of the game such that this results in it controlling the collective economic exploitation of the sport, for example in the sale of media rights, this would fall within the remit of competition law.

2. The OFT's treatment of sports cases

The OFT has stated that agreements, decisions and concerted practices concerning economic activity in the sports sector are subject to the provisions of the Competition Act 1998, to the extent that they may affect competition in the UK.¹

2.1 *British Horseracing Board and Jockey Club*

This issue arose following a complaint that the British Horseracing Board (BHB) was abusing a dominant position as a sole provider of race and runner data on UK horse racing.² The OFT considered the governance rules of horse racing in the UK: it accepted that non-commercial sporting rules, such as rules specifying the earliest age at which horses can run, how starting stalls should be operated, or how horses are to be tested for doping, are unlikely to affect competition. Additionally, the OFT accepted that the application of the competition rules in the Competition Act 1998 to a sport should be sensitive to the distinctive characteristics of that sport. Consequently, the OFT considered that, even if the rules may have some negative effects on competition, sporting rules which are essential to enable the sport to operate would not infringe the Chapter I prohibition of the Competition Act 1998, which prohibits anti-competitive agreements, decisions and concerted practices.

In addition, the OFT may exempt an agreement from the Chapter I prohibition if it is seen as contributing to the improvement of production or distribution or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit.

However, the OFT considered that certain of the rules of racing were not compatible with the Chapter I prohibition of the Competition Act 1998. First, because they contained restrictions of competition, such as limitations on organising races and market sharing which have significant economic and commercial

¹ http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft654.pdf.

² *Ibid.*

consequences. Second, because the restrictive aspects of the rules of the BHB and Jockey Club were not essential for achieving the objectives that the BHB and the Jockey Club maintained were being promoted, and were not indispensable to ensure a viable, orderly and trusted British racing industry.

2.2 *Rugby union premier league*

In addition, the OFT has considered whether the entry criteria of Premier Rugby Limited (which represents clubs within the English rugby union premier league) are compatible with competition law, following a complaint against the English governing bodies for rugby union.³

The rules in question prevented teams who are not the main tenants at their home stadium from being promoted to the premier league of first division teams. This rule did not apply to some existing premier league teams. The OFT considered that the rule had effectively prevented one club from being promoted to the Premiership in the 2001/2 season, as it was not the main tenant of its home stadium. Further, the OFT considered that the rules contained restrictions of competition, which had economic and commercial consequences, which were not indispensable to ensure a viable rugby industry. Premier Rugby Limited revised its rules so as to meet the OFT's competition concerns.

3. **Price fixing - Replica football shirts**

The OFT investigated the suspicion of a cartel between football replica shirt manufacturers, sports apparel retailers and a number of clubs. In August 2003, the OFT after concluding its investigation levied fines against a number of businesses including JJB Sports (£8.353m), Umbro (£6.642m), Manchester United (£1.1562m) and the FA (£198,000). The fines that were imposed in this were reflected the serious nature of the infringement.

The OFT concluded that there had been various agreements or concerted practices which fixed the prices of the top-selling adult and junior short sleeved replica football shirts manufactured by Umbro Holdings Ltd. In particular, the OFT found that there had been indirect exchanges of commercially sensitive information (future pricing intentions) between retailers through their suppliers in order to influence market conditions. These agreements/concerted practices related to replica football shirts of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. Some of the parties were involved with the shirts of only one or some of the teams and some for longer periods than others. The longest that any of the parties were involved was from April 2000 until August 2001. The agreements or concerted practices took effect during key selling periods after the launch of a new replica football kit and during the Euro 2000 tournament.

The subsequent Court of Appeal's decision in *Replica Kit*⁴ sets out the test for proving such indirect information exchanges which are incompatible under competition law: it must be demonstrated that where a retailer (A) discloses to their supplier (B) their future pricing intentions the circumstances of this disclosure are such that A may be taken to have intended that their supplier (B) will/would make use of that information to influence market conditions, or did in fact foresee this, by passing that information on to other retailers (C). B must also be shown to have actually passed that information to C and that they disclosed this in circumstances where C may be taken to have known the circumstances in which the information was disclosed by A to B or that C in fact appreciated that the information was passed to it with A's concurrence (i.e. to influence market conditions). It must also be demonstrated that C does, in fact, use the information in determining its own future pricing intentions.

³ For further information, please see: http://www.offt.gov.uk/news-and-updates/press/2003/pn_112-03.

⁴ *Umbro Holdings Ltd v Office of Fair Trading* (Judgement on penalty) and *JJB Sports v Office of Fair Trading* Neutral citation [2006] EWCA Civ 1318. Case No. 2005/1623.

4. Sports and media rights

The right to broadcast sporting events, and in particular to screen live coverage of major sporting events, is a prime commercial asset: rights to broadcast UK Premier League football for three seasons achieved a total of £1.78 billion in 2009. Competition in broadcasting is no less important than in other sectors of the economy. As elsewhere, it creates opportunities and incentives for suppliers to offer people what they want. Developments in broadcasting technology, which have greatly enhanced the scope for commercialisation of sports, are raising important issues under competition law.

The application of competition law to sports broadcasting should take account of distinctive economic features that do not occur in most other parts of the economy in the UK. Some of these features are set out below.

First, broadcasting provides a classic case of variable costs being very low in relation to fixed costs. Indeed the costs of broadcasting a programme are largely independent of the number of viewers or listeners.

Second, methods of revenue generation differ greatly as between broadcasting technologies. With traditional analogue terrestrial broadcasting, services are necessarily free at the point of delivery. The free-to-air broadcasters in the UK have historically been remunerated either by TV licence fees or advertising revenues. By contrast, the advent of new technologies to support pay-TV has meant that viewers, in common with consumers in other sectors, can face choices with associated prices.

Third, broadcasting is a multi-layered industry, in which market power at one level of the supply chain may have far reaching effects at other levels. This is relevant for a competition analysis. The sale of media rights in sport is characterised by the small number of powerful players at each level of the supply chain. Upstream, sports associations sell the rights to broadcast and record sporting events, typically through joint selling: a single organisation (such as a national football league) acts on behalf of its member clubs to negotiate with broadcasters. Downstream, broadcasters bid for the right to screen this content on a variety of platforms, with pay-TV the prevailing medium.

The restricted structure of the market has frequently raised issues under EU law. In addition, in the UK the vertical integration coupled with market power of one sports broadcaster, BSkyB, raised potential competition concerns about the broadcaster's conduct. The OFT investigation into this issue is discussed below.

4.1 *BSkyB*

The OFT investigated aspects of BSkyB's conduct under the Competition Act 1998, concluding its investigation in 2002.⁵ Central to this investigation was the question about whether BSkyB has a dominant market position in relation to the wholesale supply of premium sports and film content, and if so whether its pricing policies had abused that position in particular by:

- Exerting an anti-competitive 'margin squeeze' on rival distributors of pay TV;
- Pricing its channels in the form of anti-competitive 'mixed bundling';
- Giving anti-competitive discounts to distributors.

⁵ http://www.of.gov.uk/shared_of/reports/media/oft623.pdf.

The OFT concluded that BSkyB was dominant in the relevant markets for the wholesale supply of certain premium sports channels and of certain premium film channels. In particular, the focus was on channels showing content that could only be shown on pay TV. For sports, that content was identified with live Premier League football matches.

Other kinds of channel, and other means of viewing (e.g. video hire), were judged not to be sufficiently substitutable with premium pay TV channels to be included in the relevant markets. The OFT considered that one measure of the importance of the key sport content rights is their cost. The Premier League football rights alone cost almost as much as all the sports rights acquired for all free-to-air broadcasting. The OFT considered that BSkyB's ownership of these content rights had been a principal driver of its commercial strategy. Moreover, there were barriers to entry by potential rivals in premium channel supply, not least as a result of BSkyB's exclusive control of prime content rights. The OFT therefore concluded that BSkyB was dominant in the wholesale supply of certain premium sports and film channels.

Further, the OFT concluded that there were strong vertical relationships, through exclusive contracts and ownership linkages. These vertical relationships existed both between premium content and channel provision and between channel provision and distribution systems.

The OFT's assessment of whether BSkyB had abused its dominant position considered three allegations. First, it was alleged that BSkyB was abusing its dominance over premium pay TV channels, by exercising a margin squeeze in relation to its premium channels, to distort competition against rival distributors and in favour of its own DTH/satellite distribution system. The OFT therefore tested whether BSkyB had set its wholesale prices at a level that would prevent a distributor earning a normal return on the distribution of BSkyB's premium channels, even if it were as efficient in distribution as BSkyB.

Second, the OFT also assessed complaints that BSkyB was abusing its dominant position by engaging in mixed bundling with respect to its premium channel pricing. The OFT considered that a degree of mixed bundling is to be expected, and be desirable, in conditions such as those found in pay TV broadcasting. In particular, fixed costs (e.g. of acquiring content rights) are high in relation to the incremental costs of supplying additional subscribers, meaning it is neither unnatural nor undesirable for suppliers to offer discounts to consumers taking additional products as the incremental cost of supplying those extra products to consumers is relatively low.

The OFT also received complaints that BSkyB had abused its dominant position by offering anti-competitive discounts. In particular, the complaints related to the pay-to-basic ratio (PBR) discount, the volume discount and the basic penetration discount offered by BSkyB to its distributors.

In relation all three allegations of abuse, the OFT had insufficient grounds to find that BSkyB has infringed the Competition Act 1998.

4.2 *Ofcom consultation*

Finally, the market for premium sports distribution has also been investigated by the UK communications regulator, Ofcom. In January 2009 Ofcom published a consultation as part of its pay TV market investigation in order to improve competition in this sector. The consultation sets out details of a proposed 'wholesale must-offer' obligation. This is designed to address concerns about the restricted distribution of premium sports and movies channels operated by BSkyB. In addition, the consultation notes that there may be a case for specific targeted interventions in relation to the next FA Premier League auction of live broadcast rights. Further information on this consultation can be found on the Ofcom website.⁶

⁶ http://www.ofcom.org.uk/media/news/2009/06/nr_20090626.

UNITED STATES

Section 1 of the Sherman Act prohibits agreements among competitors that unreasonably restrain trade,¹ a prohibition that both the Antitrust Division of the United States Department of Justice and private parties are authorised to enforce. In part because sports leagues and competitions require some agreements among competing, separately operated teams in order to structure on-field competition,² United States courts have been routinely required to deal with private antitrust challenges involving sports leagues and sanctioning bodies.³ All such cases have been brought by private parties, however. Since 1970, the federal enforcement agencies' involvement in sports cases has consisted of filing *amicus* briefs designed to assist, as a "friend of the court," in the adjudication of private disputes.

In the United States, competition policy issues in professional sports have arisen mainly with respect to the four most popular leagues—Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL). Each of these leagues is organised as a joint venture of separate businesses. Each has a central office responsible for many operating decisions, such as determining the schedule of games for each season, but the individual teams are separately owned and operated and team owners participate in significant decisions made by the league as representatives of their respective teams. The leagues pool revenues to varying degrees, but each team is a separate profit centre and team profitability varies widely within a league.⁴

In the United States, some competition policy issues have arisen in non-team professional sports, such as golf and auto racing. These issues typically concern the conduct of sanctioning bodies, such as the PGA TOUR, which governs men's golf, and the National Association for Stock Car Auto Racing (NASCAR). These bodies generally operate much like a sports league's central office in determining the schedule of events and in licensing broadcast rights. In these sports, however, no business entities comparable to the teams in the four major leagues participate in decision making.

¹ See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

² See generally, *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) (noting that an antitrust challenge in the context of college football involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

³ Section 2 of the Sherman Act prohibits the acquisition or maintenance of monopoly power through exclusionary conduct. A few sports cases have involved allegations by one league of exclusionary conduct by a rival league. *E.g.* *United States Football League v. NFL*, 842 F.2d 1335 (2d Cir. 1988); *American Football League v. NFL*, 323 F.2d 124 (4th Cir. 1963); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

⁴ The U.S. professional soccer league, Major League Soccer (MLS), is organised differently. All teams are owned by the league, but substantial control over each is vested in its "operator/investor." Because of this separate control, MLS has been treated much the same as the four major sports leagues under the antitrust laws. See *Fraser v. MLS*, 284 F.3d 47, 53–56 (1st Cir. 2002).

1. The single-entity issue with professional sports leagues

A critical legal issue in this area is when, if ever, a sports league structured as a joint venture of separately owned teams should be considered a single economic entity for antitrust purposes. Under U.S. Supreme Court precedent, Section 1 of the Sherman Act does not apply to agreements among subsidiaries of a single firm or agreements among any other parties that are considered members of a single economic entity.⁵ It is therefore important to decide when, if ever, a sports league (or other form of joint venture) should be treated as a single-entity.⁶

On May 24, the Supreme Court addressed this issue in the *American Needle* case.⁷ The case arose from the National Football League's decision to grant a single, exclusive license for use on apparel to all the team's logos and trademarks. A hat manufacturer denied a license filed suit, arguing that the exclusive license violated the Sherman Act as an agreement among competing firms (*i.e.* the teams). The complaint was dismissed by the district court. The court of appeals, adopting the approach suggested by its precedent, held that the single entity issue had to be addressed "one facet of a league at a time,"⁸ and found that, at least with respect to licensing of team logos and trademarks, the NFL acted as a single economic entity.⁹ It therefore affirmed the dismissal of the complaint.

The Supreme Court unanimously reversed the court of appeals on the basis that the NFL teams "compete in the market for intellectual property" so collective licensing decisions "by the NFL teams . . . 'depriv[e] the marketplace of independent centres of decision-making.'"¹⁰ Even if the relevant decisions were not directly made by the teams, but rather the league's licensing entity, NFL Properties, the Court held that its actions were not those of a single economic entity because it acted as an instrumentality of the teams.¹¹ Consequently, the Court remanded the case to the lower court for further proceedings consistent with the Supreme Court's holding that the collective conduct at issue must be analysed under the rule of reason.

The Court also observed, however, that many collective actions by the teams in a sports league would be lawful under the Sherman Act either because the teams "must co-operate in the production and scheduling of games" or because of league interests in maintaining competitive balance.¹² As the Court's observation suggests, sports league cases raise unique issues because, with respect to *on-field* interaction, the separately owned and operated teams have no choice but to agree about the structure of competition between them, and antitrust law must accommodate that reality. Yet the distinction between on-field decisions and business-side decisions can be elusive, and the terms in which courts make that distinction will affect the law regarding other kinds of joint ventures as well. Because competitor collaboration is both

⁵ See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

⁶ With the exception of the lower court decisions in the *American Needle* case discussed in the following paragraphs, no sports league appears to have been found by a court to have acted as a single economic entity. Prior to that case, the NFL was always unsuccessful in arguing that it had acted as a single economic entity. See *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) (restraint on franchise ownership); *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381, 1387–90 (9th Cir. 1984) (franchise location restraints); *McNeil v. NFL*, 790 F. Supp. 871, 878–80 (D. Minn. 1992) (labour market restraint).

⁷ *American Needle Inc. v. NFL*, ___ S. Ct. ___ (May 24, 2010).

⁸ *Chicago Professional Sports Ltd. v. NBA*, 95 F.3d 593, 596 (7th Cir. 1996).

⁹ *American Needle Inc. v. NFL*, 38 F.3d 736, 742–44 (7th Cir. 2008).

¹⁰ *American Needle Inc. v. NFL*, ___ S. Ct. ___, slip opinion at 12.

¹¹ *Id.* at 17.

¹² *Id.* at 18–19.

a major source of innovation and efficiencies and a dangerous opportunity for concerted, anticompetitive conduct, this is an area where the careful development of sound rules is essential, and it is thus important to keep in mind the facts that make sports league cases distinct from many others.

2. Antitrust cases involving professional sports under Section 1 of the Sherman Act

As the Supreme Court has recently observed: “The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. . . . In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”¹³ Although the United States has experienced a great deal of Section 1 litigation involving sports leagues, the cases have yielded little insight into the unique issues arising in the application of the rule of reason to sports. One appeals court decision noted complexities arising from the fact that co-operation among teams can be procompetitive in markets where the league competes with other forms of entertainment, yet anticompetitive in markets where the scope of competition is much narrower.¹⁴ Another recognised “the need for accommodation among interdependent enterprises” in a sports league.¹⁵

2.1 Intellectual property licensing

A recent case similar to *American Needle* involved licensing of team logos and trademarks by MLB. The licensing for all MLB teams is done collectively by the league, which declined to grant a license to a company producing small stuffed bears displaying markings associated with particular teams or players. That company sued, claiming that MLB licensing was properly characterised as a cartel and therefore violated the antitrust laws. That claim was rejected for failure to proffer any admissible evidence in support and because of contrary evidence proffered by MLB that it lacked market power and that its licensing achieved significant efficiencies.¹⁶ One judge wrote a concurring opinion notable for its application of the ancillary restraints doctrine, as well as for the fact that the author—Judge Sotomayor—now sits on the Supreme Court. The opinion characterised MLB’s collective licensing as a legitimate joint venture, rather than merely a cartel, and found that the aspects of the venture resembling price fixing were reasonably necessary to achieve its pro-competitive purposes.¹⁷

2.2 Franchise location and ownership

League rules on franchise location and ownership have often been challenged under the antitrust laws. The best known of these cases involved the attempt by the Oakland Raiders NFL team to move to Los Angeles. At the time, an NFL rule required unanimous consent of the team owners, which was not forthcoming. A jury found that the rule, and its application to prevent the Raiders’ move, violated the antitrust laws, and that verdict was upheld on appeal.¹⁸ In a later appeal on damages, however, the same court of appeals held that the opportunity to put an NFL team in Los Angeles belonged to the league and therefore the considerable value of that opportunity had to be deducted from the damages awarded to the

¹³ See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007).

¹⁴ *Sullivan v. NFL*, 34 F.3d 1091, 1112 (1st Cir. 1994).

¹⁵ *Fraser v. MLS*, 284 F.3d 47, 58 (1st Cir. 2002).

¹⁶ *MLB Properties v. Salvino, Inc.*, 542 F.3d 290, 315–21 (2d Cir. 2008).

¹⁷ *Id.* at 337–40 (Sotomayor, J., concurring).

¹⁸ *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984); but see *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987) (reversing summary judgment against the NBA on its rule requiring league approval before moving a team).

Raiders.¹⁹ At issue in another case were the NFL's rules requiring approval by team owners of all transfers of ownership and the NFL's policy against public ownership. A jury held that the rule and policy violated the antitrust laws. On appellate review, the court rejected most of the NFL's contentions regarding errors of fact and law but found that other trial errors necessitated retrial.²⁰ The case was then settled.

2.3 *League membership*

By way of contrast, teams have been largely unsuccessful when claiming that the major professional sports leagues violated the antitrust laws by refusing their admission into the league. The best-known such case involved a team from the short-lived World Football League, which sought membership in the NFL after its league failed. The court rejected the claim on the grounds that the team was not complaining about a restraint on competition, but rather about the inability to share in the NFL's profits.²¹

2.4 *Equipment standards*

Antitrust litigation on equipment standards has been infrequent, although limited success was achieved by a golf club manufacturer in one case. When the PGA TOUR adopted a rule barring certain popular clubs, their manufacturer and several players using the clubs invoked the antitrust laws and obtained a preliminary injunction.²² In the most recent appeals court decision in this area, which involved decisions on permissible automobile transmissions made by a sanctioning body for auto races, the court held that it need not consider the "fairness of those decisions" and that unless "decisions are corrupted by coercion from competitors of the disadvantaged supplier," any exclusionary effect on that supplier is merely "the incidental result of defining the rules of a particular game."²³

2.5 *Real-time data*

One final decision of note addressed a media company's attempt to establish that the PGA TOUR violated the antitrust laws in preventing it from disseminating the real-time golf tournament scoring information compiled by the PGA TOUR. The court held that the media company was attempting to free ride off the PGA TOUR's significant investment in providing real-time scoring information to the public.²⁴

2.6 *Conclusion*

These cases demonstrate, again, that the distinction between the rules of play and the rules of business competition can be challenging to identify precisely, making sports cases both difficult and *sui generis*. Enforcers and courts must proceed carefully to ensure that procompetitive collaboration is allowed to go forward while anticompetitive combination is limited, giving consumers the benefit of both on- and off-field competition.

¹⁹ Los Angeles Memorial Coliseum Commission v. NFL, 791 F.2d 1356, 1371–73 (9th Cir. 1986).

²⁰ Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994).

²¹ Mid-South Grizzlies v. NFL, 720 F.2d 772, 784–87 (3d Cir. 1983). Similar is Seattle Totems Hockey Club, Inc. v. NHL, 783 F.2d 1347, 1350 (9th Cir. 1986).

²² Gilder v. PGA TOUR, 727 F. Supp. 1333 (D. Ariz. 1989), affirmed, 936 F.2d 417 (9th Cir. 1991). The district court noted, however, that it "does not substitute its independent judgment for the judgment of the sport's governing body as long as the rule adopted is reasonable, without self-interest or self-dealing among the decision-makers, and where those affected have had some opportunity for input into the decision-making process." *Id.* at 1336–37.

²³ Brookins v. International Motor Contest Association, 219 F.3d 849, 854 (8th Cir. 2000).

²⁴ Morris Communications Corp. v. PGA TOUR, Inc., 364 F.3d 1288, 1295–96 (11th Cir. 2004).

