

**GCP**

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

# Assessing the Antitrust Case Against the Bowl Championship Series

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### I. INTRODUCTION

In an uncertain world, one predictable event is that the Bowl Championship Series (“BCS”) perennially engenders widespread skepticism and strident criticism. In 2008-09, Florida (13-1) beat Oklahoma (12-2) to win the putative college football national championship. No one disputes that Florida and Oklahoma were among the nation’s best teams, but Utah (13-0), USC (12-1), and Texas (12-1) all feel they deserved a shot at the title. Indeed, Texas even beat Oklahoma in a regular season game.

This year, the president of the United States is also weighing in. President Obama stated: “If I’m Utah, or if I’m USC or if I’m Texas, I might still have some quibbles. That’s why we need a playoff.”

In place since 1998, the BCS purports to determine the national champion in college football, while preserving the century-old system of postseason bowl games. To make its determination of which teams go to the championship game, the BCS employs the *USA Today* Coaches Poll, the Harris Interactive College Football Poll, and an average of six computer rankings.

### II. HISTORICAL BACKGROUND

The Rose Bowl became the first college bowl game in 1902. It became a regular annual event in 1916. Most major bowl games have been in place since the 1930s.

College bowl games generally are organized and controlled by local chambers of commerce, convention and tourist bureaus, and assorted businesses. The bowl games’ understood purpose is to generate business for the local economy, which they usually do to some extent because the majority of attendees come from out of town. The bowls have contracts with individual conferences that provide for conference champions, runner-ups, or other designated teams to participate in the bowl each year.

Under the old system, each bowl did not know the quality of the teams it would be getting until the end of the season. The conference champion associated with a particular bowl may have had a relatively low national ranking and the opposing team may have been no better. TV networks found themselves in the uncomfortable position

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of reserving a prime spot for a bowl and paying top rights fees, yet facing the possible prospect of two teams ranked below the top ten going against each other.

The other significant consequence of these arrangements was that it was next to impossible to structure a national championship. Between 1935 and 1991, the top-two ranked teams met each other in a bowl game only eight times. It would have had to have been a coincidence that the top two teams were in the two conferences playing in a given bowl game.

The effort to structure a national championship proceeded in stages. The “Bowl Coalition” was formed in 1991, followed by the “Bowl Alliance” in 1994, and then the Bowl Championship Series in June 1996 to take effect in the 1998-99 season. The basis for the BCS was a deal among the Big East Conference, the Atlantic Coast Conference (“ACC”), the Big 12 Conference (a merger of the Big 8 Conference with 4 teams from the Southwest), the Southeastern Conference (“SEC”), the Big 10 Conference, the Pac-10 Conference, Notre Dame University, the Rose Bowl, and the American Broadcasting Co. (“ABC”), (which had broadcasting rights to the Rose Bowl). Beginning with the 1998-99 season, the national championship game would rotate among the four bowls and ABC would have broadcast rights for all four games over a seven-year period (for which the network paid the estimated modest sum of \$700 million, or \$25 million per game which was roughly 2.5 times the average 1996 rights fees for the four games).

Although many fans welcomed the heightened prospect of a national championship game in college football, the BCS came under sharp attack and close scrutiny from many observers. To its critics, the BCS, instead of promoting the highest level of postseason competition, seemed to be promoting the economic fortunes of its members and the elite college bowls, to the exclusion and detriment of other Division IA (now known as the Football Bowl Subdivision, or “FBS”) schools.

As the ongoing inequities in the system were revealed and challenged politically, the BCS administrators have tweaked their plan. Between 1998 and 2008, the BCS selection process has become incrementally more open and the revenue distribution marginally less unequal. Thus, the system to date has avoided legal challenges or congressional action. Nevertheless, the BCS system remains fundamentally closed and acutely unequal.

### III. THE SKEWED ECONOMICS OF THE BCS

While the BCS has edged toward more inclusiveness since 1998, the selection criteria of the elite bowl system today remain significantly skewed. Beginning with the 2006-07 season, a fifth BCS bowl was added — the self-proclaimed national championship, which would be played between the No. 1 and No. 2 ranked teams, according to a statistically dubious, BCS-established formula. The venue for this game

would be rotated among the existing four BCS bowls. The existing BCS bowls would continue on the same basis; that is, the champions of the six BCS conferences (ACC, Big East, Big Ten, Big 12, Pac-10, and SEC) would have automatic berths. The teams from the five non-BCS conferences in the FBS (Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference) could earn an automatic berth if either: (a) the team ranks in the top 12 of the final BCS standings, or (b) the team ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the BCS conferences. However, no more than one team from a non-BCS conference can earn an automatic berth in any given year.

