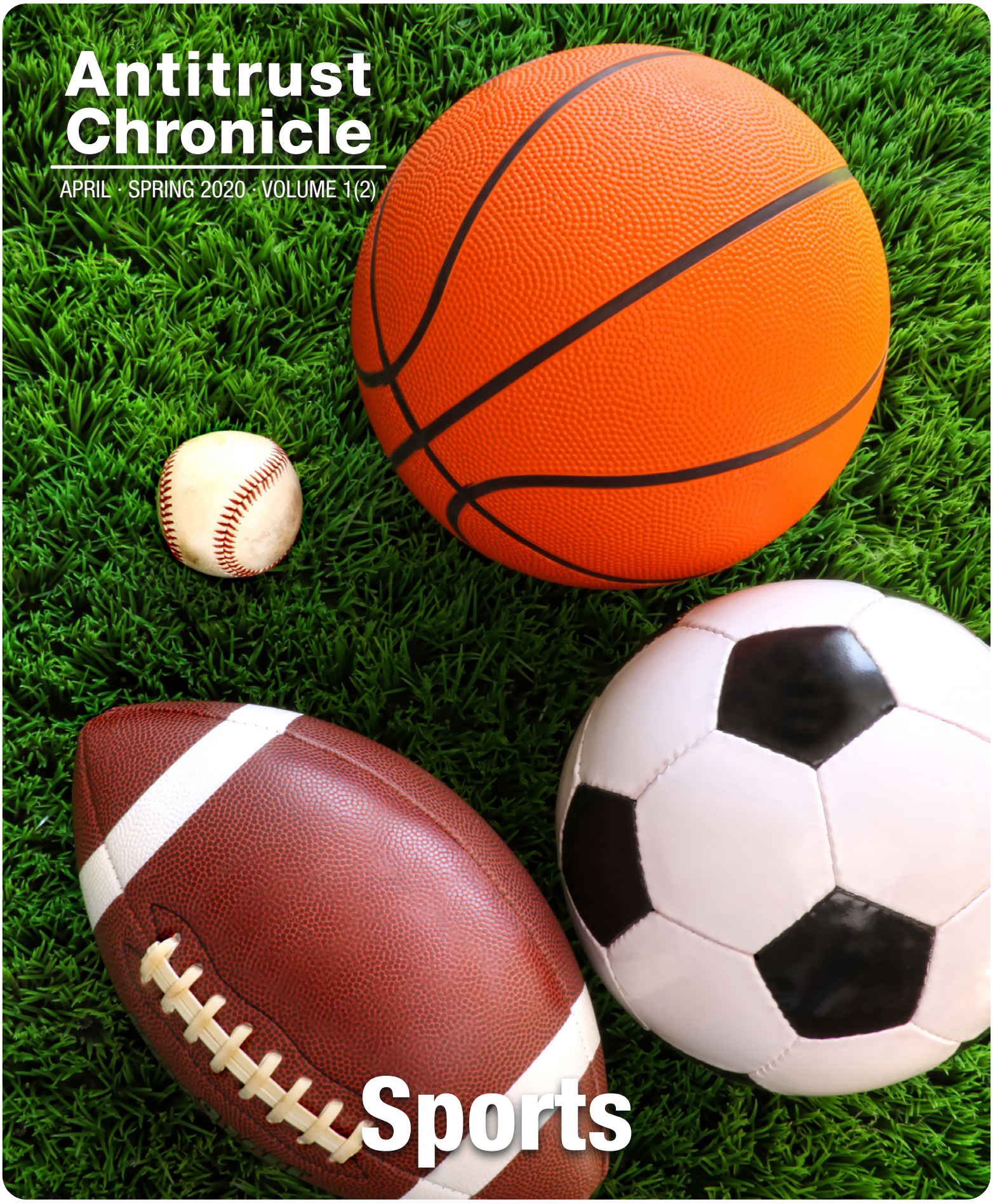

Antitrust Chronicle

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Sports

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this Chronicle we address competition and sports. All sports have layers of rules. There are the "rules of the game" itself (the size of the field, how to score points, how many players per team). Then there are the "governing rules" for the organization of competitive sports, such as league structures, financial rules, and rules on player transfers. And then there is the law. To the extent that sports constitute an economic activity, they, and their rules, are subject to the competition rules.