3. The Relevant market in professional sports

Few judicial antitrust decisions involving professional sports have devoted significant attention to the definition of the relevant market. The Supreme Court appears to have addressed sports market definition just twice: a 1959 decision involving the promotion and broadcasting of boxing upheld a lower court's determination that the relevant market was limited to championship boxing matches,²⁵ and a 1984 decision involving the broadcasting of college football games approved the lower courts' determination that the relevant market was limited to "college football broadcasts."²⁶

Recent decisions, however, have suggested that a professional sport faces competition from many and varied sources. The appeals court decision in *American Needle* observed that the NFL "competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success."²⁷ In the case discussed above involving licensing by MLB, the appeals court cited evidence that the league competes with both other sports and with non-sports licensors in licensing team logos.²⁸ Whether these factors will lead courts to adopt broader market definitions remains an open issue.

A very recent decision illustrates the importance of pinpointing the competition issue in a sports case and of defining a market relevant to that issue. Although this lesson is valuable in all of antitrust law (outside the cartel area), it is especially valuable in sports cases.²⁹ A sports league or sanctioning body is apt to operate in multiple markets with widely varying competitive conditions, and which market or markets are implicated by a particular practice is not always obvious.³⁰ This particular case involved NASCAR, which sanctions stock car races, including the premier "Sprint Cup" events. A race track that was rejected as a venue for a Sprint Cup race claimed that that rejection violated the antitrust laws. The claim was dismissed for failure to properly assess substitutes for Sprint Cup races from the perspective of fans attending the races,³¹ despite the race track's contention that the fan perspective was not appropriate for defining the relevant market because the competition at issue was that among race tracks to host Sprint Car races.³²

²⁵ International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250–51 (1959).

²⁶ National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 111–12 (1984).

²⁷ American Needle Inc. v. NFL, 538 F.3d 736, 743 (7th Cir. 2008), reversed on other grounds, ___ S. Ct. ___ (May 24, 2010); see also Chicago Professional Sports Ltd. v. NBA, 95 F.3d 593, 596 (7th Cir. 1996) (observing that the NBA is "in competition with a thousand other producers of entertainment").

²⁸ MLB Properties v. Salvino, Inc., 542 F.3d 290, 298–300 (2d Cir. 2008); see also Henderson Broadcasting Corp. v. Houston Sports Association, 647 F. Supp. 292, 297 (S.D. Tex. 1986) (rejecting a proposed relevant market limited to radio advertising on Houston Astros baseball games).

²⁹ Many markets have been involved in sports cases, and some are unique to sports. For example, in analysing the competitive effects of NFL's rule that team owners could not own other professional sports teams, the court defined a distinct market for "sports capital and skill" in which there were relatively few potential competitors. See North American Soccer League v. NFL, 670 F.2d 1249, 1260 (2d Cir. 1982).

³⁰ See Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381, 1392–94 (9th Cir. 1984) (declining to overrule the jury determination that the relevant market was limited to NFL football but observing that "market definition is especially difficult" in professional sports and recognising that NFL football competes with other forms of entertainment).

³¹ Kentucky Speedway, LLC v. NASCAR, 588 F.3d 908 (6th Cir. 2009).

³² Id. at 914, 917.

4 Limitations on the application of antitrust law to professional sports

4.1 *The baseball exemption*

Antitrust law is an exercise of the congressional power to regulate “interstate commerce.” Based on the then-prevailing understanding of those words, the Supreme Court in 1922 held that the Sherman Act did not apply to the conduct of a professional baseball league because the exhibition of professional baseball games was neither commerce nor interstate.³³ Within two decades, Supreme Court decisions greatly expanded the definition of “interstate commerce,” and the Court determined that Congress had not “intended to freeze the proscription of the Sherman Act within the mould of then-current judicial decisions defining commerce power.”³⁴ Uniquely with respect to baseball,³⁵ however, the Court gave controlling weight to the doctrine of *stare decisis* and declined in 1972 to overturn baseball’s judicially created exemption from the antitrust laws.³⁶ Eventually, Congress enacted legislation that eliminated the exemption with respect only to the major league player market, so that the antitrust laws now apply in the same way in all major professional sports leagues to disputes between the players and the league.³⁷

4.2 *The non-statutory labour exemption*

Players in major professional team sports leagues in the United States are represented by unions, which negotiate pay and working condition issues with the team owners. Restraints on pay and working conditions arising in a collective bargaining relationship are subject to the “non-statutory labour exemption” from the antitrust laws.³⁸ The exemption was crafted by the courts to reflect “a proper accommodation between the congressional policy favouring collective bargaining under [federal labour law] and the congressional policy favouring free competition in business markets.”³⁹

In the 1970s, several decisions held that the non-statutory labour exemption did not apply to the rules of major professional sports leagues restricting player mobility, and those decisions led to the negotiation of contracts between the owners and the players’ unions providing for substantially greater player

³³ Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

³⁴ United States v. South-Eastern Underwriters Association, 322 U.S. 533, 557 (1944).

³⁵ The Supreme Court also specifically rejected the extension of the baseball exemption to other professional sports. See Radovich v. NFL, 352 U.S. 445, 449–52 (1957); International Boxing Club of New York, Inc. v. United States, 348 U.S. 236 (1955).

³⁶ See Flood v. Kuhn, 407 U.S. 258, 282–84 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). The precise scope of the exemption is not entirely settled. One court held that the exemption was limited to restraints in the players market, and hence did not apply in a dispute over franchise relocation. Piazza v. MLB, 831 F. Supp. 420, 433–38 (E.D. Pa. 1993). The view generally taken is that the exemption extends to all of the business of baseball. See, e.g. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978).

³⁷ Curt Flood Act of 1998, Public Law 105-297, § 3, 112 Stat. 2824 (codified at 15 U.S.C. § 26b).

³⁸ The antitrust laws do apply to labour agreements outside the collective bargaining relationship with “the potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.” Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975); see also United Mine Workers of America v. Pennington, 381 U.S. 657, 665–69 (1965); Allen Bradley Co. v. Local Union 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806–11 (1945).

³⁹ Connell Construction, 421 U.S. at 622–23; see also Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America v. Jewel Tea Co., 381 U.S. 657, 692–93 (1965).

mobility.⁴⁰ The best-known case concerned an NFL rule requiring compensation to a team when one of its players is signed by a rival team, and the court of appeals determined that the rule had been imposed on the players union rather than bargained for.⁴¹ In antitrust litigation involving the NBA and NHL, the courts held that the exemption did not apply on the view that it could not be invoked to advantage employers in a dispute with workers.⁴²

More recent decisions, however, have consistently held that player market restraints are protected by the non-statutory labour exemption whenever they were within agreements negotiated with the players unions.⁴³ For example, one case held that the exemption applied to the NFL rule barring participation in the player draft for three football seasons after high school graduation.⁴⁴

A recurring issue in antitrust litigation between major professional sports leagues and their players is the application of the non-statutory labour exemption after the expiration of the collective bargaining agreement.⁴⁵ The rationale of the exemption certainly applies while the players and the league bargain toward a new agreement, but the Supreme Court has held that the exemption continues to apply even after a bargaining impasse is reached.⁴⁶ To avoid the application of the non-statutory labour exemption, the union representing NFL players was disbanded in 1989, so the players could pursue antitrust litigation against the league.⁴⁷

4.3 *Sports broadcasting*

Also exempt from the antitrust laws are some activities related to broadcasting of professional sports. The Sports Broadcasting Act of 1961 exempted from the antitrust laws the pooling of sponsored broadcast rights for sale as a package by the professional baseball, basketball, football, and hockey leagues.⁴⁸ The Act overturned the decision of a district court declaring that the contract between the NFL and a major television network was prohibited under the terms of an injunction entered as a result of an earlier antitrust

⁴⁰ See Lawrence M. Kahn, "Sports, Antitrust Enforcement and Collective Bargaining," 54 *Antitrust Bulletin* 857, 868–76 (2009).

⁴¹ *Mackey v. NFL*, 543 F.2d 606, 615–16 (8th Cir. 1976). In an earlier challenge to the same rule, the court held that the exemption did not apply because the rule was adopted unilaterally by the NFL when no contract was in effect. *Kapp v. NFL*, 390 F. Supp. 73, 85–86 (N.D. Cal. 1974), affirmed, 586 F.2d 644 (9th Cir. 1978).

⁴² *Robertson v. NBA*, 389 F. Supp. 867, 884–89 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 496–500 (E.D. Pa. 1972).

⁴³ *E.g.* *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1986); *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986).

⁴⁴ *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004).

⁴⁵ See, *e.g.* *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. NFL*, 888 F.2d 559 (8th Cir. 1989).

⁴⁶ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

⁴⁷ See *Powell v. NFL*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

⁴⁸ Public Law 87-331, 75 Stat. 732 (codified at 15 U.S.C. § 1291–95). The exemption does not apply if the licensing agreement prohibits televising any games, other than those "within the home territory of a member club of the league on a day when such club is playing a game at home." 15 U.S.C. § 1292. An amendment to the Act exempted from the antitrust laws the merger of the NFL with the rival American Football League. Public Law 89-800, 80 Stat. 1515 (codified at 15 U.S.C. § 1291).

suit.⁴⁹ Later, individual MLB and NBA teams licensed their games to television “superstations,” which are carried on cable systems throughout the United States, and the NBA’s restriction on the number of games carried was held not to be within the exemption.⁵⁰ Direct broadcast satellite television now carries extensive sports programming, including all regular season NFL games, and the exemption does not apply because the games are not sponsored by advertising.⁵¹ Of course, just as conduct that qualifies for a particular antitrust exemption would not necessarily violate the antitrust laws in the absence of the exemption, failing to qualify for an exemption does not mean that particular conduct necessarily violates the law. Thus, even if collective television contracts are subject to Section 1 scrutiny, they may still be permitted because the league is viewed as a single economic entity in marketing the league’s games, or because collective action by the teams is deemed either ancillary to the legitimate aims of the joint venture or otherwise reasonable.

5. Conclusion

In the U.S., competition issues relating to professional sports have arisen primarily in private litigation under section 1 of the Sherman Act. Although there are some antitrust exemptions described in this paper (e.g., baseball, collective bargaining, pooling of broadcasting rights), conduct not covered by the exemptions remains subject to the antitrust laws, and typically is analysed under the rule of reason. Sports law cases tend to present unique issues and fact patterns because of the necessity for some co-operation among teams to structure the terms of on-field competition. This peculiar aspect of sports law cases should be borne in mind when analogising such cases to other issues in joint venture or competition law.

⁴⁹ See *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961) (interpreting the prior injunction); *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953) (finding NFL rules on broadcasting in violation of the antitrust laws).

⁵⁰ *Chicago Professional Sports Ltd. v. NBA*, 95 F.3d 593, 596 (7th Cir. 1996).

⁵¹ See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

EUROPEAN UNION

1. Introduction

It has long been established by the European Commission and the Court of the European Union that economic activities in the context of sport fall within the scope of EU law, including Articles 101 (prohibition of anti-competitive agreements or practices) and 102 (prohibition of the abuse of dominance) TFEU¹ and internal market freedoms.

Already in the 1970s, the Court of Justice (CJ) (formerly the European Court of Justice - ECJ) ruled in *Walrave*² and *Donà*³ that sport itself was subject to Community law where it constituted an economic activity. This has been confirmed by the Court on several occasions later on, in particular in the *Bosman*⁴ ruling which played a significant role in guiding the Commission in its development of competition policy in the sport sector.

The fact that EU competition law is applied to sport as far as it constitutes an economic activity was recently confirmed by the CJ in the *MOTOE* judgement;⁵ as well as in rulings by the General Court (GC) (formerly the Court of First Instance) and the CJ in the *Meca Medina* case.⁶ Although sport fulfils important educational, public health, social, cultural and recreational functions that must be preserved, there exists a wide ranging field of activities in sport that clearly constitute economic activities. Examples include the sale of tickets for sport events, advertising activities, and the sale of media rights for sport events and the transfer of athletes in return for transfer fees.

This paper will give a brief overview of Court of Justice judgements and decisions of the European Commission dealing with two aspects of the sports cases: (i) certain revenue generating activities related to sports, specifically the sale of media rights and (ii) the regulatory aspects of sport.

¹ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are in substance identical. In this note references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

² Case 36/74 *Walrave and Koch v. Union Cycliste Internationale* ECR 1974, 1405, para. 4.

³ Case 13/76 *Donà v. Mantero* ECR 1976 1333, para. 12.

⁴ Case C-415/93 *URBSFA v. Bosman* ECR 1995 I-4921.

⁵ Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. EllinikoDimosio*.

⁶ Case T-313/02 *David Meca-Medina and Igor Majcen v. Commission* ECR 2004 II-3291, para. 44 and Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission* ECR 2006 I-6991, para. 22.

2. Application of EU competition rules to revenue-generating activities

2.1 Sports media rights

2.1.1 Market definitions

Market definitions are particularly complex in the fast changing world of media rights. In the media sector, products and services are not always (or no longer) clearly separable and are, also due to technological or economic “convergence”, often marketed in a bundle.

In previous Commission decisions, upstream product markets for the acquisition of sports media rights have been identified for certain audiovisual content on the basis of specific criteria, such as brand image, the ability to attract a particular audience, the configuration of that audience and advertising/sponsoring revenues. With regard to sport events, the Commission identified separate markets for the rights to broadcast sport events for the first time in 1996.⁷ Subsequently, the Commission has defined narrower markets, *e.g.* for (i) the broadcasting rights for certain major sport events,⁸ (ii) the broadcasting (and new media⁹) rights for football events played regularly throughout every year where national teams participate¹⁰ and (iii) the broadcasting rights for football events that do not take place regularly where national teams participate.¹¹

2.1.2 The Commission's decision making practice

As regards the sale and acquisition of sport media rights, the Commission's decision making practice focussed on antitrust issues connected with the joint selling agreements.

Joint selling describes, for example, the situation where sport clubs entrust the selling of their media rights to their sports association which then sells the rights collectively on their behalf. A joint selling arrangement is a horizontal agreement which prevents the individual clubs each having a relatively small market share from individually competing in the sale of sports media rights. In its three Decisions¹² so far, the Commission consistently took the view that joint selling constitutes a horizontal restriction of competition contrary to Article 101(1) TFEU, as it may hinder competition between clubs in terms of prices, innovation, services and products offered to fans, and usually leads to the league selling the rights in a single bundle or very few packages on an exclusive basis.

The Commission has recognised that joint selling may create efficiencies and it could therefore be accepted - with certain case-by-case remedies - under Article 101(3) TFEU. A joint selling arrangement has the potential of improving the media product and its distribution to the advantage of football clubs,

⁷ Commission decision of 7 October 1996, Case M.779 *Bertelsmann/CLT*, OJ 1996 C 364/3, para. 19. Also see Commission decision of 3 March 1999, Case 36237 *TPS+7*, OJ 1999 L 90/6, para. 34.

⁸ See Commission decision of 10 May 2000, Case 32150 *Eurovision* (OJ 2000 L 151/18) where the Commission considered that there was a strong likelihood that distinct markets existed for the acquisition of broadcasting rights for some major sporting events such as the Olympic Games. This decision was annulled by the GC, but the GC accepted the market definition.

⁹ Case 37398, *UEFA Champions league* of 23 July 2003, OJ 2003 L 291/25.

¹⁰ UEFA Champions League Decision.

¹¹ Case M.2876 *Newscorp/Telepiu*, OJ 2004 L 110/73.

¹² UEFA Champions League decision; Case 37214, *Bundesliga* of 19 January 2005, OJ 2005 L 134/46; Case 38173, *FA Premier League* of 22 March 2006, OJ 2008 C 7/18.

broadcasters and viewers. The Commission in its decisions has in particular identified three types of benefits:

- The creation of a single point of sale provides efficiencies by reducing transaction costs for football clubs and media operators;
- Branding of the output creates efficiencies as it helps the media products getting a wider recognition and hence distribution;
- The creation of a league product: This is a product that is focused on the competition as a whole rather than the individual football clubs participating in the competition. This is attractive to many viewers.

To ensure that the positive effects of joint selling outweigh the negative effects on competition, the Commission has sought in past decisions to remedy the competition concerns resulting from the collective sale of exclusive sports media rights by attaching conditions or making commitments binding on undertakings. The accepted solution in each case depended on the facts of the individual case including the degree of market power and the restrictive practices found.

At the same time, joint selling may also create efficiencies as it reduces transaction costs due to a one-stop-shop for media operators and clubs and may bring about advantages for the branding of a uniform league product. In its three Decisions, the Commission required certain modifications and commitments involving e.g. a short duration and a limited scope of jointly sold rights, a transparent bidding procedure, selling of some of the rights by the clubs, and reverting unsold rights to the clubs.

In the *UEFA Champions League* decision the Commission for the first time accepted joint selling of football media rights and laid out the principles for a pro-competitive rights structure. The original arrangements provided for the sale of UEFA Champions League free and pay-TV rights on an exclusive basis in a single bundle to a single broadcaster per territory for several years in a row. Buyers had only one source of supply and a single large broadcaster per territory would acquire all free and pay-TV rights, to the exclusion of all others, resulting in a number of rights being left unexploited and output restrictions. Following Commission intervention, UEFA amended its joint selling arrangements. The available rights were unbundled into several packages (in total 14) enabling more than one broadcaster to acquire rights to the UEFA Champions League. The packages were sold on the basis of an objective and non-discriminatory tender procedure. Although UEFA had the exclusive right to sell the packages of live rights, individual clubs could sell certain live rights relating to their matches, in case UEFA would fail to sell.

Certain restrictions however remained. Indeed, the exclusive sale of live rights by UEFA still prevented individual clubs from competing in the sale of those rights, a single price was fixed, broadcasters only had one point of supply in respect of most live rights and the exploitation of deferred rights was subject to limitations.

On the other hand, the Commission considered that joint selling also led to a number of positive effects and the Commission concluded that the amended joint selling agreement met the conditions for a justification under Article 101(3) TFEU.

In the sales process of the German and English top national football leagues, the Bundesliga and the FA Premier League ("FAPL") respectively, similar competition concerns arose as those found in *UEFA Champions League*. In order to address these concerns, in both cases commitments were made to amend the original joint selling arrangements by the respective leagues on behalf of their individual club members. The commitments offered by both the *Deutscher Liga-Fußballverband* (the German League

Association (GLA), the rights-holder for the Bundesliga matches) and the FAPL (the rights holder for the Premiership matches) were made legally binding under Article 9(1) of Regulation 1/2003. The commitments from both the GLA and the FAPL included the unbundling of rights into separate rights packages for TV broadcasting and mobile platforms, the possibility for individual clubs to exploit certain unsold rights and rights unused by the initial purchaser, as well as the exploitation of deferred rights and rights for the new internet broadcasting and telephony broadcasting markets. Rights were to be disposed of using a public tender procedure and exclusive rights contracts were not to exceed three football seasons.

In addition, as regards the FAPL, the open and competitive bidding process for the rights packages was made subject to scrutiny by an independent Monitoring Trustee. Furthermore, no single purchaser was allowed to acquire all the live rights packages, as first applied from the sale of rights to the 2007/2008 season (no single buyer rule). This commitment was negotiated by the Commission in order to end the monopoly of British Sky Broadcasting Group plc (“BSkyB”) over the rights to the FAPL in the United Kingdom. Following the acquisition in May 2006 of two of the six FAPL live rights packages by Setanta, an Irish pay-TV sports channel, BSkyB ceased to be the exclusive holder of live Premier League matches. In 2009, following Setanta's bankruptcy, a new auction took place and ESPN picked up both packages previously held by Setanta.

2.2 *Ticketing arrangements*

2.2.1 *Exclusive distribution rights*

The Commission decision relating to ticketing arrangements for the 1990 Football World Cup¹³ concerned the exclusive worldwide distribution of package tours combined with tickets for the 1990 World Cup without the possibility of alternative sources of supply. The World Cup Organising Committee, set up jointly by the Italian football association and FIFA for the technical and logistical organisation of the World Cup, had undertaken to confer on a single travel agency (90 Tour Italia SpA) worldwide exclusive rights for the supply of stadium entrance tickets for the purpose of putting together package tours. Other travel agencies or tour operators could therefore not obtain tickets from any other source than 90 Tour Italia SpA.

The Commission took the view that this exclusive distribution system infringed Article 101 TFEU because it restricted competition between tour operators and between travel agencies in the EU on the market for the sale of package tours to the 1990 World Cup. The restrictions could not be justified under Article 101(3) TFEU on stadium safety grounds as a number of tour operators fulfilling the same criteria as 90 Tour Italia could have competed on the market without jeopardising spectator safety. The Commission therefore found an infringement of Article 101 TFEU but did not impose fines, *inter alia*, because it was the first time it had taken action on the distribution of tickets for a sporting event. Following the 1990 World Cup decision, the organising committees of the Barcelona and Albertville Olympic Games amended their contractual agreements to allow nationals of the EU Member States also to buy tickets directly from the organising committees or from travel agents distributing them in other EU Member States.

2.2.2 *Discriminatory ticketing practices (Territorial restrictions)*

The Commission decision relating to ticketing arrangements for the 1998 World Cup¹⁴ found an abuse by the French organising committee under Article 102 TFEU as it had imposed unfair trading conditions which discriminated against non-French residents and resulted in a limitation of the market for those

¹³ Commission decision of 27 October 1992, Case 33384 and 33378, *Distribution of package tours during the 1990 World Cup*, OJ 1992 L 326/31.