The BCS bowls are not only the most prestigious, but they are the most lucrative. Teams that appear in one of the five BCS games in 2008-09 took home \$18 million to their conference. Since the six BCS conferences are guaranteed at least one participant in the series, they are guaranteed this sum of money (on average this comes to \$1.57 million per school guaranteed). If one of the six BCS conferences has a second team in a BCS game, then it receives \$4.5 million for the second team.

Overall, during the first 11 years of the BCS system, there have been 90 appearances by BCS conference teams and only 4 appearances by non-BCS conference teams, three of which occurred during the last three years. Over the last three seasons, total payouts from the BCS bowls have amounted to \$410.1 million, of which \$355.1 million (or 86.6 percent) has gone to BCS conferences.

In addition to the BCS payouts, the BCS conferences have numerous tie-ins (guaranteed appearances) with other bowls: the SEC has a total of 9 bowl ties, as do the ACC and Big 12, while the Big 10 and Pac 10 each have 7 tie-ins. Overall, in 2008-09, 44 BCS teams (including Notre Dame) and 24 non-BCS teams played in postseason bowl games. Significantly, the average payout from the 29 non-BCS bowls in 2008-09 was \$1.4 million per participating team, while the payout from the five BCS bowls was \$14.2 million per team. The total payout from all bowl games in 2008-09 was \$224.6 million, of which \$187.7 million (or 83.6 percent) went to the BCS schools.

While the incremental reforms to the BCS selection process have allowed the BCS conferences to allege that their system is open to all, the outcomes in participation and in revenue bear no resemblance to an open system. Given the fact that the BCS conferences with 54.6 percent of the FBS teams receive approximately 87 percent of the BCS revenues, it is hardly surprising that the BCS teams are able to maintain their competitive superiority. The revenues are used to build the biggest and best facilities, provide the best academic support networks, hire the most renowned coaches, and conduct the most extensive and expensive recruitment drives.

The postseason revenue advantage for the BCS schools is thereby extended to a regular season revenue advantage. Among other things, the BCS schools play in larger stadiums; this, together with their greater prestige, enables them to make the case that when they play non-BCS schools during the regular season, they should play disproportionately at the BCS team's home field. The non-BCS team receives a modest guarantee fee and the BCS team retains the lion's share of the gate, concessions, catering, signage, and parking revenue from the game. In fact, between the 2002-03 and 2008-09 seasons, 80.7 percent of the 751 games between BCS and non-BCS teams were played on the BCS field.

The inequality is further aggravated by the presence of a clear home field advantage. In the 570 regular season matchups between BCS and non-BCS teams from 2002-03 to 2008-09 that were played at the BCS home field, the BCS won 493 for a .865 winning percentage. In the 181 matchups played at the non-BCS home field during this period, the BCS won 113 for a .624 winning percentage. Thus, despite the occasional superlative performance of a standout team (e.g., the regular season records of Tulane, 11-0 in 1998, Boise State, 12-0 in 2006, Hawaii, 12-0 in 2007, Utah, 12-0 in 2008, plus a decisive BCS bowl victory against Alabama), the prejudicial selection and revenue rules of the BCS appear to be bifurcating the FBS subdivision of Division 1 and engendering a caste system.

#### IV. ANTITRUST CONSIDERATIONS

Does the BCS violate U.S. antitrust laws and is it vulnerable to an antitrust challenge? As anyone familiar with the record of antitrust litigation in this country knows, there is always substantial uncertainty in such matters. Part of the uncertainty results from the merits of the case, but a significant part of it results from the venue of the challenge, the judge and the jury selected, and the skills of the lawyers bringing the case.

To assess the antitrust substance involved with the BCS system, it makes sense to consider the 1984 Supreme Court decision in *Board of Trustees of the University of Oklahoma v. NCAA*.<sup>2</sup> In this landmark case, the University of Oklahoma sued the NCAA over its national TV contract, in which the NCAA limited the number of appearances on national television to a maximum of three for any team and arranged for each participant to receive the same payment, whether it was a popular game such as Oklahoma playing Michigan or an obscure game such as Appalachian State playing Temple. The decision in this case against the NCAA established much of the relevant jurisprudence for understanding the antitrust treatment of college sports.

First, the Supreme Court made clear that horizontal restraints on output (and price) are condemned. Second, the Court found that "The NCAA creates a price

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<sup>2</sup> NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).

structure that is unresponsive to viewer demand.” The Court further stipulated that: “A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.” The Court concluded: “Today we hold only that the record supports the District Court’s conclusion that, *by curtailing output and blunting the ability of member institutions to respond to consumer preference*, the NCAA has restricted, rather than enhanced, the place of intercollegiate athletics in the Nation’s life.”

As it pertains to the BCS, these are the key precepts from the 1984 decision. They lead to the following fundamental question. Can it be shown that there is a horizontal combination that restricts output, distorts prices, and drives resource allocation away from maximizing consumer welfare?