But sports are, to some degree, different from other economic activities. While professional (and indeed some amateur) sports generate billions of dollars in revenues, this is dependent on maintaining audience interest, and competitive conditions between teams. Sports also serve a social function, are a means of cultural expression, and embody societal values such as amateurism and athleticism that cannot be quantified in pure econometric terms. Indeed, as the articles in this edition well illustrate, these values find different forms of expression in different countries, and this must be factored into the analysis.

As such, the application of competition rules to sports raises myriad interesting questions. To what degree should the competition rules apply to amateur sports? Do financial rules such as salary caps, or aid restrictions for amateur or student athletes, restrict competition between sports teams as economic agents? Are league rules limiting or prohibiting player transfers between teams justified? In the burgeoning market for sports data, would leagues be engaging in an anticompetitive conspiracy by centralizing the collection of such data from their teams? And would refusing to supply such data constitute monopolization or a form of abusive refusal to supply?

These are not all new questions, and they have been dealt with in varying ways the world over. Nonetheless, enforcers and courts must continue to act as referees and make difficult calls as to whether rules ostensibly designed for sporting purposes constitute foul play under the antitrust laws.

The contributions to this Chronicle span the globe, and illustrate the latest trends in competition enforcement practice in sports.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

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CPI Talks…

…with James Keyte

In this month's edition of CPI Talks… we have the pleasure of speaking with James A. Keyte, Director of the Fordham Competition Law Institute, Director of Global Development at The Brattle Group, and a former antitrust partner at Skadden Arps who litigated may sports-related antitrust cases. James also is an adjunct professor of comparative antitrust law at Fordham and has written extensively on antitrust and sports, including a comparative perspective.

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Towards an Economic Theory of Amateurism: The NCAA, Antitrust, and the Student-Athlete

By John P. Bigelow & Kenneth G. Elzinga

Confusion and disagreement over the distinction between paying student-athletes to play and providing them with financial aid for their education has made intercollegiate sports the object of antitrust litigation as well as public controversy. The conventional wisdom is to model the National Collegiate Athletic Association ("NCAA") as a monopsonistic cartel. We show this to be inconsistent with the economics of cartels. The economic logic of the NCAA's amateurism rules is better understood as a multi-sided platform, subject to network externalities which must be managed by the platform to ensure participation of all constituencies, and which is subject to potential free-riding by individual schools seeking a private advantage at the expense of the platform by paying athletes more than the NCAA-sanctioned cap.

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The Equitable Future of Intercollegiate Athletics

By Michael D. Hausfeld, Sarah LaFreniere & Eduardo A. Carlo

For too long now, the NCAA has hidden behind its veil of "amateurism" to justify depriving college athletes of reasonable compensation for use of their name, image, and likeness ("NIL"), much needed comprehensive academic opportunities, and much more. While significant incremental improvements have been achieved through litigation, legislatures have finally realized that they have a role to play in creating an equitable system of intercollegiate athletics. Ever since California passed the Fair Pay to Play Act in 2019, there has been exponential increase in the introduction of reform bills targeting the injustices of college athlete compensation under the NCAA's regime. In this article, the authors address a proposed formula for federal legislation aimed to achieve a more equitable system in intercollegiate athletics.

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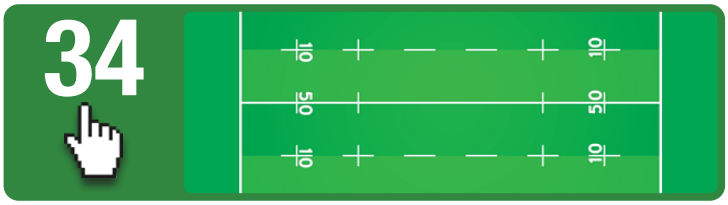
The Antitrust Perils of Sports Data For U.S. Sports Leagues

By Gregory J. Pelnar

Sports data account for only a small percentage of the revenue generated by U.S. sports leagues. However, as states legalize sports betting, the demand for such data is expected to grow. How leagues choose to meet this demand may raise antitrust issues under both Sections 1 and 2 of the Sherman Act. Two data-related theories of harm concern the collective sale of data at the league level and the leveraging of monopoly power over the market for league games to the market for data generated by or about those games. An empirical analysis of the market(s) for sports data would prove valuable to a rule of reason analysis of challenged practices.