¹⁴ Commission decision of 20 July 1999, Case 36888 *1998 Football World Cup*, OJ 2000 L 5/55.

consumers. In particular, the general public throughout the EEA could only purchase certain match tickets on condition that they provided an address in France to which the tickets could be delivered. The practical effect of such a requirement was to deprive the overwhelming majority of citizens outside France of the possibility of purchasing any of the tickets in question. In addition, non-French residents were restricted to reserving tickets by means of written application while French residents could avail themselves of other, quicker means including reservation by telephone or by accessing the electronic French Minitel system. The Commission only imposed a symbolic fine of €1000 because of the legal uncertainty concerning ticket arrangements under EU law at the time and steps undertaken by the organising committee to ensure access of EU consumers to more tickets.

2.2.3 *Restrictions in payment methods (Credit card exclusivity)*

The Commission has also examined credit card exclusivity arrangements for sport events in two cases: the VISA exclusivity for ticket sales via the internet for the Athens Olympic Games in 2004, and the MasterCard exclusivity for direct sales of tickets for the FIFA Football World Cup 2006.

2004 Athens Olympic Games. In the Athens Olympic Games, tickets ordered via the internet directly from the organising committee ('ATHOC') could only be paid for with VISA cards. The Commission took the view (Case 38703) that this exclusivity did not constitute an infringement of Articles 101 or 102 if consumers in the EEA had reasonable access to tickets via alternative sales channels that did not require payment with VISA cards. Such an alternative supply channel for the general public was available in that tickets could be bought from any National Olympic Committee in the EEA as the latter accepted other payment methods. ATHOC also agreed to improve the information to consumers regarding all options for the purchase of tickets and by intervening with the National Olympic Committees in the EEA. The case was subsequently closed without a decision.

2006 Germany World Cup. The 2006 World Cup case was triggered by a complaint from a UK consumer organisation 'Which?' against FIFA and the German Football Association under Article 102 TFEU (Case 39177) concerning the MasterCard exclusivity arrangements for tickets intended for the general public. The Commission followed the same guiding principle as in the Athens Olympic Games case, *i.e.* there should be reasonable access to tickets for all consumers in the EEA. Tickets from the World Cup Organising Committee ('OC') could be paid for with MasterCard credit card, direct debit from a German bank account or international (cross-border) bank transfer. However, in the latter case, significant costs could arise for consumers in EEA countries outside the Eurozone, such as the United Kingdom. In light of the enormous demand for tickets and the importance of direct sales by the OC, the Commission was of the opinion that there needed to be a viable alternative to the direct sales by the OC to ensure reasonable access to tickets for the World Cup 2006 for those consumers who did not possess a MasterCard product. This alternative could take the form of (i) other payment forms for direct sales by the OC (*i.e.* more than one credit card and/or bank transfers without dissuasive additional costs for the consumers), or (ii) other sales channels for which there is no credit card exclusivity. As a result, the OC set up local currency accounts enabling fans based in non-Eurozone countries in the EEA to pay for tickets by making domestic bank transfers. The complaint was subsequently withdrawn and the case was closed without a decision.

3. **The application of EU competition law to the organisation of sport**

3.1 *Meca medina judgment – General principles*

In the *Meca Medina* judgment of 18 July 2006, the CJ rejected the notion that a "purely sporting" rule might fall outside the scope of EU competition law. The case concerned anti-doping rules adopted by the International Olympic Committee and implemented by the swimming governing body, Fédération

Internationale de Natation Amateur. Two athletes challenged the compatibility of the anti doping rules with the EU rules on competition and freedom to provide services.

The CJ held that the mere fact that a rule is purely sporting in nature, does not have the effect of removing from the scope of the EU competition rules the person who is engaged in that activity. Sports rules, irrespective of their nature, should be investigated on a case-by-case basis in order to assess whether they are compatible with the EU competition rules, taking account of the overall context and more specifically, the rule's objectives. The CJ held that it has to be assessed whether the rules pursue a legitimate objective, and whether the restrictive effects resulting from such rule are inherent to the pursuit of that objective and are proportionate to its achievement.

After carrying out such assessment, the CJ concluded that the rules in question did not infringe Art. 101(1) TFEU. The overall objective of the rules was to combat doping in order to ensure fair competition for all athletes, as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The limitations of actions imposed on athletes were inherent in the organisation and proper conduct of competitive sport and it was not established that the rules at issue were disproportionate.

3.2 *The MOTOE judgment – Exercise in parallel organisation of sporting event and economic activities*

The CJ provided further clarification concerning the application of EU competition law to sporting rules in the MOTOE ruling in 2008. The Court held that a non-profit-making motorcycling association could be considered as an undertaking if it organised motorcycling events itself and entered into sponsorship, advertising and insurance contracts. This conclusion was not affected by the fact that the entity had the power to give its consent to applications for authorisation to organise competitions submitted to the public authorities.

Also, the CJ concluded that such an association that also takes part in administrative decisions authorising the organisation of motorcycling events, had the power to prevent other competitors to enter the market of motorcycling events and therefore could distort competition. The CJ held that Articles 102 and 106 TFEU precluded a national rule which conferred on such association the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

The CJ explained that to entrust such an association the task of giving the competent administration its consent to applications for authorisation to organise motorcycling events, was *de facto* tantamount to conferring upon it the power to designate the persons authorised to organise those competitions and to set the conditions in which those events are organised, thereby placing the association at an obvious advantage over its competitors. The CJ was of the view that such a right may lead such association to deny other operators' access to the relevant market.

3.3 *The Lehtonen case – Rules concerning transfer deadlines*

The *Lehtonen* judgment¹⁵ of April 2000, concerned organisational rules and transfer rules of the International Basketball Federation [Is it called FIBA? Yes, it is called FIBA.]. These rules, implemented by the national basketball associations, prohibited clubs in Europe fielding foreign players in national championships who had played in another country in Europe, if they had been transferred after 28 February. After that date it was still possible, however, for players from non-European clubs to be

¹⁵ Case C-176/96, *Lehtonen et al v. FRFB*, ECR 2000 I-2681.

transferred and to play. Mr Lehtonen, a Finnish player, had been transferred to his Belgian club after that date and thus was not allowed to participate in the championship.

The national court made a reference to the CJ, asking whether these transfer rules were contrary to EU law (in particular to the freedom of movement for workers and competition law) in the case of a professional player who is a national of a Member State of the EU. The CJ found a restriction of the free movement of workers but considered that the restriction could, in principle, be justified. The CJ explicitly acknowledged the important role of transfer deadlines in ensuring the regularity of competition and observed that transfers late in the season might upset the competitive balance and damage the effective functioning of a championship. In the case at hand, the CJ found that the rules must be regarded as going beyond what was necessary to achieve the legitimate aim pursued. However, the CJ added that it is for the national court to ascertain whether there are objective reasons, concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone, which justify such different treatment.

3.4 *The Piau case - Organisation of ancillary activities (Agent licensing)*

The *Piau* judgment¹⁶ concerned FIFA rules governing the profession of football agents through whom professional football players may conclude contracts with the clubs.

Under the FIFA rules, a contract in such case was valid only if the agent involved had a licence for his/her practice issued by the national football association. Licensed agents had to pass an interview, have an impeccable reputation, and deposit a bank guarantee. The complainant claimed that the rules had infringed competition rules. As a result of the Commission's investigation, FIFA removed the most restrictive limitations (for example, the deposit was substituted by liability insurance; the interview was replaced with a multiple-choice test, *etc.*). Following these amendments, the Commission rejected the complaint and this decision was appealed by Mr Piau.

The GC considered that the football agent's activity (to introduce a player for a fee to a club or clubs to each other with a view of employment) clearly does not pursue a purely sporting interest. The GC questioned the legitimacy of FIFA's right to regulate the profession of football agents (not specific to sport and of unequivocally economic nature) which would normally be the prerogative of public authorities. However, the GC acknowledged that the players' agent profession needed to be supervised by some entity, which, due to the quasi total absence of national laws in this respect and the lack of internal self-regulation among the agents does not otherwise exist. The GC upheld the Commission's conclusion that the rules in question did not produce anti-competitive effects under Article 101(1) TFEU, as the most restrictive rules had been modified by FIFA. The CFI also agreed with the Commission that, even if such anti-competitive effects existed, they could benefit from the exemption under Article 101(3) of the EC Treaty.

As regards Article 102 TFEU, the GC considered that FIFA, as the emanation of the national associations and the clubs - the actual buyers of the services of players' agents - was active in the market for players' agents through its members, and that it held a dominant position in this market. The GC stated, however, that an abuse could not be established, relying essentially on the same arguments as those used in relation to Article 101 TFEU. The GC thus agreed with the conclusion in the Commission's decision that there was no infringement of Article 102 TFEU.

¹⁶ Case T-193/02, *Piau v. Commission*, ECR 2005 II-209; the appeal was rejected as being partly manifestly inadmissible and partly manifestly unfounded by order of the CJ of 23 January 2006, Case C-171/05P, ECR 2006 I-37.

3.5 *The Commission's decision making practice concerning organisational rules*

In 2009, the Commission rejected a complaint concerning anti-doping rules. In this case a professional tennis player lodged a complaint against the World Anti-Doping Agency, the ATP Tour Inc. and Court of Arbitration for Sport. The complainant claimed that the rules of the World Anti-doping Code, adopted/applied by the above organisations, were excessive and disproportionate and therefore they had a harmful effect on competition between professional tennis players. The Commission took the view that there was no Community interest to open an investigation in this case. The Commission also pointed out that it was very improbable that the anti-doping rules would restrict competition under Article 101(1) on the basis of the *Meca Medina* test. Concerning Article 102 TFEU the Commission stated that the complainant did not provide evidence of any abusive behaviour and there was no indication that the practices at issue would affect the functioning of the internal market. The complainant lodged an appeal against the Commission decision, the case is currently pending before the GC.¹⁷

In 2002 in the *ENIC* case the Commission took the view that UEFA's rule on the independence of clubs does not violate Art 101 and 102 of the TFEU. *ENIC*, a company that owned stakes in six professional football clubs in various Member States had lodged a complaint against a rule adopted by UEFA in 1998, which stated that no two clubs or more participating in a UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person. The Commission rejected the complaint concluding that there was no restriction of Article 101(1) TFEU. Although the UEFA rule is a decision taken by an association of undertakings and, therefore, theoretically caught by the prohibition principle set in Article 101(1) TFEU, it can be justified by the need to guarantee the integrity of the competitions. The Commission concluded that the rule “*aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competitions...*” The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim: *i.e.* to protect the uncertainty of the results in the interest of the public. The test applied by the Commission is similar to the one applied by the CJ in *Meca Medina*, therefore it would appear likely that the rule would not infringe Article 101(1) TFEU on the basis of *Meca Medina*.

In the FIA case the Commission dealt with a conflict of interest situation arising from the fact that a sport association was not only the regulator but also the commercial exploiter of a sport. The Fédération Internationale d'Automobile (FIA) is the international association for motor sport whose members, *inter alia*, organise and regulate motor sport in their respective countries. FIA itself also acted as organiser and promoter of motor sport championships, in particular Formula One. In 1999, the Commission issued a Statement of Objections (SO) concerning rules by FIA which prohibited drivers and race teams that held a FIA licence from participating in non-FIA authorised events. Circuit owners were prohibited from using the circuits for races which could compete with Formula One. The Commission came to the preliminary conclusion that these rules violated Articles 101(1) and 102 TFEU as they gave FIA the control to block the organisation of races which competed with the events FIA promoted or organised (*i.e.* those events from which FIA derived a commercial benefit, in particular Formula One).

The Commission also objected to certain terms of the contracts between the Formula One Administration Ltd (FOA, subsequently Formula One Management Ltd), the company that administered the TV rights to Formula One races, and broadcasters because they made it possible to block the organisation of motor sport events that would compete with Formula One races. For example, the agreement with broadcasters imposed a severe financial penalty on them if they showed anything that would be deemed by FOA a competitive threat to Formula One. Finally, the Commission objected to FIA rules according to which FIA automatically acquired TV rights to all the motor sport events it authorised even if these were promoted by a different promoter.

¹⁷ Case T-508/09 *Cañas v Commission*.

The Commission closed the case after having reached a settlement in 2001. The settlement provided in particular that FIA would:

- Limit its role to that of a sport regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest (through the appointment by FIA of a “commercial rights holder” for 100 years in exchange for a one-off fee);
- Guarantee access to motor sport to any racing organisation and to no longer prevent teams to participate in and circuit owners to organise other races provided the requisite safety standards are met;
- Waive its TV rights or transfer them to the promoters concerned; and
- Remove the anticompetitive clauses from the agreements between FOA and broadcasters.

ARGENTINA

Football (or soccer) is the most important professional sport in the Republic of Argentina.

The sales of player's contracts and the advertisement generate huge revenues to all the market agents.

However, one of the main issues is the administration of the broadcastings rights.

In the next work, we will try to show the Argentinean experience about the broadcasting rights and the antitrust problems which arise from the exercise of such rights.

In Argentina there is a mayor league in which participate twenty teams. This league is organised by the Argentinean Football Association (herein "AFA").

All teams transferred their local broadcasting rights to the AFA, so this association can negotiate the transmission of the matches.

In 1991 AFA sold the broadcasting rights to a company called TELEVISIÓN SATELITAL CODIFICADA (herein "TSC") for a period of 6 years which was renovated several times up to 2016.

TSC was integrated by many firms which controlled one cable company.

We have the first problem here: the vertical integration.

The second problem which arises from this frame is the right hold by TSC: the firm had the exclusive right to rebroadcast all the matches through a TV programme which was produced by TSC called Futbol de Primera (herein "FDP"). Only after the rebroadcasting of the matches (or highlights of the matches) the rest of the channels or the programmes (which compete with TSC and its controllers) could use the images taken from those matches.

The next paragraphs will be divided in five sections: (1) The structure of the pay TV in Argentina; (2) The TSC Contract; (3) the antitrust problems caused by the TSC contract; (4) the main cases investigated by the National Antitrust Commission; and (5) the Government solution.

1. The structure of the Pay TV in Argentina

From the economic point of view, cable television, satellite television and ground television can all be included within the concept of "pay television". This name refers to the fact that all these services are marketed through firms that enter contracts with their viewers and, by means of them, such viewers subscribe to a certain service and pay a certain amount of money, usually monthly. This is their main difference in comparison with open television services, which can be received directly and for free by any person who has a television set, without having to subscribe to any particular television company.

According to the information supplied by the National Institute of Statistics and the Census of Argentina (herein "INDEC") and the main pay television suppliers, the number of homes that have access to this kind of service amounted to 5.7 million in 2001 throughout the country. This represents 56.3% of

the total number of homes that had a television set. Of this figure, 53.2% were users of cable television, and 3.1% were users of satellite television or ground television services. The penetration level of cable television in Argentina is remarkable in comparison with other Latin American countries and with many European countries, although it is lower than that of some developed countries such as Canada (72.1%), the United States (71%), Denmark (68,3%) and the United Kingdom (60.3%). Another figure that shows the importance of the cable television service in Argentina is the fact that of all the homes where the cable networks are available, 72.8% of them are users of the system.

The main cable television suppliers in Argentina are Cablevisión, Supercanal, Telecentro and Red Intercable. The latter is not a company in itself, but a network of about 450 local independent operators. Of the companies that we have mentioned, Telecentro operates in the city of Buenos Aires and its surroundings, while Supercanal does not operate in that area but covers an important part of the interior of the country. The largest company in terms of users on a national level is Cablevisión, it has an important geographic coverage, both in Buenos Aires and in the rest of the country. It concentrates almost 60% of cable television users throughout the country, a figure which is much higher in Buenos Aires and in several other provinces.

One of the characteristics of cable television in Argentina is that in several urban areas there are two or more overlapping cable networks.

As regards satellite television, in Argentina, is provided by only one operator, DirecTV, and it makes use of the provision system known as DBS.

There are some differences concerning the additional services offered by DirecTV in comparison with cable television operators. It is worth mentioning that satellite television has a greater range of optional premium channels, and it provides the service of pay-per-view programmes, which is unusual for cable in some areas where they have no digital connection.

Another advantage has to do with the fact that, since wiring is not necessary, satellite television can reach places that cable television cannot, mainly in rural areas and other areas with a low population density.

As regards the problems of the satellite television system in comparison with those of cable television, there are two that are worth mentioning. In the first place, as the broadcasting of the programmes is carried out from the same place, it is not possible to include local television channels within the grid, unlike cable television operators who generally do so in the different cities where they operate. Secondly, because of the technology employed, it is not possible for the different television sets installed in a single home to watch different channels, unless there is a separate antenna connected to each television set (with the subsequent additional cost that this implies). In this sense, cable television has an advantage over satellite television, since all the channels are transmitted through the same wire, which means that different channels can be watched at the same time in different TV sets in the same house.

Traditionally, the price of satellite television in Argentina has been higher than the price of cable television, and this has led to the fact that, in those areas where wiring is available, most people choose cable television instead of satellite television. However, in the last years this difference has narrowed. So with the reduction of the price gap, the number of users of satellite television in Argentina has increased in the last few years.

Moreover, we can point out the fact that, together with the emergence of digital television, the main telephone companies in Argentina (Telefónica and Telecom) are investing in infrastructure that will enable them to offer the services known as “triple play” (voice, data and video), with which they could offer their

own pay television systems. For the time being, however, this development is still in an early stage, and there are also certain regulations preventing telephone companies to offer television services.

1.1 Provision of television channels

The main input used by pay television companies is the one constituted by the channels that they include in their grids. Therefore, the provision of those channels represents one of the key elements along the process of distribution of television programmes. As regards the supply of television channels, we can distinguish two stages in its distribution and marketing. The first stage links the channel suppliers and the television system operators (content distributors). In the second stage, those distributors supply the channels to the users, and distinguish between those that will be televised through the basic service and those that will be codified, premium or pay-per-view. Concerning the demand for television channels, there are also two stages for the sake of analysis. First, content distributors choose the channels that will make up the grid that they will offer, creating the channel package that they will purchase from the suppliers. Secondly, viewers demand certain contents and show their preferences over the channels, and the times at which they watch the different channels. This demand can be measured by means of the rating or the share of each programme or channel. In order to reach the viewers, contents go through different stages. Therefore, there are content producers who provide the necessary resources in order to create programmes. Once the contents have been created, the “programme gatherers” purchase the broadcasting rights of the different kinds of contents, and organise them according to a certain schedule. As an example of this, we can mention the case of movie channels which purchase the rights to broadcast certain movies and organise them according to a schedule. Finally, there are different means through which those programmes are distributed to the final users, which are the different pay television and open television systems.

Pay television systems in Argentina distribute an important number of channels, since the usual grid has an average of 65 to 80 channels, between those included in the basic service and the codified channels. However, as we mentioned before, almost 70% of the share is concentrated in the five open television channels from the Buenos Aires metropolitan area, which can also be watched in the rest of the country through cable and satellite television. In the remaining 30%, the largest portion of the audience is captured by the channels specialised in movies, sports and children’s programmes.

With reference to channel suppliers, the most important ones are Tevefé, Pramer and Artear (controlled by GP), which are the companies that provide pay television operators with the private open television channels from Buenos Aires (Telefé, in the case of Tevefé, Canal 9 and América 2, in the case of Pramer, and Canal 13, in the case of Artear). Pramer and Artear also market several other specialised channels (news, sports, movies). The next suppliers in order of importance are Imagen Satelital and Turner, which only provide pay television channels specialised in movies, music, news, children’s shows, and others.¹

Although the most direct indicator of the importance of the different channels is their audience, the different marketing methods of the programmes mean that some channels are considered much more important than what their ratings or shares indicate. This is the case of the movie channels that are usually codified, and for which users pay an additional fee. Among these channels we can mention HBO and

¹ As regards private open television channels, the most important ones are, undoubtedly, the four channels from the city of Buenos Aires. The first three are: LS 83 TV Canal 9, owned by Telearte S.A., LS 84 TV Canal 11, owned by Televisión Federal S.A. (Telefé), and LS 85 TV Canal 13, owned by GC and LS 86 TV Canal 2, owned by América TV S.A. These companies cover directly an area of an approximate 70-kilometer radio from their originating station and in many cases they have relay stations in other parts of the country. On the other hand, apart from these relay stations, in other parts of the country there are a large number of open television channels that have their own programmes.

Cinemax, provided by HBO, and Cinecanal and Movie City, provided by LAP TV. Although these channels usually have relatively low ratings (since not all users are subscribed to them), they usually generate larger amounts of money for their suppliers and cable television operators, since they produce an additional specific revenue. The same happens with the codified soccer matches which were broadcast by TyC Max in Argentina, and are marketed by the TSC group. As well, these “star channels” have brought about the greatest number of antitrust cases over disagreements between suppliers and cable television operators.

TyC Max’s status of “star channel” seems to extend to the TyC Sports channel, which most pay television operators include as part of their basic service. In fact, these two channels stand out because they are the only two channels that broadcast the Argentine first division soccer matches live. As most cable television operators surveyed by the CNDC have mentioned in several merger and anticompetitive conduct cases, TyC’s channels are, from that point of view, channels that contribute to differentiate the service offered by each operator. Indeed, the evidence gathered shows that they are two of the most expensive channels to purchase, and this means that those operators who have them charge a higher amount of money for their service in comparison with those who do not include them in their grid (such as Telecentro (before 2008) in the metropolitan area of Buenos Aires, and several other companies belonging to Red Intercable in the rest of the country).