That there is a horizontal combination among the 65 BCS schools is not in question. The only question is whether this combination is incidental and necessary to developing a national championship; and, if it is, whether it is the least restrictive form this combination can take. Let us consider these various elements in turn.

Does the BCS create a reduction in output? The answer here depends on to what the BCS is compared. If it is compared to an 8- or 16-team playoff system, it seems manifest that there is a reduction in output. The two issues here are: (a) whether the extension of the postseason into January for a minority of teams would compel a reduction of regular season games by one and (b) whether the total eyeballs watching and the total revenue generated by the postseason would increase. The first issue would become irrelevant either if there were no regular season reduction in the number of games or if the market was defined to include only competition for the national championship. The latter appears plausible given the 1959 Supreme Court decision in *International Boxing v. United States*,<sup>3</sup> that championship fights are a separate market from non-championship fights because of the huge payout differential.

The second issue is empirical, but *a priori* does not appear to be a serious concern. Many television industry mavens have estimated substantial growth in rights fees by a move to either an 8-game or 16-game playoff from the current BCS arrangement. Depending on the playoff system, a doubling or more of television revenue is often estimated.

If the playoff was effectively organized, it seems that the only practical issue would not be whether it attracted more eyeballs and created more overall revenue, but whether, given the diminished share of the overall take going to the BCS schools, it generated more net revenue for the BCS schools.

The BCS response to this argument would probably be that the wrong standard is being applied. The BCS should not be compared to some future hypothetical playoff

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<sup>3</sup> *International Boxing club v. United States*, , 358 U. S. 242 (1959).

system, but rather to the system that prevailed prior to the organization of the BCS. Prior to 1992, there was no national championship game, and the top two ranked teams rarely played each other at season's end. The BCS precursors (the Bowl Coalition and the Bowl Alliance) improved on this situation and the BCS added the Pac-10 and Big 10 conferences into the mix, giving still greater legitimacy to the national championship. Since that time, the BCS has made it marginally easier for non-BCS schools to play in a BCS bowl. Hence, the BCS can argue that each step it has taken has been toward opening competition, rather than shutting it down. From this perspective, the BCS is pro-competitive.

This is a substantial argument. Yet, the previous system was itself a network of exclusive dealing contracts that also probably violated the antitrust laws, so going from one anticompetitive system to another does not make the latter pro-competitive.

The question remains whether the BCS is engaging in ongoing exclusionary acts to curtail greater competition. Four antitrust claims might be advanced against the BCS in this regard. The first is a Section One claim of unlawful boycott or concerted refusal to deal, i.e., a collective action by a group of competitors for the purpose of excluding or otherwise interfering with a potential competitors' access to the market in which they compete. For such a claim to prevail, the plaintiff must prove harm to competition and consumer welfare, not just harm to an individual competitor. The second is a Section Two, or attempt to monopolize, claim. Given the Supreme Court's finding in *International Boxing v. United States*, the case could be made that the BCS is attempting to monopolize the market of college championship football. Here, the argument could be that the BCS conferences are allowing access to the market, but they are not doing it in an objective, non-discriminatory manner. As such, they have the specific intent to exercise monopoly control over this market.

The third claim is related and usually represents a more problematic legal path to pursue. It could be argued that the BCS is an essential facility and without fair access to the facility, it is impossible for potential competitors to enter the market. The fourth claim might be challenging the rule that limits the non-BCS conferences to one automatic appearance in a BCS bowl as a restraint of trade. Such a rule will produce inferior BCS matchups if the second non-BCS school is stronger than one of the selected BCS teams.

The BCS may also be vulnerable to claims of price fixing. Each of the five BCS bowl games, including the national championship, carry the same payout to the participating teams. This is despite the fact that the national championship game regularly has the strongest ratings by a healthy margin and some of the remaining BCS games have considerably higher ratings than others, yet the payout is identical to all bowls regardless of ratings or attendance.

There remains the question of whether there are less restrictive alternatives available to the current BCS system. It seems there are several compelling, less restrictive alternatives. The most obvious is to have the National Collegiate Athletic Association (“NCAA”) run a national championship tournament, as it does in basketball and in Division IAA (FCS), Division II, and Division III football, among playoffs in all its other championship sports. The Division III gridiron championship, for instance, began in 1973 as a single elimination tournament with four teams. It became an eight-team single elimination tournament in 1975 and the current format has 16 teams. Division IAA also has a 16-team playoff.

Of course, the NCAA is also a cartel. In this instance, however, it is a more open and inclusive one. An NCAA-organized national championship would not only produce a less ambiguous champion, it would generate more output and more revenue, and it would allow for a more equal distribution of the spoils across all 1100-plus schools in the NCAA.