Apart from the specific features that we have mentioned, there is the feeling that in Argentina the main cable television operators have certain buying power as regards channel suppliers. This buying power seems to be limited to the national channels, and this is probably why those channels usually make use of specialised firms that market television channels, granting them the distribution rights of those channels, in order to counteract the bargaining power of the cable systems. The most renowned international channels, instead, usually negotiate directly with pay television operators through their local or regional branches (for example, Turner, Fox, ESPN, HBO, etc.).

Another aspect that is worth mentioning is the relatively important vertical integration that exists in Argentina between pay television operators and channel suppliers. In fact, the main cable television operator as regards the number of users (the Cablevisión group which belongs to GC) is vertically integrated with TyC (TSC) and Artear.

Lastly, we can mention the strategic relationship existing between América TV (supplier of an open television channel, a news channel and a sports channel) and Supercanal (a cable television operator), between Fox and DirecTV, and between Telecentro and Canal 26, a news channel. Therefore, of all the important firms taking part in the business, only Telefé, Pramer and some international channel suppliers (Turner, ESPN, HBO) are currently outside the segment of programme distribution through cable or satellite television systems.

As regards the relationships established between channel suppliers and pay television operators, we must say that, normally, the former do not allow the latter to change their contents either completely or partially, and this means that channel suppliers can market their advertising spaces exclusively. This seems to be related to the fact that the satellite provision of the channels determines a national programme planning that hinders local advertising. Nevertheless, in the case of cable television operators, a part of the advertising space is usually sold locally, taking into account a series of restrictions regarding their length and commercial terms previously determined by the operator and the channel supplier. This does not happen with satellite television, which cannot include local advertising in its programmes because of technological obstacles.

Concerning the price of the channels paid by television operators, this is based mainly on the number of users that each operator has. Therefore, channel suppliers usually establish a categorisation of their

customers according to an arbitrary range of users, and that is how they establish the price. In other isolated cases, suppliers charge a fixed price for their channels, and this generally applies to small cable television operators. There are also some companies that offer discounts based on the number of users, on the number of channels purchased, on the number assigned to each channel in the TV operator's grid (the lower the number, the greater the discount), etc. In most contracts, the marketing firms do not establish, suggest or recommend the price that the operator should charge its users, but there has been at least one case where a company established in its contract that if a cable television operator raised the price of its basic service, then the channel supplier had the right to raise its own price in the same proportion.

2. The TSC contract

In 1991, AFA celebrated an agreement with TSC. Through this agreement AFA gave exclusively to TSC the rights of broadcasting and commercial exploitation of the football matches that take place each Friday before to each date of the concerned tournament. These matches had to be transmitted live to the interior and exterior of the country through the codified television system and in deferred to the areas of dispute (Capital Federal y/o Gran Buenos Aires) and its zone of influence of 60 km. In complement AFA also gave TSC the rights of transmission of the football matches of the different tournaments that took place on Sunday's. These transmissions had to be in deferred through the codified television system for "Capital Federal", "Gran Buenos Aires" and the interior of the country, and live or deferred to the exterior of the country. Additionally, through a complementary agreement, AFA gave TSC the transmission rights of the football matches that take place each Saturday, or in its defect the day of the week to be arranged, before to each date of the concerned tournament. These matches had to be transmitted live or deferred in "Capital Federal", "Gran Buenos Aires", the interior of the country and the exterior. As well, with date 29 of July of 1994, AFA and TSC subscribed an agreement through which AFA gave TSC the commercialisation and transmission rights of the matches that take place each Monday, which are to be transmitted live or deferred through the open or closed television system of "Capital Federal", the interior of the country and the exterior as well.

The mentioned agreement had a lasting period of six years, but was renewed and extended for six more years till the year 2003.

Since the contracting parties noticed that the agreement they had, affected positively the evolution of television products and the diffusion of professional football, creating a permanent a stable network of football watchers, they decided to renovate their agreement once again for six more years, till the year 2009.

The parties agreed that the rights that AFA gave to TSC were for the exclusive commercialisation, diffusion, editing and transmission through television of the images and sounds, inside the country and outside, through all the possible systems of transmission that exist, with exclusive rights of repetitions and commercialisation without limit of time, territory and number of times.

In return for the rights that AFA gave to TSC, the last one will pay AFA:

- For the matches that take place on Friday's and Saturday's, TSC will pay AFA the 40%, free of charges, of the sums perceived by TSC resulting from the commercialisation of the live transmission of the above mentioned matches, leaving all the other incomes and costs that the commercialisation and transmission give and require to TSC.
- In relationship to the matches that take place on Monday's the terms applicable are those agreed in the contract with date 30 of November of 1995.

In the agreement subscribed between AFA and TSC there was a clause that gave the Television Show FDP an exclusive permission to re-broadcast the highlights and goals of the football matches. Not only after 12 pm could other television shows re-broadcast the highlights or goals of the football matches.

The preceding contract was renewed for the last time till 2014.

3. The antitrust problems caused by the TSC contract

The existence of the vertical relation between TyC (a content producer and a broadcasting rights holder) and GC (a channel owner) produced several problems from the antitrust point of view.

The first one was the refusal to deal the broadcasting rights to the rest of the cable operators (or the excessive price charged).

The right to broadcast football is a very high asset in Argentina. So, those cable operators who have such right, are able to face a demand in best position than those who have not the right. It is important to take into account that the cable company can discriminate between customers who want to watch football using a low cost device.

This allows GC and the companies under its control to have an advantage to its competitors.

The second problem which arises from the scheme created is that the TSC Contract gives TSC the exclusive right to rebroadcast the matches and their highlights through its TV programme called FDP.

This show, during the validity of the TSC Contract, had an important market share (or rating), because the customers, who many of them could not pay for the pay TV, watched FDP as the only possibility to access the matches highlights.

The Antitrust Authority understands that there are two different relevant markets. One is the broadcasting of live matches. The other is the rebroadcasting of matches (or its highlights).

The first one has a natural monopoly characteristic. It has a high cost structure and it is not affordable to be supplied by two or more firms with today's technology.

The second one is not necessarily needed to be supplied by just one firm. Here the demand can ask for big shows (with high production inversions, lots of cameras in the field, high technology to analyse the plays and important journalists) or small shows that just rebroadcast the highlights (maybe just one camera is needed for each stadium).

So, in this scenario the competition is possible and can improve the costumer welfare.

However, under the TSC Contract, the competition was not possible because FDP attracted an important share of the market under an artificial monopoly and the rest of the producers didn't have incentives to participate in the rebroadcast football market.

4. The main cases investigated by the National Antitrust Commission

4.1 *Concerted practices*

The most relevant case of anticompetitive concerted practices that has been analysed in Argentina in the sector of television programme distribution has undoubtedly been "CNDC vs. TRISA, TSC and others" (2002). The CNDC started this case in February 1999, in reference to the behaviour of a television channel

supplier (TSC) consisting in setting minimum resale prices for the broadcasting of some soccer matches organised by the AFA. This behaviour, which was a vertical practice that affected the games broadcasted by the so-called “coded system”, and had taken place during 1996, 1997, and 1998 in the Buenos Aires metropolitan area, also involved the three main cable television operators in that area (VCC, Multicanal and Cablevisión), who had participated in the analysed conduct. TSC was in charge of the purchase and sale of the rights for the television broadcasting of AFA’s official soccer games, and it produced television programmes where those games were broadcast. Multicanal, Cablevisión and VCC, on the other hand, were cable television suppliers. In the beginning they were completely separate companies, but in 1998 VCC was bought in equal shares by the other two companies. Sometime later, VCC was split in two and absorbed by Multicanal and Cablevisión. At the same time, stockholders of Multicanal and Cablevisión held stock in TRISA and TSC, but the stockholding composition of these cable TV companies was sufficiently different as to consider them as independent economic agents, which were also independent from the TRISA-TSC group. In 2007 Cablevisión merged with Multicanal.

The first element that the CNDC took into account to define the existence of the anticompetitive behaviour was the definition of the relevant market and, from this, the position that the accused companies had in that market. As a first step toward defining the market, soccer was separated from the other sports, given the importance that the local audience assigned to it. This could be seen from the fact that soccer was the sport that received the greatest amount of money to be broadcast, the one whose advertising space was the most expensive, the one which generated the highest income from its sponsors and private advertisers, and the one whose clubs managed the highest budgets.

Secondly, the CNDC analysed the degree of substitution between the Argentine first division soccer and other national soccer tournaments, and concluded that the different categories were not considered substitutes by soccer enthusiasts. In fact, of all the categories that competed within AFA, the only category whose broadcasting was coded was the first division, which meant that there was a specific demand for those matches.

Lastly, the pre-recorded broadcast of soccer matches was separated from their live broadcast. Taking into account that both kinds of broadcasts of a single event took place within hours of difference from each other, and that the accused company who owned the broadcasting rights (TSC) coded one of them while the other could be watched on open television, it could be seen that the different broadcasts were not part of the same market, since, if they were, no viewer would have agreed to pay the additional price for the coded games broadcast live.

Therefore, in the market that we have described, TSC had no competition whatsoever as regards the broadcasting of the first division soccer matches, since it hold the exclusive rights for the broadcast of those matches until the year 2014. The CNDC could verify that TSC fixed a minimum resale price, below which cable television operators would not market coded soccer games. The participation of all of the accused companies in that minimum price-fixing was twofold.

On the one hand, TSC had set the resale prices that cable television operators would have to charge. On the other hand, cable television operators had taken part in this behaviour, by meeting and jointly accepting the resale conditions for coded television that we have described.

Hence, the CNDC came to the conclusion that, as a consequence of the analysed behaviour, the existing competition for the provision of this product was severely limited, and that the final price was artificially high and caused damages to cable TV users.

TSC was sentenced with fines of 529,289 Argentine pesos each (which was the maximum amount allowed by the applicable antitrust law at that time), while Cablevisión, Multicanal, and VCC were

sentenced with somewhat lower fines (\$352,859 each), since their participation in the questioned behaviour was considered to be less important.

It is worth mentioning that the resolution of this case was appealed by the sanctioned companies before the National Economic Criminal Court, and that such court revoked the resolution in 2003. In doing so, it understood that the analysed behaviour was not anticompetitive, since it was considered to be a vertical practice that had not brought about a restriction on the existing competition between TSC and other suppliers of sport television contents. In its analysis, the court of appeals considered that the relevant market for this case was broader than the one defined by the CNDC. Besides, it did not assign importance to the implicit horizontal price-fixing agreement among Multicanal, Cablevisión and VCC. This ruling of the court of appeals, however, is still susceptible to be changed, since the case has been appealed before the Argentine Supreme Court.

4.2 Vertical exclusionary practices

Most of the formal complaints against anticompetitive practices related to the sector of television programme distribution in Argentina are associated with problems between television content suppliers and cable television operators. These conflicts are originated by supposed refusals to sell on the part of channel suppliers, or by the imposition of prices that are considered abusive by the plaintiffs. In most cases, these practices can be classified as exclusionary practices, encouraged by the horizontal and vertical relationships established among the main companies in the sector.

An important part of these complaints is related to the segment of sport television channels. The CNDC has noticed on several occasions that sport television channels represent one of the most valued products in this sector, and that final users of the service take them into account when choosing a television system operator. This feature usually implies that the sports programme suppliers have a dominant position in the market of the analysed input. Sometimes, that position is reinforced by the vertical integration between them and the TV system operators.

One of the best examples of this kind of behaviour can be found in “Multicanal vs. Fox Sports and others” (2004), where the complaint was about the supposed refusal of Fox Sports to sell Multicanal the rights to broadcast its sport channel under the same conditions it was provided for its competitor (i.e., Cablevisión, which was partially owned by the Fox group before the merger with Multicanal). This behaviour had the potential to cause a downstream competition problem, because of Cablevisión’s presence in the market as Multicanal’s competitor. The CNDC pronounced a preliminary decision compelling Fox to provide Multicanal with the sport channel under the same commercial terms and with the same contents as those established for Cablevisión. In its final ruling, the Commission considered that the incipient discrimination was rapidly corrected by means of the cease-and-desist order mentioned before, as well as by the agreement reached by both parties.

The company TRISA held the broadcasting rights of the first division soccer games organised by AFA. In “Teledifusora vs. TSC” (2002), for instance, a supposed refusal to sell the sport cable channel called “TyC Sports” was investigated, as well as the refusal to sell the soccer matches and events marketed separately by TSC. TSC and Teledifusora had started discussing terms for the commercialisation of those rights in January 1998, but after a year the companies did not manage to reach an agreement regarding the price of the service provided by TSC. This was finally solved in July 1999, when the CNDC accepted the explanations given by TSC, considering that the supposed refusal to sell was in fact the result of a private commercial disagreement between both parties.

4.3 *Vertical mergers*

The most relevant merger of predominantly vertical nature, analysed by the CNDC in the markets of television service provision, is undoubtedly the case called “Liberty Media-Hicks/Cablevisión” (2001). In that case, the acquiring companies (Liberty Media and Hicks), already controlled several cable television operators and television channel suppliers, and they jointly took over Cablevisión, one of the main cable television operators in many Argentine cities.

As the transaction did not bring about a significant increase in the concentration within the markets of cable television services, the CNDC approved the transaction without requesting any divestiture of assets. Nevertheless, to avoid potential damages to competition derived from the strengthening of the vertical relation produced by the transaction, the CNDC obliged the parties to warrant the availability of the television channels controlled by Liberty Media and Hicks, in fair commercial terms, to all those television operators who requested them. Similarly, the grid of Cablevisión, and the ones of the other cable TV operators that became part of the same group, should be available, in fair commercial terms, for the television channel suppliers that competed against Liberty Media and Hicks in the markets of television contents.

As part of the previous transaction, Hicks reached an agreement with Liberty Media that resulted in a joint control over Cablevisión, where each of them received 50% of the stock belonging to the other. Likewise, the transaction also stated that half of the Cablevisión’s stock bought by Liberty Media would go to Unitedglobalcom, a firm devoted to the production and marketing of contents. This change in the nature of control over Cablevisión was analysed from the point of view of two different scenarios. On the one hand, if Liberty Media did not control Unitedglobalcom, the transaction would imply a horizontal relation of relatively small magnitude connected to two TV channels called MGM and Casa Club TV. This, in turn, implied a divestiture, since five other channels split away from the group (those connected with Discovery Networks Argentina and with Fox Sports). The second analysed scenario took for granted that Liberty Media controlled Unitedglobalcom, or that it had a strong influence on it. This meant that the second stage of the transaction would produce horizontal relations and that the divestiture mentioned before would not take place.

In any of the two analysed scenarios, however, the transaction did not alter Cablevisión’s shares in the markets of cable television services, since it did not imply an increase in the number of users of this company. However, the CNDC took into account the possibility that the merger would increase the incentives for a possible co-ordinated action in the market of pay television channel provision, in order to exclude competitors or to establish discriminatory clauses when marketing TV channels. In fact, the Hicks group controlled Pan American Sport Network, a sport channel, and was a stockholder in Imagen Satelital, a company that produced and marketed television channels. On the other hand, Liberty Media controlled Pramer, a company that supplied more than television channels, and was a stockholder in Fox Sports, MGM and Casa Club TV.

Apart from this, Hicks and Liberty Media partially controlled TyC Sport and TyC Max, the main sport channels.

In order to protect the competitive process from practices that could have an adverse effect on competition, the Liberty Media group took the responsibility before the CNDC of exercising its right to sell its stock in Fox Sports, and made a commitment not to market those television channels where it had direct or indirect participation jointly with the Hicks group, as long as market or stockholding conditions did not change substantially.

The “Liberty Media-Hicks/Cablevisión” merger induced a relatively large reorganisation of the sector of television programme distribution in Argentina, and this took place through several other transactions carried out in the following years. The most significant one was the merger analysed in “Liberty Media/Fox Sports” (2004), where the group formed by Liberty Media and Hicks joined the Fox group in order to create a new company (Fox Pan American Sports), which would provide mainly sport channels. This new company, in turn, entered a contract with Torneos y Competencias, by means of which that company, that owned the main competitor of the Fox Sports channel, was in charge of selling the Fox Sports contents to the television system operators.

This transaction, therefore, had a great effect on the market of sports channel broadcasting. Following a methodology through which the CNDC analysed several alternative relevant markets, it was concluded that this merger entailed the joint operation of the only channels that participated in the marketing of sport channels that broadcast live soccer games played by Argentine first division teams. The channels that did so were Fox Sports (the channel under examination), on the one hand, and TyC Sports and TyC Max, on the other (controlled by Torneos y Competencias).

The entry conditions into the defined relevant market were characterised by the existence of barriers that prevented a timely, likely and sufficient entry of competitors that would be able to counteract the possible exercise of market power. One of those barriers was the existence of a long-term contract for the assignment of broadcasting rights, signed by the Argentine Football Association and the Torneos y Competencias group. Another important barrier was the existence of vertical relations between Fox Sports, Torneos y Competencias, and the main pay television operators. On the other hand, no efficiency gains that could counterbalance the potential exercise of market power could be observed; neither was the “failing firm defence” considered to be applicable. Finally, the existence of contracts and no-competition clauses between Fox Sports and Torneos y Competencias strengthened their dominant position even more in the defined relevant market.

Taking all these reasons into account, the transaction was approved conditioned to the fulfilment of certain terms that both parties would have to present. First, the parties presented an agreement by means of which they would implement a swap between Fox Pan American Sports and Torneos y Competencias, in order to completely separate the stocks of both companies. This agreement was approved, but a further requirement was added to it, which was also suggested by the merging companies. This requirement was that Torneos y Competencias stopped marketing the Fox Sports channel to television system operators.

5. The government solution

Because of the importance of the football for the Argentinean audience, the government decided to modify the *status quo*. It offered a new contract to AFA with almost the double of price than the contract signed with TSC.²

AFA breached the contract with TSC and signed a new one with the government.

Under the new frame the market changed. Nowadays, there is no exclusivity over the rebroadcast of the matches. After each match, any channel can show a highlight of it.

² It is important to mention that AFA sold all broadcasting right in one block to one firm. This contract was renewed many times. So, the broadcasting right were hold by the most important cable operator in Argentina. On the other hand, the many clubs which participated in the mayor league in Argentina were in a bankrupt situation because the money from that contract was insufficient. So, the new contract brought a solution to the club’s problems.

The audience grew (there was an increase in the ratings of live broadcastings) and FDP disappeared because of the drop of the audience. In this case there was a trade off between those markets increasing the customer's welfare because these do not have to wait till midnight to watch the most important plays.

Before the state's contract, there were problems because of the creation of a non natural monopoly from a situation where the competition is necessary and usual. However, with the assignment of rebroadcast right in the head of just one firm (or show), the situation obtained was not optimal.

After the new contract, the non natural monopoly and the vertical antitrust problems disappeared. The rebroadcasting right are free in the market, so any firm or show can use them (according to the intellectual property law) and the vertical antitrust problems finds a solution because the state does not participate in so many markets as the former private firms did.

BULGARIA

1. General legislative framework of sport activities in Bulgaria

1.1 National legislation

The main national law, regulating sport activities in Bulgaria, is the Law on Physical Education and Sport.

Art. 4 of the law stipulates that the state regulates the sports, among others through:

- Creating regulatory provisions for the physical education and sport in the country;
- Supporting, co-ordinating, regulating and controlling the activity of the sport organisations.

The law provides that the sport activities are performed by the sport organisations (sport clubs, sport federations and national sport organisations), which should be legal persons. The sport clubs are voluntary associations of citizens, registered as non-profit legal persons, which perform training and other sporting activities, organise and administer sport competitions, etc. The sport clubs of different sports could create joint sport clubs and register as non-profit legal persons.

The professional sport clubs should be either joint stock companies or non-profit associations. They should also fulfil the following requirements:

- To include explicitly in their names the fact that they are professional sport clubs;
- The professional sport clubs, which are joint stock companies, to issue only registered stocks;
- No natural or legal person shall hold majority share or control in more than one professional clubs participating in one competition;
- To have regulated the rights and obligations of the professional players in contracts.

The sport clubs have the rights to carry out the transfers of athletes, to own the rights for advertising, TV and radio broadcasting of the competitions, organised by them and under the terms and conditions, determined by the respective sport federation, to provide sport services, to propose to the respective federations the granting, termination and revoking of athlete rights.

The sport federations are voluntary associations of sport clubs for one or similar sport and they should be registered as non-profit legal persons. The minister for physical education and sports issues refuses to issue and terminates the licenses of the sport federations and the sport organisations. The sport federations are in charge of the licensing of the sport clubs for the particular sport(s).

There is a special Ordinance for the licensing of sport organisations in Bulgaria, which sets out the detailed rules to be applied for the licensing of sport clubs, federations and organisations.

1.2 EU legislation

By virtue of Council Regulation (EC) No 1/2003, Bulgarian Commission on Protection of Competition applies independently or in parallel with the relevant national prohibitions the provisions of Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC) in cases where the alleged violation of antitrust rules might affect trade between EU Member States.

The European Commission and the European Court of Justice have adopted several decisions, stating that sport activities are subject to EU competition rules insofar as they constitute economic activity. At the same time, the special nature of sport is recognised at EU level, exempting from the application of the competition rules the social aspects of sport, which do not have economic impact. Therefore, the European Commission makes a distinction between the principles of competition policy and the requirements of the sport policy. Bulgarian Commission on Protection of Competition adheres to this distinction in its enforcement decisions related to the sport activities.

2. CPC cases in the sport sector

The CPC has examined two mergers in the area of professional sports. These mergers concerned two consecutive acquisitions of one of the leading professional football clubs in Bulgaria. As part of its analysis, the CPC defined the following separate sport markets:

- Sale of tickets for home games;
- Marketing and communication services/Sport marketing;
- TV rights;
- Players' transfer rights;
- Additional activities related to the sale of goods wearing the club insignia (caps, T-shirts, etc.).

2.1 Sale of Tickets

The tickets for matches are sold by the host club and the volume of the sales depends on the popularity of the particular sport, of the participating teams, of the particular competition. Regardless of the fact, that the sale of tickets for football matches is purely economic activity, the CPC established that a number of non-economic factors influence and regulate the competition on this market. Professional football teams have a limited possibility to determine their competitive behaviour on this market due to the fact that the number of the matches, the competing teams and the stadiums where the matches are played are strictly regulated by the rules of the particular competition. Even though the clubs determine freely the price of the tickets, the clubs dispose of limited possibilities to influence the sales of the tickets as the attractiveness of a particular match depends rather on the interest of the club's fans than on the price of the tickets.

2.2 Marketing and communication services/Sport marketing

This activity includes sponsorship for the sporting equipment, sales of advertisement billboards at the stadium, as well as public relations activities. The CPC¹ and European Commission's² case law in this area considers the market for marketing communications services (advertising, information and consulting, public relations, direct marketing and event management, etc.) as a uniform (single) market, with a possibility for the sport market to be a separate market, having in mind the fact that the sport attracts specific audience.

1 CPC case No 212/2003г.

2 Case COMP/M.2483-GROUP CANAL + /RTL/GJCD/JV.

2.3 *TV rights for regular football matches*

By virtue of Art. 19, para 1, p. 10 of the Law on Physical Education and Sport, the licensed sport federations have the right to be owners the broadcasting and advertising rights for the competitions, organised by them. The TV rights for broadcasting Bulgarian national competitions are transferred from the professional football clubs to the Bulgarian Football Union/the Professional Football League, who decide in the beginning of each season which matches will be broadcasted. The Professional Football League (which has a statute of commission within the Bulgarian Football Union) negotiates the TV rights with Bulgarian televisions and concludes the contracts for broadcasting the matches. The professional football clubs receive part of the money for the TV rights for the broadcasted matches with their participation.

The CPC made a distinction between broadcasting of two main types of matches.

Regular football matches, held during national and international championships, competitions, cups, etc. These matches generate regular incomes for radio and TV operators, which include these matches in their programming.

Football events held once in several years (World Cup, European Championship, etc.). They generate significant incomes for a relatively short period of time and require specific programming for the transmitting operators.

Following the European Commission's case law³, the CPC defined the relevant market in these cases as the market for sales of TV rights for transmission regular football matches at national level.

The CPC noted that the professional football clubs have very restricted role in the sales of TV rights for football matches held in Bulgaria and abroad. According to the normative acts of the Bulgarian Football Union (BFU), all clubs that are its members, cede to it the right to offer these TV rights to the TV operators and then the BFU the incomes received between the participating clubs according to an adopted by the union methodology. The mechanism for the TV rights for football matches, organised by UEFA, is similar. In this situation no professional football club in Bulgaria is in the position to influence the offering of these TV rights and therefore to exercise any market power towards the buyers of these rights.

2.4 *Transfer rights market*

The transfers of rights of the football players in Bulgaria are regulated by the normative acts, adopted by the Bulgarian Football Union, as well as by the acts on this subject, adopted by UEFA and FIFA. The rules on the transfers of rights of the football players are unified both on national and on international level as a result of the rules of UEFA and FIFA. The coherence of these rules and the rules of the game, the fact, that the requirements in respect of the qualities of the football players are the same everywhere in the world, lead to defining the market for transfer of football players rights as world market, with Bulgaria being a part of this market.

Players' transfers involve change of the club, for which the player competes. This change could be done between two clubs in one state or between clubs from different countries. The legal relations in respect of the players' transfers are complex and they include the labour relations between the football player and the club, the relations between the player, the club, the corresponding national federation and UEFA and FIFA, and relations between the two clubs.

3 Case COMP/M.2483- GROUP CANAL + /RTL/GJCD/JV.

The transfers of professional football players are regulated in detail by the above-mentioned rules. Clubs enter into financial relations only in cases where the football players change their club before the expiration of their contract, where the players are allowed to play temporarily for another club, and where players younger than the age of 23 change their club after the expiration of their contract. In the latter case the new club should pay for the young player's years of training indemnity, determined by the Bulgarian Football Union. No indemnity is due for players older than 23, changing their club after the expiration of their contract. The usual practice is to agree on transfer sum as a percentage of future transfers and incomes.

Insofar as the CPC defines the transfer market for football players as world market, the competitors on this market are all professional football clubs from Bulgaria and the world. Most of the transfers are international with Bulgarian players being transferred abroad and foreign players coming to play in Bulgaria.

EGYPT

1. Background and introduction

Prior to 2002, the Arab States Broadcasting Union (“The Union”) was the negotiating agent on behalf of Arab broadcasters. The Union was the exclusive contractual counterparty to the various sports federations and leagues. The Union would negotiate for the broadcasting rights to all sports events and, in turn, distribute the rights to the channels that would air them.

ART is a pay-TV channel owned by Arab Media Corporation. The distribution system remained in place, until ART split-off from the Union and independently entered the bidding for the broadcasting rights of the World Cup 2002. Other channels proved unable to bid given ART’s considerable financial strength, which eclipsed even the Union. ART subsequently bid for the broadcasting rights in the Middle East for practically all major football championships retaining the rights for many years. For all practical purposes, given the duration of the agreed-upon contract, the Union has no chance to bid.

ART's dominance was seemingly threatened by Al Jazeera Channels (JSC). In 2003, JSC launched a new free sport channel. However, JSC did not have access to major football championships. Some federations and leagues require that the broadcasting of their events must be through subscription. JSC sports responded by switching some of its channels to a pay TV system in 2005.

Over time, JSC sports channel acquired the rights to broadcast all major football championships in the Middle East and North Africa as well as European leagues games and cups. These actions eroded ART’s dominance. Nonetheless ART still owned the rights of the World Cups and some regional championships like the Cup of African Nations (CAN).

In 2009, ART sold their broadcasting rights of all the major sports events to JSC sports. In effect, JSC sports became the sole owner of all rights to practically all important football events under an agreement that extends to 2016. ART remains a major broadcaster of movies and entertainment programs. It also carries the JSC sports channel along for events other than major sport events *i.e.* CAF and world cup.

Claims and counterclaims of abuses of competitions during the negotiations over the broadcasting rights of recent events - including the 2010 World Cup - brought the controversy to the attention of the Egyptian Competition Authority (ECA). IN 2010 the ECA opened an investigation to examine the competitive nature of the matter.

2. Elements of a possible market definition

According to article 3 of the Egyptian competition law, “The relevant market, in the application of the provisions of this Law, is the market that consists of two elements, namely, the relevant products and the geographic area. Relevant products are products considered to be practical and objective substitutes to each other. The geographic area means a certain geographic territory where competition conditions are homogenous while taking into consideration the potential opportunities for competition, all in accordance with the criteria set out by the Executive Regulations in a manner consistent with the objectives and provisions of this Law.”

There are at least two scenarios in defining possible relevant product markets:

- In the upstream broadcasting rights market, would competitors consider alternative leagues as substitutes to the league that they would like to place their bids on? Secondly, should we consider potential competition in the advertisement market? In other words, do other carriers (sub license) of the broadcast rights create a threat for license owner in the advertisement market?
- The second scenario: In the downstream market, do viewers consider various programs and bundled offers including sport and non sport events, offered by different channels as substitutes? In other words, to what extent do sports channels compete with other forms of sports and non-sports premium programming?

According to the preliminary investigation done by the Egyptian Competition Authority (ECA) the primary findings, in both scenarios, are that viewers don't find any other sport event or any football match as a substitute for the CAN 2010, as Egypt has been the champion for the last three leagues. In other words, the Egyptian soccer team was able to grab the viewer's attention by winning 3 tournaments in a row making it difficult for the viewers to accept other events as a substitute to the CAN.

Through this investigation conducted to date, it has been proven that primary live sports events broadcasted on TV are a separate market from the following:

- Other broadcasted programs (drama, music, movies, etc.);
- Pod casting and radio broadcasting;
- Recorded matches, summaries, football programs.

In the next stage, the question that was raised is how much all sports events are considered to be in the same relevant market and how much the advertisement revenues fluctuate? The following indications show how much a sport event can be a distinct market from the others:

- The participation of the Egyptian national team: The Egyptian viewer considers the sport event where the Egyptian national team is participating as a distinct product from any other event;
- The revenues from the advertisements and the "rates of viewing."

ECA concluded that the relevant product in this case is the live broadcasting of CAN 2010, where ERTU wants to purchase the rights to broadcast. Every championship is a distinct product for the Egyptian viewer, especially if Egypt is a participant. Moreover, the market could have been subdivided into only the matches where the Egyptian team is participating, or even the most important matches. However, as the JSC owns the whole championship, there was no need to subdivide the CAN into several products.

As for the geographical area, due to the exclusivity contracts, the selling of broadcasting rights outside the specified geographic area is not allowed. The regional and international football events are sold by zones, Egypt is part of the Middle East and North Africa zone. The Egyptian viewers cannot subscribe outside Egypt, thus the latter is considered to be the geographic area for World cups and regional championships for the Egyptian viewers.

3. Competition concerns

In the broadcasting rights markets, ECA has competition concerns related to the position of JSC sports (and ART channels) in the market, regarding possible anticompetitive unilateral conduct.

3.1 *Barriers to entry*

According to the to the Egyptian competition law the stakeholders in the broadcasting rights are subject to the competition law, including leagues, federations and original owners of these rights.

The broadcasting rights to several CAN championships are sold in one bid to a single channel. In the case in point, the JSC channels purchased the CAN championships along with other events, such as the Champions League, the Confederation Cup and the Super Cup, for the time period 2009 - 2014.

Article 7 of the Egyptian competition law stipulates that: “Agreements or contracts between a Person and any of its supplier or clients are prohibited if they are intended to restrict competition.” Article 12 of the Executive regulations of this law adds that: “The evaluation of whether or not the agreement or contract between a person and any of its suppliers or clients would restrict competition is based on the inquiry made by the Authority on a case by case basis in light of the following factors:

- The effect of the agreement or contract on the freedom of competition in the market;
- The existence of benefits accrued to the consumer from the agreement or contract;
- The considerations of preserving the quality of the product, its reputation, safety, and security requirements, in a manner that do not harm competition;
- The extent of compliance of the conditions of the agreement or the contract with established commercial customs in the activity subject to examination.”

The concern raised is whether the exclusivity period for the aforementioned championships stipulated in the agreement between the CAF and the JSC could be considered as anticompetitive, and consequently, renders the latest contract to be a violation to the Egyptian competition law?

In order to answer this question, the ECA is examining whether this long period affects the entry conditions for potential competitors in the market. Specifically, the ECA will examine whether the duration of the existing contract is – on balance – anticompetitive. Long term contracts – all else equal – have both anti and pro competitive elements. The CAF argues that historically it was suffering from payment non-compliance by their national African TV counterparties. The CAF hired a marketing company to manage the deals with African channels; in addition, they extended contracts to facilitate the financial commitments of the undertaker. Moreover, the undertaker of long term contracts due to financial and economic strength provides better events coverage before and after the matches, *i.e.*, interviews with coaches and players, analysis studios...and more spread customer service centres.

3.2 *Dominant position*

After a huge, largely unflattering, press campaign against Aljazeera alleging high-handedness on their part during the negotiation for broadcasting rights to the Cup of African Nations (CAN) 2010, the ECA opened an inquiry to examine whether the aforementioned channel holds a dominant position and consequently the likelihood of any anticompetitive behaviour in this market. Such allegations were raised during the negotiations between JSC sports and the Egyptian Radio and Television Union (ERTU) (the government agent that owns the terrestrial channels in Egypt).

The negotiations between both parties began with an offer of 10 matches chosen by the JSC sports for 10 million dollars, a price considered excessive by the ERTU – alluding to the fact that ERTU stood to gain considerably less than 10 million dollars in advertising revenue. The negotiations lasted for 2 weeks between both parties. Subsequent JSC offers - at a seemingly lower price - were conditioned with unusual modifications and unorthodox elements. For example, demands were made soliciting access to all the

ERTU archives and licenses of Egyptian championships owned by the Egyptian Federation of Football. The final offer was 8 million dollars for 10 matches, 6 chosen by the ERTU. No conditions were imposed. However, the ERTU refused the final offer and the deal was not concluded.

According to article 52 of the Confederation of African Football (CAF) statutes, the CAF is the rightful owner of the broadcasting rights of 7 regional competitions and all other continental and intercontinental competition. These events include mainly the CAN, the Champions League, the Confederation Cup and the Super Cup.

The purchase of these rights from the CAF is done via an intermediary: a marketing company known as Sport 5. The broadcasting rights to the regional sport events mentioned above are sold to a sole channel that has a geographic and linguistic broadcasting exclusivity right. For JSC, the exclusivity is for the Middle East and North Africa zone, in Arabic.

ECA has tentatively set forth that the relevant product in this case could be the live broadcasting of CAN 2010, where ERTU wants to purchase the rights to broadcast. Indeed, it is possible that every championship is a distinct product for the Egyptian viewer, especially if Egypt is a participant. Moreover, the market could have been subdivided into only the matches where the Egyptian team is participating, or even the most important matches.

JSC has an exclusive right for broadcasting CAN 2010 for North Africa and Middle East zone. In order for ERTU to broadcast the championship in Egypt, it had to acquire the sublicense from JSC, and is not allowed to buy it from any channel in another geographical zone. On that basis, the geographical area we are considering is defined as North Africa and the Middle East.

In terms of article 8 of the Egyptian competition law, a market player must have a dominant position to be incriminated for any of the anticompetitive unilateral conducts stipulated in the law. According to article 4 of the aforementioned law, *“In the application of the provisions of this Law, dominance in a relevant market is the ability of a Person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it.”*

JSC is the sole market player that owns the broadcasting rights for CAN 2010, which makes it in a position to control the prices and the volume of supply, with the absence of competitors in the market there is no ability to limit their market power. In principle, JSC is in a dominant position in the relevant market.

The potential challenge to JSC dominance in the relevant market is the informal competition in the downstream market. The introduction of pay TV in the Egyptian markets opened the floor for new profitable, albeit illegal, activities. As not everyone can afford the cost of subscriptions, people have resorted to other alternatives. Rebroadcast of channels through illegal networks has taken two major forms. First, through cables, where mainly the infringer subscribes to the most popular channels with other free channels and delivers it to unlimited number of illegal users. The other form is through the purchase of a ‘smart’ card which breaks the codes of decoders through the internet. Market studies proved that 90% of the market is using illegal cables and smart cards rather than subscriptions.

These activities could, at first glance, erode JSC’s dominant position in the downstream broadcasting market to the Egyptian viewer. However, our preliminary analysis showed that the revenues of JSC depend primarily on the advertisements, secondly; the subscription fees. To the extent that the pirated broadcast transmits the JSC’s advertising content, illegal activities increase the rate of advertisements and enhance JSC’s impact and associated revenues. Consequently, the informal sector could have a minimal effect on the dominant position of JSC Sports in the downstream market.

This conduct of JSC vis-à-vis ERTU raised a potential concern on which ECA opened an investigation. The primary potential concern is the refusal to deal. Article 8 of the Egyptian competition law stipulates that: “A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following: (...) b) Refraining to enter into sale or purchase transactions regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person’s freedom to access or exit the market at any time (...)”. The Executive regulations in article 13/b stipulates the following: “Refraining from entry into sale or purchase transaction regarding a product with any Person or totally ceasing to deal with it in a manner that results in restricting that Person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings.(...)”

ECA identified two potential markets in this case, the upstream broadcasting market where ERTU is purchasing the sublicense of the relevant product. On the other hand, the downstream broadcasting market where ERTU and JSC sports are competitors. The preliminary investigations showed that the behaviour of JSC led to restrict ERTU from entering the market to live broadcast CAN 2010. An economic and legal analysis is in progress to determine whether this behaviour constitutes a refusal to deal according to the provisions of the Egyptian law.

3.3 Tying

The ECA received a complaint against ART, accusing it of tying two different products. Tying by a dominant firm is a *per se* violation according to the Egyptian competition law.

Before the deal between ART and JSC took place, ART offered three packages to its subscribers. A “package” constitutes a grouping or bundle of thematically related channels. The first package was the Family package (drama, music, movies; mostly entertainment), the second was the Sport package (all the sport channels), and the third was the full – or combined - package (Family and Sports).

ART subsequently decided to cancel the Sports package. It is not clear what drove ART’s decision. However, any viewer who only wanted to subscribe to the Sports channels alone could not do so. To acquire the sports offerings a viewer was obliged to subscribe to the Family package.

The ECA did not open a formal investigation into this matter largely because the behaviour occurred for only a couple of months; it, in effect, ceased when JSC bought all broadcasting rights from ART.

As discussed above, there are indications that suggest that sports events are a distinct product from any other program broadcasted on TV. Also, at this stage of the investigation we hold that each championship is possibly a distinct market. At the time this conduct occurred, ART owned the broadcasting rights of CAN, which, as stated earlier, was believed to be a distinct product.

Article 8 of the Egyptian competition law incriminates tying, by stipulating that “A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following: (...) c) To impose as a condition, for the conclusion of a sale or purchase contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement. (...)”.

CHINESE TAIPEI

1. Background: Chinese Taipei's professional baseball

Professional baseball is the only professional sport in Chinese Taipei and it started with the founding of the Chinese Professional Baseball League (the CPBL) in 1989. At the time, it was the 4th professional baseball league organised in the world, after the MLB of the USA, NPB of Japan, and KBO of Korea. The CPBL was initially composed of four teams, the Brother Elephants, the Wei Chuan Dragons, the Mercuries Tigers, and the Uni-President Lions.

Professional baseball flourished in Chinese Taipei with the CPBL being a 7-team league. In 1996, a second professional league, the Taiwan Major League (the TML), was established, which also comprised four teams. The two leagues engaged in heated competition, and, after years of losses, the TML consolidated the four teams into two teams and was then merged into the CPBL in 2003. The CPBL currently operates as a single league with four teams, the Uni-President 7-Eleven Lions, the Brother Elephants, the Sinon Bulls and the La New Bears.

During the first decade of operations (from 1990 to 2000) of the CPBL, baseball fever spread throughout Chinese Taipei. Chinese Taipei's baseball environment greatly improved, with an increase in player salary, the construction of more baseball fields, and attendance by baseball fans at more than 200 scheduled games during each season. In addition, the media, magazines, and newspaper reports helped the public have a better understanding of the professional skills of baseball, baseball culture, history, and heritage, etc. Baseball has become entrenched in Chinese Taipei's soul and has undeniably become the national sport and a part of its culture and everyday life.

2. The practices of the professional baseball market in Chinese Taipei

2.1 *Exclusive broadcasting rights*

As regards its the television broadcasting rights, after considering the views of the four teams, the CPBL was authorised to consult with television broadcasters, as a result of which the CPBL and the four teams signed television contracts with television broadcasters. Currently, the Videoland Television Network holds the exclusive broadcasting rights to broadcast all games of the CPBL for a period of 3 years. In fact, there are currently no alleged disputes relating to the exclusive broadcasting rights in Chinese Taipei.

The first eight years of the CPBL can be rightly described as Chinese Taipei's baseball heyday with 7-8 competitors bidding for the television broadcasting rights. During the bidding for a three-year television contract in 1995, the Videoland Television Network paid nearly 1.5 billion New Taiwan dollars for the exclusive broadcasting rights to broadcast CPBL games. However, in the current baseball market there are fewer viewers, and fewer television broadcasters compete for the broadcasting rights.

2.2 *Market definition*

In 1993, the Fair Trade Commission (the FTC) had dealt with a case regarding the baseball player transfer agreements drawn up by 5 teams. In its decision, the FTC was of the opinions that this case was not applicable to the Fair Trade Act and that "professional baseball" was identified as the relevant market.

In fact, baseball is the sole professional sport in Chinese Taipei now and there are no other professional sports markets to compete with the professional baseball market.

2.3 *Barriers to entry*

Business entities, which intend to organise new teams to enter Chinese Taipei's baseball market, have to obtain the consent of the CPBL. Given its charter responsibility for promoting professional baseball in Chinese Taipei, the CPBL will evaluate proposals regarding the number of players, the terms and conditions of their contracts, possible stadiums, sources of capital, training programmes and business philosophy, etc.

Considering Chinese Taipei's population of 23 million, and its more than 20-year history of professional baseball, averaging 200 professional games each season, with an average attendance of approximately 3,500 per game, the enterprises' incentives for entering the professional baseball market are solely based on a profit motive that cannot be considered to be too great, and thus the possibility of establishing a competing league is also not very likely.

2.4 *The nature of the Chinese Professional Baseball League*

The CPBL was established in accordance with the Civil Associations Act governing organisation and activities of civil associations as a social association with a non-profit purpose.

The league was established to promote the development of professional baseball, through hosting regional, national and international professional baseball tournaments, and providing social entertainment, and to improve the technical level of baseball, promote national participation in sports activities, strengthen participation in international professional baseball activities, and improve the life quality of citizens.

The CPBL is primarily responsible for hosting the professional baseball games, planning the schedule of games, handling issues related to employing umpires and referees, and stipulating the rules and regulations of professional baseball.

2.5 *Certification and exclusivity*

When the CPBL was being established, the founding clubs formed the Chinese Professional Baseball Commercial Co., Ltd. which obtained exclusive licensing of the "CPBL" trademark, and operated souvenir business, magazines, books related to professional baseball and other licensed products' business.

In practice, if other enterprises have the need to use the "CPBL" trademark as part of their business operations, such as baseball games broadcasting, the CPBL will agree to authorise the use of the trademark without turning away those who wish to obtain such authorisation.

As for each team's relevant merchandise, each team can handle its licensing operations individually or authorise certification through an agent, and currently there are no competition restraints issues related to certification in Chinese Taipei.

2.6 *The league and teams*

Before participating in the CPBL, a team has to sign the Chinese Professional Baseball Agreement and thereby become a group member of the CPBL. With respect to teams' interests, the CPBL integrates the views of team members of the league and represents the rights and interests of these stakeholders in negotiating with other enterprises, such as baseball broadcasting rights as mentioned above. Therefore, if the practices of the CPBL involve the Fair Trade Act, since the decisions of the CPBL represent a consensus reached by all teams, each team is likely to be deemed the subject of the case in question.

2.7 *Player market*

Article 6 of the Chinese Professional Baseball Agreement provides that “teams cannot try to poach their competitor’s players or engage in other malicious competitive practices. For players whose contracts have not been rescinded by the law or have not expired, any other team must obtain the consent of the original team prior to entering into any contract with such players.”

Should one team wish to designate players for assignment, it must comply with the requirements of Chapter 18 of the Chinese Professional Baseball League regulations governing the “Assignment of Player Contracts” which provides the assignment procedures. The procedures begin with one team applying to the league for the assignment of a player’s contract. The implementation of the assignment system must conform to the interests of both the teams and players, and any team is barred from directly or indirectly engaging other teams regarding the acquisition of the assignment or the rescission of the assignment. If a player suffers loss resulting from such improper team practices, he has the right to seek arbitration in respect of any complaints, and the league retains its right to punish offending teams.

In addition, a player can be traded by one team to another, and thus the subject of a trade includes exchanges of players or monetary compensation. While such a transaction must be reported to the league prior to its coming into force, such a transaction is not subject to the consent of traded players or other teams.

In addition, according to Chapter 26 of the Chinese Professional Baseball League regulations governing the “Free-agent system,” pursuant to Article 6 therein, a player, who has met the criteria of 9 years of major league service or at least 6 years of major league service since registering to play in the field for the first time and receives the consent of the original team, will have the right to conclude a contract with any team, and will be called a “free agent.”

Article 97 of the Chinese Professional Baseball League regulations governing the transfer system of foreign (professional) players stipulates that when a foreign player does not renew a contract upon its expiration or the contract is rescinded before expiration, unless he seeks to return to the original team or joins any team suspended for participating in the match, a foreign player will be banned from playing in the CPBL for a period of two years.

2.8 *Relevant cases handled by the FTC*

In the more than 20 years of Chinese Taipei’s professional baseball league operations, the FTC has only handled two cases in 1993 and 1997, both of which have been to decide whether agreements restricting the free movement of players between teams constituted a violation of the Fair Trade Act. At the time the CPBL was established in 1989, the regulation of sport had not yet materialised and, therefore, some teams drew up their own agreements that restricted the rights of freedom of movement of players between teams. After investigation, the FTC made a decision that the activities were subject to Articles 482 through 489 of the Civil Code regarding employment relations, and a player in question would not qualify as a “product” under the Fair Trade Act. In addition, a player’s contract involved duties of employment which did not comply with the term “services” in the Fair Trade Act and, therefore, a player could not have been regarded as an enterprise that came within the scope of the Fair Trade Act.

Moreover, the purpose of the Chinese Professional Baseball Agreement established by the CPBL was to safeguard the sound development of professional baseball. This Agreement appears to some extent to have been a reasonable necessity and, therefore, the practices of the CPBL restrictions on teams or teams’ agreed restrictions on the movement of players between teams did not apply to the Fair Trade Act that prohibited concerted actions.

Currently, given the comprehensiveness of the CPBL regulations, and the establishment of the CPBL arbitration committee, as well as the provision of arbitration mechanisms for disputes involving the league and teams, among teams, or between players and teams, any such disputes may be submitted for arbitration.

BIAC

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Competition and Professional Sports.¹

1. Solidarity mechanisms

As acknowledged by the European Commission in its 2007 White Paper,² sport is highly dependent on intellectual property rights and investment in both professional and grassroots competitions. Sports would struggle without direct investment in grassroots competitions from commercially successful rights owners. Grassroots sport is the foundation of any professional competition, and therefore the professional game nurtures its grassroots by reinvesting a substantial part of its revenues in development programmes.

In the UK, according to the 2008 study during the French presidency of the EU, the Department for Culture, Media and Sport invested €174.8 million across all sports on behalf of the Government and taxpayer, whereas professional football organisations, of their own volition, invest €185m in grassroots football alone (through the combined contributions of the Football Association and the Premier League).

Moreover, in many European countries, investment in grassroots sport is directly and proportionately dependent upon the value of sports rights. In the UK, the major sports have signed up to a voluntary code of conduct run by the CCPR³ which ensures a minimum percentage of the income from TV rights is directly invested in grassroots sports. In Germany, a contract signed by the professional football league and the federation secures 3% of the league's turnover to be transferred to grassroots organisations. Another contribution is given directly by the professional football clubs. In France, a similar agreement leads to a €60m investment into grassroots sport.

2. Exclusivity: A key principle beneficial to consumers and sports

In 2003, the European Commission issued a decision concerning UEFA's selling of media rights, which has since served as a template for the sale of rights by sports bodies across Europe. In this decision and others (e.g. Premier League and Bundesliga), the EC has explicitly endorsed the principle of exclusivity.

There are multiple benefits of this model: for the consumer who does not have to subscribe to a host of media suppliers to follow one competition; for the media supplier who can increase revenue from advertising; for the advertisers who will have a defined target demographic; and for the sport which can

1 This paper has been substantially prepared on behalf of BIAC by the Sports Rights Owners Coalition ("SROC") which is an informal group of representatives of international, European and national sports bodies operating as a forum through which sports bodies can share information and experiences including best practice on key, legal, political and regulatory issues.

2 COM(2007) 391 final, 11 July 2007, page 11.

3 Central Council of Physical Recreation, representing 300 members, 150,000 clubs and 13 million regular participants.

improve revenue through the enhanced value of this exclusive agreement. All these benefits are set out in more detail in the Commission's 2003 decision. While the Commission's decision supports the exclusivity model on the grounds of economic efficiency, it has also clearly recognised the benefit to grassroots sport through solidarity mechanisms. Estimates suggest that the exclusivity of media rights adds substantial value to contracts and this added-value contributes to a substantial investment in grassroots sport.

In UEFA's case, the beneficiaries of exclusivity and collective selling are often teams from smaller European countries and grassroots sport in general. Roughly 70% of the media rights from the UEFA European Football Championship are redistributed to the national federations, with that money specifically ring-fenced for grassroots projects.

3. Territoriality as a part of the sports rights business model

According to a 2009 study from RBB Economics,⁴ "the EU consists of member states with distinct cultural, linguistic and viewing preferences. The European audio-visual industry is organised to accommodate those differences and ensure that a targeted product is made available to European consumers so that stakeholders across the audio-visual industry are more able to recoup their substantial and risky investment in the production and distribution of content. Territorial exclusivity is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold within member states on an exclusive basis and in a way which meets demand in each member state within the EU."

Sport is territorial by nature. National matches and competitions are watched more fervently by those from hosting or participating countries. This can be seen at a glance from the national lists of designated events which can be safeguarded by Governments for free-to-air television broadcasting. While the lists of course include major world events like the Olympics, they serve as a clear demonstration that sports events – from the Giro d'Italia in Italy, the finals and semi-finals of national and international football club competitions in Germany, to the All-Ireland Senior Inter-County Hurling Finals in Ireland – are principally of importance in domestic markets; their value and appeal likewise differs across Europe.

Territoriality was also recognised by the Commission in its 2003 UEFA decision, in which it notes that "media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national".

The result is that sport has a very different value depending on the territory in which it is being watched. It is important for both sport and Europe's citizens that sport is allowed to be sold to media organisations territorially. If this was not the case, only the largest media organisations in Europe would win contracts and there is the possibility that smaller territories in which these organisations did not operate would receive less choice. The impact that this could have on smaller sports and grassroots sport could potentially be devastating, harmfully reducing sporting and cultural diversity.

4. The benefits of collective selling

Whereas efforts to win larger market shares and hence to squeeze other market participants out of the market is an intrinsic element of competition in other economic sectors, sporting competition requires the preservation of the opponent by its nature and only creates a marketable product when different teams meet

4 "The benefits of territorial exclusivity in the European audio-visual industry", RBB Economics, London, February 2009.

in the framework of a sporting contest. A condition for a league game to be held is the coming together of two teams in the framework of a sporting competition organised by an association and in the meantime established as a brand. The organisation of such complex sporting events is extremely cumbersome and inconceivable without the organisational input of leagues and federations. They lay down the ground rules for games and ensure that these rules are complied with. They monitor the authorisations of club and players using licensing proceedings, draw up a nationally and internationally co-ordinated framework calendar, plan match times, game opponents and the home/away rhythm, regulate player and transfer management, certify clubs' youth training centres, organise refereeing and the doping control system, protect the image and rights of the competitions and their members, and represent the competition vis-à-vis the outside world.

In its 2007 White paper on sport, the European Commission emphasised the eligibility of collective selling to be exempted from competition law, and in particular the advantages of the solidarity mechanism for the sporting balance of a league *“The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs marketing the rights individually). While joint selling of media rights raises competition concerns, the European Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports. The European Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport.”*

The European Parliament also expressly shared this view in two own-initiative reports and called on the Commission to present clear guidelines taking account of the specificity of sport which eliminates the current legal uncertainty – in particular regarding central marketing of sporting competitions.

5. New developments in sports rights

Positively embracing the desire for greater international profiling and access, sport is developing its offer to reflect a new technological era. Sports' rights contracts are becoming more and more platform-neutral, allowing operators to provide online alternatives to their traditional diffusion method (in the case of some contracts even obliging them to do so). Sports bodies are also developing alternative platforms to supply territories in which there is no media platform willing to invest in traditional deals, so as not to discriminate against the minority communities and individuals with an interest in viewing their competitions; examples of this include World Marathons, the International Tennis Federation and Cricket Australia, who now offer online access to their events if no rights holders exist in a given territory.

Other sports also provide an online platform as an alternative even though events are shown on television. For example, all UEFA Champions League games are also available to watch “à-la-carte” through the UEFA website. Six Nations Rugby Limited gives its broadcasters certain rights to exploit their broadcasting rights on the Internet, including the right to simulcast in full their television and radio broadcasts of Championship programmes. Major events can nowadays be accessed legally and watched directly on the internet. Many legal offers exist and many more are in development. Nevertheless sports events are still widely pirated, contradicting the increasingly heard assertions that the solution to digital piracy, be it of sport, music or film content, is to provide alternative legal offers.

6. The digital piracy threat

Sport content has been a stimulus to new audiovisual and broadcasting technology for some time. The Olympics in 2012 will see Super HD and 3D television showing events, and live streaming of over 5000

hours of sport will be available on the internet and broadcast on digital channels. That equates to over 200 days worth of live sport content.

However, major sports events and competitions are very attractive, and in great demand, making them particularly vulnerable to attack from pirates. Football has seen an increase in the amount of sites and viewers illegally watching content. Football is not, however, the most pirated sport globally. This dubious honour belongs to cricket, which sees around 1000 different websites illegally hosting pirated coverage of its live events. Many of them are funded by advertisement and over 200 of these websites are even operating as subscription channels, with the pirates being directly remunerated, without contributing to the development and advancement of sport or to jobs or to tax revenues and eliminating any pretence of an “open access philosophy”.

The Organisation for Economic Co-operation and Development (OECD) has acknowledged the significant threat to the creation and strengthening of legitimate services to distribute copyrighted content online caused by IP infringements, and the threat to innovation caused by IP infringement was made a top priority at the G8 Heiligendamm Summit. Moreover, the OECD has commissioned a case study of digital piracy in the sports sector as part of Phase II of its project on the Economic Impact of Counterfeiting and Piracy.

It should be noted that the challenges sport is facing are not identical to those the music and film industries are trying to tackle. The value of sport content is substantially based on its ‘live’ broadcast status and therefore the main challenge faced is combating illegal live streaming, more than re-useable recorded media as is the case for music and film. For this reason it is crucial to include sport in the various policy debates at national and international level.

The growing phenomena of internet streaming of live sporting events and peer-to-peer file sharing are very real examples of the need for a strong response to new trends in digital piracy which threaten to undermine the value of media rights and consequently investment in sport at every level. Technical measures such as notifications to users from their Internet Service Providers about breaches of IP rights, or the possible restriction (or in extreme cases even suspension) of services are needed. While legal action must only be taken as a very last resort, and in that instance preferably targeting the illegal websites and not the individuals using them, a credible legal threat is needed to help act against piracy.

A strong IP framework does not “hamper” the development of online content and services. It is our view that the contrary applies. Sport content is one of the first to be available on 3G technology. Sport organisations are the originators of economically significant content for audiovisual and audio broadcasts in their many formats, and across an ever increasing array of platforms. Sport organisations are constantly striving to bring consumers the widest range of choice of coverage that technology allows.

7. The QC Leisure and Euroview sport cases

The QC Leisure case was brought by the Premier League and one of its foreign licensees, Netmed Hellas (the licensee for Greece which operates as Nova), against two suppliers of foreign decoder cards, QC Leisure and AV Station, and four pubs which used foreign decoder cards in their pubs to show foreign broadcasts of live Premier League football.

The case concerns the legality of satellite television decoder cards authorised for use in one country of the EU but then exported for use in another. The claims brought by the Premier League and Nova included a claim under section 298 of the Copyright Designs and Patents Act 1988, which gives effect in English law to the Conditional Access Directive (98/84/EC).

A number of organisations within the creative industries believe they could be affected by the outcome of the case. For this reason, UEFA and Sky as co-claimants recently brought an action against a supplier of European decoder cards, Euroview Sport, and this has also been referred to the Court of Justice of the EU. It is not yet known whether the Euroview Sport case will be joined with the QC Leisure case. In any event, the parties and EU Member States and institutions will soon be invited to submit written observations. Member States should be encouraged to do so.

QC Leisure and Euroview Sport are no longer about the narrow issue of football broadcasts from elsewhere in the EU being shown in pubs in the UK. The final decisions in these two cases call into question fundamental questions of the law relating to Copyright and Intellectual Property Rights generally and go to the heart of the EU's creative, audio-visual, broadcasting and broadband industries and those, like sport, which supply them.

Not only are a wide range of industries affected by the cases but also consumers and Member States. Consumers enjoy sport, film, TV programming and other audio-visual products tailored to their specific needs and languages. Member States are also affected as the Case could shortcut the ongoing debates at national and EU level and prevent EU Member States from playing their legitimate institutional role in the framework of the usual EU decision making process.

SROC has raised concerns with BIAC that adverse CJEU decisions (Negative Findings) in these cases could have a profound impact on a wide range of businesses dependent on the exploitation of intellectual property rights. They believe that negative findings would challenge long-established principles of copyright law and pose difficulties for buyers and sellers of any audio-visual programming which is exploited in more than one territory.

More specifically they say that negative findings would mean:

- An end to the recognised exclusivity principle and therefore threats on the value of audio-visual content which could affect investment, innovation and redistribution mechanisms;
- An end to the territoriality principle which is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold in a way which meets differentiated cultural and linguistic demand. This would ultimately threaten cultural diversity, one of the EU fundamental principles; and
- A reduction of competition, as only substantial operators could exploit pan-European rights, thus discriminating small and local broadcasters and inhibit new entrants to the broadcasting markets.

8. Teams in leagues and federations: single entities, joint ventures, or multiple, independent entities

Sport leagues and federations, like many joint ventures, enable a product that otherwise might not exist in the absence of the joint venture. Moreover, for many business transactions, they offer an efficient mechanism for working with vendors, suppliers and other third parties. BIAC supports flexible rules that allow sport leagues and federations to efficiently act on behalf of their constituent teams, but also prevent those individual teams from using the sports league as a shield to avoid competition where it would otherwise be appropriate.

Most recently, the US Supreme Court examined whether the 32 teams in the National Football League (NFL) could license their individual intellectual property collectively through a single corporate entity. The

Court concluded – without passing on the legality of the underlying action – that such an arrangement amounted to concerted action involving multiple actors rather than a single economic enterprise.

The decision must be understood in context. Prior to 1963, the teams in the NFL made their own arrangements for licensing their intellectual property. In 1963, the NFL teams formed a corporate entity, National Football League Properties (NFLP), to collectively develop, license, and market their intellectual property. The NFL teams remained able to withdraw from this arrangement and at times sought to do so.

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. In 2000, the teams authorised NFLP to grant exclusive licenses, which NFLP did, excluding certain manufacturers that had previously licensed the intellectual property of some or all NFL teams.

In defending their conduct, the NFL teams, the NFL and the NFLP argued that they were a single economic enterprise, and thus incapable of conspiring under case law precedent. But, the Court examined the relationship not in terms of whether the parties were formalistically one or separate corporate entities, but rather whether the conduct of the parties demonstrated functionally separate economic actors pursuing separate economic interests. The Court asked, "whether the [NFLP] agreement joins together 'independent centres of decision making.'" Finding that each of the NFL teams is independently owned and independently managed, the Court found the NFL teams capable of conspiring. Importantly, the Court's opinion does not end the inquiry and whether the conduct alleged is unlawful was remanded for further determination.

The treatment of sports leagues and associations as joint ventures of separate economic actors, rather than as single entities, does not mean that their collective conduct is unlawful. Sports leagues and federations are often necessary to the existence of the respective sport. Indeed, but for such entities, no organised competition would exist. Accordingly, whether conduct by sports leagues and federations in the US violates the antitrust laws has often been adjudged under the more flexible rule of reason standard. Under the rule of reason, which undoubtedly will apply to future proceedings in the American Needle case, ancillary rules, necessary for orderly competition and production of the sport — including rules prohibiting gambling and substance abuse, requiring the use of certain equipment, and limiting player eligibility — normally have been upheld by the US courts. And rules imposed by the sports league or association that are not necessary to orderly competition and production of the sport — including rules capping the salaries of coaches and limiting the ability of franchises to relocate — sometimes have been deemed unlawful.

Rational businesses seek to expand their positions in the marketplace to the greatest extent possible. These objectives drive companies to out-perform their peers through superior innovation, efficiency and industry. But, oftentimes businesses can only achieve innovation and efficiency through joint conduct. Joint ventures create opportunities for innovation, marketing and manufacturing where such opportunities might not exist if undertaken by entities individually. Joint ventures often produce transactional efficiency without an adverse effect on competition. And, in some cases, joint arrangements between competitors can drive competition in the marketplace where none would otherwise exist — i.e., joint ventures can be market making. The sports community exemplifies this premise. Absent sports leagues and federations, competition between individual sports teams, and competition between disparate sports leagues, might not exist.

Sports leagues and federations, as joint ventures, should not be immune from the antitrust laws. Sports teams compete on the field, but also compete off the field in the business arena by contracting with vendors, equipment suppliers, fans and other third parties. Having sports teams individually vie for this business may in certain instances be beneficial to consumers. In other instances, it may be more efficient for sports teams to operate collectively — e.g., in advertising the sports league or federation to which they belong.

The business community requires flexibility in the structures under which it operates. The ability to structure joint ventures that contain certain restraints is important to business and critical in many cases to ability and willingness of parties to form joint ventures. Businesses must be able to protect their inputs to the joint venture. Sports leagues and federations are no different and individual teams must be able to protect their contribution to league or federation. Moreover, the joint venture must be able to protect its collective intellectual property and act efficiently for the constituent teams.

BIAC supports flexible antitrust laws and rules that permit businesses to operate jointly where such operation does not demonstrably harm competition yet which also prevent unlawful conduct in those instances in which long-run consumer harm is a necessary result. As with other areas of commerce, authorities should neither create rules that are so overly stringent as to bind the hands of businesses, nor allow impermissible conduct to hide behind the guise of joint ventures.

SUMMARY OF DISCUSSION

By the Secretariat

1. Introductory remarks by Professor Stefan Szymansky

The Chairman of the Competition Committee, Frédéric Jenny, introduced the roundtable and welcomed expert speaker, Professor Stefan Szymansky.

Professor Szymansky gave an overview of the subject. He said a key step is to recognise sports as a special case in that sporting competition should be distinguished from economic competition. He stressed that when we look at sports we are dealing with two forms of competition simultaneously. It is inherent to sporting competition that the athletes agree to abide by the rules of the game and that they enter agreements among themselves as to how the competition will be run. In other contexts many kinds of such agreements would be per se illegal. But in the case of sports competition the rules have to be examined on a case by case basis.

He went on to summarise the four main considerations outlined in his background paper.

The first consideration is that you need competitors to make competition, which leads to something called the competitive balance defence. The key argument is a market failure argument: if a competition is organised without any restraints then the outcome is likely to be that some competitors will achieve an excessive level of dominance. What does excessive dominance mean in this context? It would mean that consumers would prefer other competitors to win more frequently, but if a small number of teams win too often then consumers will lose interest in the competition, the competition will not be as desirable as it could be, social welfare is reduced and therefore we have a case of market failure. If that is true, then there is a case for some form of agreement amongst competitors to restrain themselves to achieve a socially optimal competitive balance. Prof. Szymansky recognised that the problem is that the existence of this market failure has not been demonstrated well enough by economists.

The extreme example could be the World Cup where although a small number of teams are dominating the competition there is no lack of consumers' interest. Probably there are other things about the World Cup that make it attractive even if it is not very balanced competitively; but when you look at the empirical literature on this in the economic world there are not many good papers which demonstrate clearly that a lack of competitive balance leads to a lack of consumer interest. For Prof. Szymansky this is one of the key problems.

A second issue arises when the economics and the politics of sports collide with each other. The cultural dimension has been very important as sport is often associated with national identity and indeed sport is frequently seen as a sphere separate from the commercial sphere. In some jurisdictions that argument is less plausible, for example in the US very few people would argue that the major leagues are not commercial organisations. Whether there should be special treatment for leagues and competitions because they are not organised on commercial principles is something that has been a major issue, and within the EU for instance although there is the recognition of the specificity of sport it is not entirely clear what that means.

The third point is linked to the second as it concerns the relationship in the labour market between amateurs and professionals. Particularly outside of North America, in most nations there is a hierarchical model in which a governing body is responsible for managing the sport as a whole, there are professional leagues and competitions at the apex of the pyramid and then below there is a series of tiers with increasingly amateur organization. There is inter-connectedness through the system of promotion and relegation whereby amateurs can rise up to professional levels. This link led to the argument that the apex of the pyramid has a special position and that there is a need for cross-subsidies from the top down to the bottom and these cross-subsidies for some reason justify restraints on competition at the highest level. Prof. Szymansky has always been sceptical towards this argument, but others believe that sports leagues should be given special treatment within the competition law.

The fourth issue is in many ways the trickiest issue: governance. Sports organisations are typically autonomous and guard their private law status. In some ways sports organisations are private governments of sport of their own right; they often come into conflict with governments over issues related to managing sports, such as what is good for the sport and some broader social issues. Other conflicts lie in the dominance of these large federations and their ability to use that dominance to achieve particular outcomes. There are significant conflicts when autonomous federations are not only rule makers and arbitrators within a sport but also organisers of major competitions.

Prof. Szymansky added a few remarks on the status of professional leagues within competition policy in general. Since most sports are organised on the basis of professional leagues many of the competition cases have focused on the status of a league and how we should think about the relationship between a league and its members. The predominant approach in competition cases – certainly by the competition authorities themselves – has been the joint venture approach, to think about a league as an arrangement amongst competitors who make necessary agreements to organise a competition. The other approach is the single entity approach, which essentially posits the idea that although in legal terms clubs a league may be independent, the economic reality is that they are engaged in the production of a single product (the league) and therefore from a competition law perspective the company should be seen no differently from subsidiaries of a single corporation. (A corporation cannot collude with itself). In that sense, with a single entity approach there is no role for cartel law. This argument has been put forcefully in competition cases by leagues. On the whole the courts have tended to view this somewhat sceptically and recently the Supreme Court rejected the single entity approach in its judgment in the NFL/ American Needle case.

Finally, Prof. Szymansky mentioned three more issues that were discussed in his paper and which would come up during the roundtable:

- **Market definition**

Market definition is linked to the changing technology and fragmentation of broadcast markets. Now sport has become a key driver for broadcast channels and is distinct from other forms of content. Between a narrow or broad view, a narrow definition is desirable because there are very few close substitutes for premium sports.

- **Labour market issues**

The issue of players' market restraints goes right back to the beginning of professional sport. Typically the restraints have been justified with the competitive balance defence, but obviously a labour market restraint agreed amongst employers has significant potential to enhance profitability as well and could in many cases be anticompetitive. In the US there is a non-statutory antitrust exemption for collective bargaining agreements, which allows the players' unions to negotiate for concessions such as minimum salaries. The European Union (EU) does not have a similar exemption for collective bargaining agreements. Although leagues claim they

face financial problems, there are strong political arguments being presented that these kinds of restraints should be permitted.

- **Broadcast markets**

The main issues in litigation have tended to be collective selling and whether it can be justified by the competitive balance defence. That defence has tended to be viewed rather negatively by the courts, but legislatures have often changed the rules to make collective selling legal. The classic example is the US Sports Broadcasting Act permitting collective selling at least for free to air broadcast rights. In recent years there has been a lot of negotiation between the EU and various pro leagues. The EU ended up adopting a fairly permissive stance towards collective selling and has not been prepared to challenge it.

2. **Sporting rules and business decisions**

A good question to ask is which market are we worried about, the one for sports championships or the one for broadcasting? In the EU the concern has largely been about the latter. This has had some unfortunate consequences for competition and the level of the sport; whether this has had any beneficial effects at the level of competition in broadcasting is an interesting question that is quite difficult to study empirically, but it is one that people will need to focus on in the future.

The Chairman turned to the subject of sporting rules and business decisions. He started with the US contribution, touching on a particular aspect of the “American Needle” decision of the Supreme Court, which will be discussed in detail later. In “American Needle”, the Supreme Court made a distinction between on-field decisions and business decisions. One could say that this is fairly clear: on-field is how the sport should be played, and business is everything else that may have an impact on competition. But the contribution states that “*the distinction between on-field decisions and business-side decisions can be elusive, and the terms in which courts make that distinction will affect the law regarding other kinds of joint ventures as well.*” The Chairman asked the US to explain their source of insecurity in this distinction and the meaning of their statement about the possible application to joint ventures.

A delegate from the US specified that the language in the contribution was theirs and not the Supreme Court’s. The purpose was to use simple language to summarise the continuum of business conduct that a league and teams can engage in. The intention when referring to on-field conduct was to refer to the rules of play, and those are rules that would not reasonably raise competitive concerns. However, there are many things that teams can do that would raise competition concerns, including possibly what the NFL was doing in the “American Needle” case, so the Supreme Court sent the case back to lower courts to think more about this. “American Needle” explores what “single entity” means in the context of sports leagues as a whole and of that case in particular.

The Chairman wanted to see whether there is a difference between the US and the EU approaches. In particular with respect to the “Meca Medina” decision, in which the Court of Justice rejected the notion that a “purely sporting” rule might fall outside the scope of EU competition law. Therefore he asked the EU to explain what that decision means and to react to what the US just said. Is there a difference in position?

A delegate from the EU started by commenting on the decision itself. Sport is an area where there are few decisions from the court and the vast majority of them focuses on the free movement aspects which are at the heart of the Treaty’s and the courts’ interests. There has been a series of judgments and opinions in this case. Following the Commission’s decision there was the decision of the court of First Instance, then the opinion of the Advocate General and finally the decision of the Court of Justice.

The delegate said that under EU law, as long as an activity is an economic activity, which is undeniable for professional sports, it falls under the rules of the Treaty. Various provisions – including free movement and competition – therefore need to be applied. The Court of Justice introduced a 2-step approach for sporting rules, looking first at the objective necessity and proportionality of the rule, i.e. whether it is viewed as restrictive under competition provisions.

Looking at the enforcement side and how the Commission views sporting rules, the annex to the White Paper is informative in this respect as it was adopted after the “Meca Medina” judgment. It draws a distinction between pure rules of the game and pure economic aspects in terms of enforcement priorities. The Commission looks at this on a case by case basis, that is, it does not take a regulatory approach looking at every possible scenario *ex ante*.

The Chairman noted that there are some unexplored areas where there could be a question about whether sporting rules have implications. Chile’s contribution gives such an example; it talks about a case in which the competition authority objected to the programmed relegation of some clubs. Chile was asked if it has second thoughts about whether this was something that could fall under the competition law and what the case was about.

A delegate from Chile noted that this case dates to 2003. The investigation conducted by the *Fiscalia* charged the programmed relegation system adopted by the national professional soccer association with adopting and implementing an anticompetitive agreement among teams belonging to a soccer association. The system aimed to avoid relegating into a second tier league any of the teams that were part of the first tier. The system would last for the 2003 and 2004 seasons. According to the president of the association the purpose of the system was to protect teams from financial distress by reducing competition among them, freeing them from the risk of relegation and by reducing teams’ incentives to raise players’ salaries or to hire players whose salaries would not be affordable. Most of the teams were facing insolvency problems which in some cases even prevented the teams from paying salaries to the players.

The *Fiscalia* decided to close the case because no material effect in the market had been identified as a consequence of the programmed relegation system. It seems now that the basis for this decision was probably the financial crisis that the football teams were facing at that time.

The Chairman turned to Turkey, whose contribution describes a case in which the issue was how many foreign players were allowed to play on the field and how many could sit on the bench. Turkey was asked to comment.

A delegate from Turkey explained that the rule is 6 + 2 in Turkey, which means that you can have 6 foreign players on the pitch and 2 sitting on the bench. Although it looks like a purely sporting rule, it has an effect on competition between teams because it prevents them from hiring any players they want. The rule was changed to 6 + 4 this year; so you can have 6 players on the field and 4 sitting on the bench; but the same argument can be made here.

The Chairman asked Prof. Szymansky whether competition authorities should look at everything that they feel could have an anticompetitive effect or there is value in establishing a typology.

Prof. Szymansky said that the competition authorities are not willing to abrogate their authority over any issue relating to sport and they would be crazy to do so. The challenge however is that sports organisations want some form of legal certainty about how they can behave. The threat to competition law is obviously that these organisations are politically powerful and if they perceive they have been unreasonably treated, political pressure could come into play.

3. Sporting rules and barriers to entry

The Chairman moved to the next topic: sporting rules that may create barriers to entry. One of the contributions that talks about barriers to entry is from Finland, which expresses the view that licensing rules may go beyond what is necessary and therefore breach the proportionality principle. One example was where a sport federation tied sport injuries insurance to the sport licence. He asked the delegation from Finland to present this case. Why was the federation tying the insurance and the licence?

A delegate from Finland said that the Finnish Competition Authority (FCA) considers that requiring athletes to get injury insurance or accident insurance in order to obtain a sporting licence may be acceptable but demanding that the insurance be taken from a specific insurance company and tying the insurance to the sporting licence may be forbidden. Investigations were initiated when the FCA received enquiries from athletes practising different sports regarding whether sport federations were allowed to tie accident insurance as an obligatory part of the sporting licence.

The FCA found out that even if there were several insurance companies offering accident insurance for athletes there was primarily only one insurance company who had an agreement with several sports federations. The agreement often included marketing operations between the federation and the insurance company. Even if the insurance relationship itself was between the insurance company and the athlete the FCA considered that the sports federations got indirect benefit from this kind of arrangement due to the marketing arrangements between the federations and the insurance company. The sports federations agreed to change their practices and not require injury insurance from a specified company.

The Chairman drew a parallel with similar cases in France back when the French ski federation imposed exactly the same kind of arrangement. He then noted that another type of barrier to entry arises when sports federations use a certification process to reduce or eliminate competition in the production of something which is essential for the sport. The example in the Austrian contribution took place in the 2004 karting championship, where some type of equipment was imposed by the federation. He asked Austria to explain this case and what was going on beyond the fact that there was a competitive impact.

A delegate from Austria explained that the organisers of some karting championships obliged participants to use one specific brand of tire which they had to buy from one specific retailer for one specific price. There were provisions with similar terms for oil and engines. The Austrian Competition Authority did not accept the arguments of the parties and obliged the organisers of these karting championships to adopt an open procedure for calls for tender with objective conditions for all tire suppliers, without specifying any specific types of criteria that the federation had to use.

The delegate could not confirm that all the problems are solved but a good indication is that the Authority did not receive further complaints. More light will be shed on this question once the Austrian competition authority finishes its current remedies project: they check all remedies imposed since July 2002 in merger and antitrust cases, see whether first parties really comply with the remedies and try to find out if these remedies were efficient and solved the problem.

The Chairman turned to Japan, which investigated a case in which a sports federation may have created a barrier to entry and the JFTC used a merger between two baseball teams to focus on the issue of fees that teams have to pay to be able to play. It seems that the JFTC said that fees could be so high as to create a barrier to entry. But it does not say whether such high fees have in fact been observed. The Chairman asked the delegate from Japan how one defines a high fee.

A delegate from Japan said that the JFTC did not conclude that large fees to enter Nippon Professional Baseball (NPB) would impede entry but it just considered in general that the large

membership or entry fees will be deemed problematic as a factor impeding entry. The criteria of illegality cannot be quantitative but should be considered on a case by case basis.

The Chairman turned to the contribution from the Czech Republic, which described rules set up by sports federations that may create barriers to entry. It gave details about a case in relation to professional ice hockey where the *Extraliga* was given the authority to re-write the rules and the allegation was that they re-wrote the rules in their interests. The Czech competition authority thought there might be a competition issue. The Czech Republic was asked to explain this case and whether they describe these rules as sporting rules in light of the previous discussion. Was there a clear barrier of entry due to the rules or was it just a potentiality that the authority was contemplating?

A delegate from the Czech Republic said that the case concerns possible barriers to entry between two professional ice hockey leagues. The highest level league, called extra league, changed the rules regarding relegation between the leagues.

It introduced a so-called entrance fee, whereby the winner of the lower league could join the extra league subject to the payment of an entrance fee amounting to 1 million euro. The association of professional clubs admitted that the main aim of this entrance fee was to prevent professional clubs from the lower league to enter the extra league. The authority did not regard this as a purely sporting rule but a commercial rule. It was a pure barrier to entry because the members of the lower league could not enter the extra league. The authority did not issue any decision, as the extra league changed the rules for the next ice hockey season.

Prof. Szymansky commented that the sponsorship of products by players is an issue that has come up in the World Cup and other sports leagues where the player has a sponsorship but the league has an exclusive sponsorship as well and a conflict arises. It is not clear from the competition perspective whether it is the legitimate right of the federation (or the organiser) to impose a single brand or whether they are infringing the rights of the players to have their own sponsorship. That is a tricky issue. He added that the last intervention on the Czech case illustrates the cultural issues in sport in a very dramatic way. In most parts of the world the promotion/relegation is an accepted norm of sports organisations. The idea that a league would be imposing a barrier to entry through imposing fees would be widely accepted. In the US that is standard practice. One question is whether there is a theory of harm to consumers caused by not having a system of promotion/relegation. The battle lines are usually drawn on the question of access to consumers in some cities or towns who will not get a chance to compete at the highest level as opposed to imposing minimum standards in terms of the stadiums and the quality of the environment of the sporting event, which can be improved by imposing these fees.

The Chairman said that this was not the answer that the Czech Republic gave; the hockey association did not say that its rule would improve the quality of the game. Instead, they just wanted to keep the others out.

The delegate confirmed that this was exactly the case. The association itself said that they adopted this new rule because they thought the best teams were already there and they did not want anybody else to enter. The competition authority inquired about the rationale for the amount requested, and the association replied they did not know but thought 1 million was a fair amount. When asked how this money would be used they said they did not know yet but it would be for the benefit of ice hockey. The authority thought there was no sporting reason for such a fee and that consumers would not be happy to have the same teams all the time, so the rule was not reasonable. After these discussions the association changed the rules so the authority did not have to interfere.

4. Is the market for broadcasting rights a “bidding market”?

The Chairman then raised the issue of the nature of the market for broadcasting rights. Sweden’s contribution gave an example of a merger between two broadcasting companies that together possessed over 50% of the broadcasting rights of sporting events sold in Sweden. The issue of dominance arose in the investigation by the Swedish Competition Authority (SCA) but ultimately the SCA did not object to the merger because other factors counterbalanced the dominant position of the new entity. During the investigation, the parties to the acquisition argued that they did not hold a dominant position because there was a bidding market and the broadcasting rights are reallocated through competitive tender. The SCA did not agree and considered that the owner of broadcasting rights could have an advantage in future tenders. However, one or two years after the acquisition there was a new tender and the newly merged entity lost the rights for the Premier League. The Chairman asked if this could be an indication that a bidding market did exist. He also asked Sweden to give more detail about this case and whether the events described in the post-script somehow make the SCA think twice about this issue of bidding markets.

Although the SCA has not yet formally discussed these recent events, the delegate from Sweden reiterated that it does sound like an indication that a bidding market can exist, keeping in mind however that the need to build a loyal customer base and the presence of switching costs are an indication of the opposite. The SCA did not fully agree at the time of the investigation that the market for acquiring broadcast rights to sporting events was a pure bidding market, in the sense that market power does not matter in future tenders in a bidding market. The two main reasons were rights holders’ opportunities to build up a loyal customer base in addition to switching costs for customers and limited customer mobility. Evidence against the existence of a bidding market was, for example, the fact that rights holders tend to retain the rights to specific sports for longer periods, i.e. winning the tenders for specific sport rights repeatedly. The SCA’s conclusion was that the acquisition would result in a situation where one company would control several important sport rights for a period of time, which ultimately could provide a competitive advantage. However, the SCA concluded that the large number of competitors in addition to the fact that several of those competitors also controlled important sports events would be enough to compensate for the potentially stronger market position after the acquisition and thus neutralize the potential restrictions on competition suggested during the investigation.

5. New media platforms and exclusive broadcasting rights

The Chairman noted that this issue of treating the broadcasting rights market as a bidding market has not come up in any other jurisdiction.

Another issue is the type of rights for a platform as seen in the Australian contribution where there is an obligation to provide free access to sporting events of national importance and cultural significance. The Chairman wanted to know how one defines an event of national importance and how a sporting event of cultural significance is different from an event of national importance. Television broadcasters are prevented from buying the rights to televise listed sporting events before free-to-air television broadcasters have had an opportunity to purchase these rights. This list is called an “anti-siphoning” list. The Chairman asked Australia to discuss whether the internet platform should be submitted to the same regulatory environment or whether there is good reason not to have it limited in the same way.

A delegate from Australia gave some background on the anti-siphoning list, which was aimed at ensuring that Australians could continue to have access to important events on free-to-air TV and, that those events would not be siphoned away exclusively to subscription TV. The legislation governing the anti-siphoning arrangements does not actually specify any criteria for listing an event nor does it precisely define an event.

He went on to describe how it operates in practice. On the question of whether there is controversy over which event should be on the list, it is interesting to note that the industry bodies representing both the free TV and the subscription TV operators are the focal point for a lot of the debate. Subscription TV providers have argued that this scheme is anticompetitive and protects the free-to-air broadcasters given that something like 70% of the listed events are not actually broadcasted. In practice there are issues about how it actually works and whether it is beneficial to consumers. Perhaps the most important criticism or analysis of the anti-siphoning arrangements came last year by the Productivity Commission. It was critical of the fact that there were no transparent criteria for determining what should be on the list and that it imposed substantial regulatory burdens and competitive disadvantages on subscription TV networks. The option to abolish the anti-siphoning regime should be explored, the Commission concluded. The most likely development could be to consider shortening the list.

There is currently a review of the anti-siphoning regime and how it operates, and a key focus of that review is the way in which the list applies to new media platforms. The Australian government is committed to raise broadband speed up to 100 mega per second over the coming period. That obviously gives rise to the potential for Internet protocol TV and its interaction with the anti-siphoning list to become a much more major issue over the coming period.

The Chairman then switched to the topic of exclusive broadcasting rights. His question to France related to the entry of a new player in the pay TV market, the company Orange, which managed to obtain part of the rights for sporting events and argued that they would need a “double exclusivity” in order to develop their TV offer together with their internet access. The Chairman asked France to explain this case.

A delegate from France stressed that the question of double exclusivity was brought to them by the French government, which wanted to know about its potential problems on the pay TV and broadband markets. The entry of Orange on the pay TV market was unusual in that it bundled an exclusive distribution offer with the obligation to buy internet access, the so-called ‘double exclusivity’.

Although the authority realised Orange was a new actor on the pay TV market, this double exclusivity bore the risk of restricting competition on the downstream market, and the benefit of enhanced competition on the upstream market could not compensate. The solutions suggested included limiting exclusivity to one or two years, allowing certain technical experimentations. Another solution was auto distribution, which consists of the broadcaster, for example Orange, remaining the exclusive distributor of the rights it acquired but offering its content to other internet access providers.

Prof. Szymansky commented that from an economic point of view this seems like a case of bundling of a number of services and bundling can be an accepted form of practice in a number of markets. It is possible to think of cases where bundling clearly is pro competitive for consumers, so the question is whether this bundling will harm consumers.

6. Joint selling

The Chairman moved to joint selling and returned to the “American Needle” case. The main issue in the Supreme Court decision is whether a league should be considered a single entity for competition law purposes or not. The Chairman asked the US to describe the case and noted that the Department of Justice and Mr. Szymansky were *amici curiae* in the case so they had a high level of interest. He also asked why there was this very high level of interest and what the case changed compared to what existed before.

A delegate from the US confirmed that the issue in the “American Needle” case was whether the NFL and its 32 separately owned teams functioned as a single entity when licensing trademarks and logos. The NFL granted Reebok a 10 year exclusive licence for all clubs’ trademarks and logos, which denied

American Needle the right to continue selling NFL licensed hats, for which it previously had a non-exclusive licence.

American Needle challenged the exclusive licensing to Reebok on the basis that it was an unreasonable restraint brought about through the concerted action of the 32 member teams. The trial court granted a summary judgment against American Needle on the basis that the NFL teams acted as a single entity in licensing and thus section 1 of the Sherman Act did not apply to that conduct. The Seventh Circuit Court of Appeals affirmed.

In its unanimous decision the Supreme Court disagreed with the lower courts and said that the NFL and its teams did not constitute a single entity for the trademark licensing at issue, as the teams separately owned their trademarks and pursued separate economic interests. The Supreme Court did not close the case but sent it back to the appellate court to decide whether the challenged licensing conduct violated the rule of reason.

The Solicitor General filed a brief because the Supreme Court asked for the United States' views at the petition stage, and the case presented important antitrust issues.

Prof. Szymansky stressed that this is a very important case, which is why he contributed to the amicus curiae brief supporting American Needle's arguments. He was concerned that, had the NFL won their argument, there would have been a number of significant changes in sport's organisation, in particular on the broadcasting market. In his view, an NFL victory would have allowed collective selling of broadcast rights to pay TV, which currently can be challenged under the Sherman Act, whereas games on free-to-air TV cannot, as sponsored telecasts benefit from an exemption. Thus, he believed that the case was very important in terms of protecting American consumers' interests by preventing a massive move to pay TV.

The Chairman raised the question whether the joint selling of media rights is really useful and/or necessary. In the EU contribution many cases discussed involve media rights for football games, and the issue of joint selling has been analysed as a potential competition problem but with positive effects that tend to outweigh the negative effects on competition. He asked the EU to explain the kind of solutions they use and asked whether selling all the rights individually would not be easier as in some other countries this can work and therefore the competition problem would not arise in the first place.

A delegate from the EU said that it is fair to say that for consumers to benefit from the whole product there needs to be an aggregation of rights somewhere. It is accepted that individual selling is a default option, as the clubs are free to sell individually, so where there is no joint selling, individual selling exists. Spain and the Netherlands are examples of countries in Europe that continue individual selling of rights. The Commission never had to assess individual selling as such, so they have neither objected to it nor expressed any preference for individual selling.

When the Commission dealt with joint selling they adopted a critical approach and in all cases accepted commitments from the parties.

The role of the national competition authorities in addressing particular issues is important and the Commission took the position from 2004 that national competition authorities may be well placed to deal with national issues, not only in the case of football, but in other sports too.

The Chairman turned to Italy's contribution and said that in 1999 Italy's Competition Authority – unlike the EU – issued a decision banning the collective marketing of broadcasting rights of the main national matches by the Italian Football League. But in 2006, the Authority reassessed the situation and looked at the problems experienced with individual selling of broadcasting rights and recommended the reintroduction of the collective selling of rights and gave some advice on the related issue of to how to

share revenue between clubs. Subsequently it found a case of abuse of dominance in selling the rights jointly. Italy was asked to explain why the Authority changed its position on the collective selling of rights between 1999 and 2006. What kind of problems did they find when there was an attempt to sell those rights individually? Where do they stand now?

A delegate from Italy explained that the broadcasting rights in Italy mainly go to the pay TV market because only the highlights of the matches are left to broadcast free-to-air. Individual selling led to the two pay TV broadcasters competing for the acquisition of all rights, but consumers were not so happy to have the rights split into two different TV channels, so in order to be able to watch all the matches of the championship consumers would have had to pay for two different subscriptions.

The two pay TV channels merged into Sky, which disadvantaged the weaker teams in selling their rights because they were faced with only one buyer, to the point that it disrupted the championship. The competition authority opened a market study and observed that the gap between weaker and stronger teams had widened after the introduction of individual selling and the system of redistribution was not enough to grant competitive balance. The system provided that 18% of the revenues coming from individual selling were then redistributed among the teams.

A new law entered into force in 2008 which reintroduced collective selling as a rule and introduced some requirements for this selling in order to enhance competition in the broadcasting markets. Measures included limiting the duration of the exclusivity for the rights and that these rights should be sold in different sort of packages to allow different broadcasters to compete for the acquisition of the rights.

A recent case from the authority shows that a balance has not yet been reached, as it was a complaint against the way in which packages were designed by the league. The decision from the authority has been overturned in the administrative tribunal and the decision of the Council of State is now pending.

The Chairman asked Germany to explain the split between the *Bundeskartellamt* and the German parliament over the issue of whether competition law enforcement applied to football in general, how it evolved and where it is now.

A delegate from Germany referred to two cases to answer the question. The first one was a 1994 decision on central marketing by the European League. The *Bundeskartellamt* decided that it infringed competition law. This case went to the Supreme Court, the Court confirmed their decision and after that the legislature changed the law and exempted sports from competition law in general. The other took place in 2009, where the *Bundeskartellamt* made a non formal assessment of the model of joint selling of media rights in the *Bundesliga* and communicated it to the German Football League. The previous scheme for football rights marketing of the German Premier League had expired in 2009 and the German Football League decided to reconfigure its TV and media rights system. In essence the German Football League planned to conclude an agreement and a joint venture with a company owned by Leo Kirch, Sirius, for the selling of transmission rights for matches of the Premier League in Germany. Sirius guaranteed 3 billion Euros for the period of the deal (6 years) to the German Football League that is 500 million Euros per year. The *Bundeskartellamt* found that this form of central marketing of TV rights constituted a cartel agreement and it excluded football clubs from concluding media deals on their own. They looked at possible advantages but none could balance enough in favour of the consumer.

To make sure that consumers are allowed a fair share of the benefits resulting from the agreement on central marketing (cf. Art. 101 (3) T, the *Bundeskartellamt* insisted that highlights are broadcasted on a free-TV channel (to be determined by auction) at a reasonable time span after the end of the matches. In the *Bundeskartellamt's* view this would have ensured that all TV viewers benefit from the highlights programme whose emergence is significantly supported by central marketing; and that pay-TV customers

will not have to suffer from high prices, as there is sufficient fringe competition between pay-tv live-coverage and free-TV highlights and consumer choice limits the pay-TV right holder's ability to raise prices. It was a critical case because it attracted the attention of the media and political decision makers as well. The German Football League accused the *Bundeskartellamt* of having prevented them from earning money and from buying the best players in the world. This was why German football was not as present as it could be in European tournaments according to the League.

The average revenue for the *Bundesliga* is currently 412 million Euros/year, which is roughly the revenue of the previous periods.

7. Individual selling

The Chairman called on Spain, where rights to broadcast football matches for the Spanish League and the King's Cup are sold individually. They can be sold exclusively to a TV broadcaster and a TV broadcaster can acquire a number of exclusivities but in that case it must make some of those broadcasting rights available to others so that there will not be too much concentration. This system has been going on since 1996 without too many problems. Spain was asked to explain why they moved to a system of individual selling and to provide a short description of how it works.

A delegate from Spain said that, like in Germany or Italy, it has not been an easy task for the competition authority to deal with football cases because they were quite political. The football league accused them of harming the Spanish League, too, saying that Spain did not have the best players. The system changed in 1996, establishing an individual selling system based on the unilateral decision of the Spanish League which at the time was bankrupt and saw an opportunity to make money with the development of pay TV. The delegate stressed that whether it is individual or joint selling, what matters is how the system is applied and the small rules are sometimes the most important.

To understand how the Spanish system works nowadays, one has to answer the following questions: how many teams' rights do you need to broadcast the game? Do you need the right of the 2 teams that are playing that game? Why will the individual selling system have huge barriers to entry?

He explained that buying the two teams' media rights can be dangerous and it is not clear what rule exists within the Spanish League. Moreover the competitive balance of the Spanish League is not very good because two teams, Madrid and Barcelona, attract most of the supporters and viewers, conveying an advantage to the TV operator which has the media rights of Barcelona and Madrid or the pooling agreement to use those rights.

The home team rule for the media rights is more pro-competitive because TV operators will be able to buy the media rights of the team in the region where those rights are more important and it will be able to offer an interesting program to its viewers. However, problems remain with the highlights as you need the media rights of all teams to broadcast them. What do you do with timetables? Who decides when a match is played, as timing is key?

If several TV operators have media rights from different football teams this can affect consumer welfare. It leads to a football war if they do not reach a pooling agreement, which is the case between SogeCable, a TV operator in Spain, and Mediapro which is a free TV and pay TV operator in Spain. SogeCable had some teams and Mediapro had the others and they sued each other over the ownership of the rights of some teams, as a result some matches were not broadcasted. What happened the day before the roundtable is that Mediapro, who is the owner of almost all media rights, filed for bankruptcy because it was unable to meet all payments following the football war against SogeCable.

The Chairman turned to Mexico, where teams also sell their rights individually. In Mexico, some of the teams are owned by TV broadcasters and this has added a layer of complexity.

A delegate from Mexico said that the Spanish case is quite different from the Mexican situation. In Mexico, a couple of broadcasters have clear dominance and a lot of negotiation power with soccer teams in the country. This dominance is also strengthened by the fact that some of the broadcasters own 5 teams out of the 28 soccer teams in Mexico and those are the most important soccer teams.

The Chairman asked whether that bargaining power leads to competition problems that the Mexican competition authority would like to look into.

The delegate answered that having excessive bargaining power does not in itself violate the competition law, but in some cases strong bargaining power could facilitate illegal behaviour. For instance, the Federation of Professional Football league's officials have publicly acknowledged the existence of an agreement among broadcasters to keep their number of contracted teams to 9 each, unaltered by promotion or relegation rules, which would be contrary to competition law. No investigation has been launched so far but there are suspicions that something could be analysed in that market.

8. Professor Szymansky commenting on collective versus individual selling

The Chairman closed the discussion on joint selling versus individual selling by asking Prof. Szymansky to comment on what he had heard.

Prof. Szymansky said he would try to defend individual selling, although lots of arguments were presented to say that individual selling is not very efficient and causes problems like in Italy, Spain or Mexico. His yardstick is to consider it in terms of the effect on consumers and the effect on output. Collective selling could be acceptable if it did not restrict the output of professional sports leagues.

Szymansky has written papers showing the inefficiencies resulting from some of the decisions of sports leagues, whereby money is wasted. That is bad for the league but ultimately bad for consumers too, if they are not being supplied with the product.

Collective selling enables a single broadcaster to make the product available and avoids consumers to have two sets of technologies or subscriptions, which discourages demand. That was the problem in Italy, but the Norwegian case shows that it is perfectly possible to see increasing output, an increasing number of games shown and an increasing number of viewers watching the games even if you have programming available across multiple channels. If the problem is technology then there is also the possibility of cross licensing. There is a strong economic incentive to cross-license the product across different platforms to overcome problems.

The competitive balance argument aims to justify collective selling because it redistributes income to smaller clubs. However, redistribution can be achieved whether you have collective selling or not, Szymansky argued.

He stressed that much depends on the underlying structure of the league and the way in which the ownership of rights is determined. Barriers to entry can arise when there are obstacles to ownership which could be created through collective selling; so a definition of ownership is important. Regarding scheduling, collective selling is not the only means to achieve a sensible schedule of games for clubs, if you compare it to the management of aircraft taking off and landing at airports in particular slots; they do it without any need for collective selling agreements.

9. Competition issues raised by exclusivity

To summarise the issue of collective versus individual selling, Prof. Szymansky thinks that it is a question of consumers' interest and output restriction, if as a competition authority you are satisfied that a collective selling regime has no consequences for output, then there is no problem; but in so many cases you can see significant ways in which output is being restricted and therefore one should be very cautious about collective selling.

The Chairman then turned to the exclusive selling of broadcasting rights. The Norwegian contribution exposed the new system for broadcasting of rights the competition authority came up with, where the exclusivity dimension has been much reduced. Being the only delegation offering views along those lines he asked Norway to explain what has been the evolution of the Norwegian system under the authority's intervention and what is their assessment of the necessity or lack of necessity for selling broadcast rights on an exclusive basis?

The delegate from Norway said that the broadcasting rights for Norwegian football are jointly managed by the Norwegian Football Association and the association for the top football clubs in Norway. Historically these rights have been sold collectively rather than individually by the clubs. In 2005 all the significant broadcasting rights for the period 2005-2008 were bought jointly and exclusively by the two major commercial public broadcasters in Norway. The authority was concerned about the continuing exclusivity for the next period (2009-2011) and found that the major problem was the competition on the broadcasting side in the distribution. Their solution relied on removing the exclusivity in order to get more competition in broadcasting distribution, which worked without the need to open a formal procedure, and the new contract for 2009-2011 was made partly on a non-exclusive basis.

Norway mentioned the good effects it had on accessibility for consumers, on prices for consumers and on innovation. The market players have also been innovative in using web and IP TV platforms; they are now offering consumers multiple game choice, interactive services, archives clips/matches. Web TV and IP TV platforms faced some problems because of the quality of the games shown on these platforms, so competition has forced the market participants to be innovative also in this area; they have made significant changes in order to improve their processes and therefore improving the quality of the games shown on web and IP TV.

On the Chairman's request the delegate explained what he meant by non-exclusivity. Now both broadcasters (NRK and TV2) have matches to show on free-to-air and these 2 channels are available in all distribution packages. Before, TV2 controlled the web and IP TV rights, now these rights are split among other market participants as well.

Norway explained, further to a comment by Prof. Szymansky, that there is exclusivity in matches but not at the league level. For example, when you look at TV2 and NRK they have exclusivity for matches that are shown on commercial TV, and that is the only exclusivity left because all the other games are available on the other platforms.

The Chairman turned to the UK's contribution, which discusses the BSkyB case. The OFT investigated potential abuses of dominance by BSkyB. The UK was asked to explain what kind of conduct was permitted and what the relationship with the exclusive distribution of rights was.

A delegate from the UK said that the BSkyB case is quite old, as it was opened in the early part of the last decade and closed in 2002. The focus of the investigation was to find out whether BSkyB, now Sky, had a dominant market position in relation to the wholesale supply of premium sports and film content and if so whether its pricing policies abused that dominant position in some respects. Firstly by imposing a margin

squeeze on rival distributors of pay TV, secondly by pricing its channels in the form of anticompetitive mixed bundling and thirdly by giving anticompetitive discounts to distributors. On each complaint the OFT reached the conclusion that there were insufficient grounds to find that there was an infringement.

The UK delegate emphasised that this was based on the allegation, facts and circumstances in 2000-2002 and that there is currently an ongoing review of the pay TV sector by the communications' regulator, which also has competition powers.

The Chairman noted that the Turkish Football Federation (TFF) sells exclusive broadcasting rights in contracts that seem to be quite long, like 4 + 1 Year or 4 + 2 years. The Turkish competition authority looked at those contracts and decided that there was no competition issue, but this can be questioned. He asked Turkey about their assessment and why they thought there were no real competition concerns.

A delegate from Turkey started by explaining that the TFF requires first league matches to be broadcast on pay TV because of the presumed negative effects of free-on-air broadcasting on stadium attendance. The Turkish authority agrees with the argument that exclusivity in sports broadcasting rights can cause foreclosure in the market unless it is limited both in terms of scope and duration.

The delegate turned to competition for the national team's matches and said that the law requires that national matches be broadcast on free TV. Only 2 broadcasters bid for the qualifying matches for the 2012 UEFA championship and 2014 World Cup qualifying matches; the competition in that market is less than desirable.

The Chairman turned to Poland, which discusses the relationship between the Polish Football Association (PZPN) and TV Broadcast of Canal +. They apparently entered an exclusive agreement including a clause that gave priority to Canal + in case of renewal of rights. Poland was asked to explain this case and discuss why it thought that the agreement between the PZPN and TV Broadcast of Canal + was a serious breach of the Polish competition law?

A delegate from Poland said that during the proceedings they took into consideration the circumstances, as in 2000 the broadcasting rights for football matches of the Polish league were sold collectively by the Polish football association. The agreement between the Polish Football Association and Canal + was considered a serious breach of Polish competition law because this agreement not only granted the exclusive rights to broadcast the football league matches for four years but it also gave preferential treatment to Canal + in obtaining a license for another consecutive period of time and that clearly harmed competition. The case went to the Supreme Court last year and was upheld.

10. Comments by Professor Szymansky on the issue of exclusivity

The Chairman asked Prof. Szymanski to comment on the issue of exclusivity and the problems it creates by giving an advantage to the holder of the rights on the TV broadcasting market.

Prof. Szymanski said that broadcasters and leagues should aim to balance the needs to have exclusive rights and to invest in the long term quality of the product. One question is always if there is a real necessity for exclusivity. As the Norwegian contribution showed it is perfectly possible to have successful programming even where some exclusivity has been removed at the level of the game itself, so you have the same game shown on 2 platforms at the same time and yet broadcasters are willing to pay or enter into an arrangement to achieve an outcome that is consumer friendly. The objection regarding technological barriers is less and less significant as time goes by so it would not be a long-term obstacle. Taking an evidence-based approach, there is reason to believe that exclusivity does not produce as many benefits as is often claimed and given the significant potential for anticompetitive harm associated with exclusivity, such arrangements should be examined very carefully before being allowed.

11. Piracy, competition and broadcasting rights

The Chairman moved to the topic of piracy raised in Egypt's contribution.

A delegate from Egypt talked about broadcasting rights for the Cup of African Nations, the CAN, which is a bi-annual championship. The Al Jazeera Channel (JSC) has exclusive rights to broadcast to Middle Eastern North Africa in Arabic for 10 years, ending in 2016. A competition case concerned negotiations between Egyptian TV and JSC for the broadcasting of 10 matches on free TV, but the authority did not accept the agreement due to JSC's dominant position. While establishing JSC's dominant position, they found out that the informal sector (i.e., black market) has a large part of the viewers of JSC, for example 20% are subscribers, 80% are non-subscribers. A 'dream box' is sold very cheaply, the subscription is 5 USD/month, and you can watch everything you want. This sells very well in Egypt and affects the market for subscriptions. Although there are not many subscriptions there is positive demand for advertisement because advertising agencies look at the total number of viewers.

In the end JSC decided to air the games for free to Egypt at the last minute. They say it was political pressure but the delegate thinks that JSC's revenue from advertising was also threatened.

A delegate from New Zealand said that the premiership rights are sold exclusively to Sky TV in New Zealand and they broadcast 3 or 4 of the matches, none of the others are available on the Internet or anywhere else because of geographical restrictions. He asked Prof. Szymansky whether some piracy is driven purely by the inefficient selling of the broadcasting rights, the money that is left on the table essentially being taken up by the pirates or consumers who want to watch the games but cannot access the games because the rights are tied up so they turn to illegal means.

12. Free movement of players

Prof. Szymansky said that the piracy issue is a very serious one. He referred to the Sports Broadcasting Act in the US which does not allow collective selling except on free to air, which has served in part to keep rights on free-to-air TV. That has not happened in many parts of the world but American consumers have benefited from that.

The Chairman said that another type of problem which was not tackled much in the contributions is the free movement of players. The contribution from Chinese Taipei describes cases where the free movement of players between teams was at issue. It does suggest that the Fair Trade Act (FTA) did not apply but it also suggests that had it applied, the practices probably would have been exempted on the basis that they were good for the development of the sport itself.

A delegate from Chinese Taipei talked about the professional baseball league, the CCPL, and a case in which the Commission had to assess professional baseball agreements that included a clause restricting the free movement of players. At that time, the regulation on sports had not yet materialised, and the Commission found that the purpose of the restriction of free movement of players was to prevent teams from being able to purchase their competitors. This agreement was to promote the development of professional baseball and to safeguard fair competition, and it appears to some extent to have been a reasonable necessity.

The Chairman said that Bulgaria has looked at the market for players in the context of merger cases. Bulgaria was asked about the circumstances in which they had to look at the market for players and what the determinations in those cases were.

A delegate from Bulgaria said that they had two merger cases involving one of the leading Bulgarian football clubs. During the first case and its investigation, the Bulgarian Commission on the Protection of

Competition made an analysis of the relevant markets involved and distinguished the market for transfer of players as one of these relevant markets. In its assessment the Bulgarian Commission determined this market as being worldwide for several reasons. Mainly, due to UEFA and FIFA rules, there are homogeneous transfer rules all over the world and requirements for the qualities and the skills of the players are the same everywhere. The third parties invited to comment on the merger said that the transfer market is not influenced by the ownership of the capital of the respective clubs.

The Chairman then noted that the contribution from Denmark expressed some thoughts about the wage and labour relation of professional sportsmen, salary caps, and the extent to which they could be considered as illegal price agreements under the competition law.

13. Salary caps and final remarks by Professor Szymansky

A delegate from Denmark started by saying that the Danish Competition Act does not in general apply to wages and labour relations even though agreements of this kind can be anticompetitive. Nevertheless the Danish Competition Act may be applicable to agreements on wages for sportsmen. The key question is whether a professional sportsman is engaged on conditions similar to an employee, i.e. being employed on terms subject to collective agreements, or whether on the other hand the sportsman acts as a self-employed businessman. In the latter case it is the opinion of the Danish authority that the Danish Competition Act will actually be applicable. The line may be quite difficult to draw and they do not have any case law or empirical evidence as to the content of sports' contractual terms.

The Chairman gave the floor to Prof. Szymansky for his final remarks.

Prof. Szymansky said that the labour market issues have given rise to a lot of decisions in most of the world. In the US the non-statutory labour exemption rules out relevance for competition policy in many of these areas.

It is very striking that in North American sports when players move from one team to another the payment goes from the team that is losing the player to the team that is gaining the player in many cases. Whereas in football it is the opposite situation, the acquiring team pays the selling team for the player and these fees can be very large indeed and obviously controversial. Sometimes it is very hard to imagine what those payments are compensating for; when Ronaldo sells for 18 billion Euros, what is it actually for?