SUMMARIES



Game-Changer: Why the *Saracens* Decision Will Transform the Governance of Sport

By Benoît Keane

In the *Saracens* case, an independent disciplinary panel of England's foremost professional rugby league, Premiership Rugby (the "Panel"), was confronted with a competition law challenge to the legality of a salary cap put in place by Premiership Rugby. However, the Panel rejected these claims, finding that agreements concerning wages and salaries cannot be categorised as restrictive "by object." It also rejected the claim that there was a harmful effect upon competition, finding no evidence to show that the recruitment of rugby players had been adversely affected. To the contrary, the Panel ruled that the salary cap was actually beneficial to competition as it ensured that clubs as well as Premiership Rugby remained financially viable and it protected competitive balance in the league. The decision is a game changer as it potentially opens the way for other sports organisations to adopt salary caps, and greater financial regulation in sport.

State Aid in Football: Fall-Out From the General Court's Judgments in the *Valencia* and *Elche* Appeals

By Peter Alexiadis & Teodor Asenov

Modern football creates unprecedented investment pressures on clubs, which leave them exposed to high levels of financial risk. This risk is often diluted by supporting measures introduced by government authorities. An increase in such State involvement has prompted the European Commission to extend State aids policy into the world of football over the past decade. This culminated recently in successful appeals by three Spanish football clubs before the General Court against a 2016 Commission Decision declaring loan guarantees from a State-sponsored intermediary to be incompatible aid. In overturning the Decision, the Court has required the Commission to satisfy an onerous standard of proof, driven by the complexity of the economic conditions that characterize the business of football. The complex economic issues at stake take on a particular significance in the wake of the economic crisis generated by the Covid-19 pandemic. Due to the suspension of football matches, the economic hardships faced by football clubs suggest that many of them will have no choice other than to turn to the State for greater assistance.

Call of Duty: The Yet Unknown Battlegrounds of EU Competition Law and Esports

Fredrik Löwhagen & Sînziana Ianc

Esports or professional video gaming, is taking the world (of sports) by storm. So far, this relatively new and booming sector has not received much antitrust attention. In an era where both Big Tech and traditional sports undergo a tougher antitrust scrutiny than ever, this will no doubt change soon. With structures and actors similar to traditional sports, esports is widely expected to raise analogous antitrust issues. However, the very status of esports as "sports" under Union law is contested. Moreover, the absence of sports governing bodies in the traditional sense and the fundamental role played by game publishers and their IP rights in shaping virtually all aspects of the esports industry means that the competition-IP interface is likely to play a very prominent rule in future antitrust enforcement in this sector.

Competition Law and Sports in Japan: A New Olympic Legacy?

By Shingo Kasahara

Given the increasing number of self-employed workers, recently the Japanese competition authority has been more and more engaged in human resources markets. In terms of sports, regulations on player transfers between teams invite close scrutiny. Based on its fact-finding survey, the Japan Fair Trade Commission published its guidance on the matter. The guidance clarifies that a non-hardcore cartel approach is applied to the transfer regulations; and sets out a basic framework to evaluate whether a regulation is anticompetitive or not in light of its rationality and necessity. The sports community has responded to the watchdog's action, by eliminating or amending some regulations that contain antitrust concerns, but it seems to be still halfway. These developments may become a part of the legacy of the 2020 Tokyo Olympic Games.

WHAT'S NEXT?

For May 2020, we will feature Chronicles focused on issues related to (1) **Healthcare**; and (2) **Killer Acquisitions**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES JUNE 2020

For June 2020, we will feature Chronicles focused on issues related to (1) **Self-preferencing**; and (2) **Monopsony**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with James A. Keyte

In this month's edition of CPI Talks we have the pleasure of speaking with James A. Keyte, Director of the Fordham Competition Law Institute, Director of Global Development at The Brattle Group, and a former antitrust partner at Skadden Arps who litigated may sports-related antitrust cases. James also is an adjunct professor of comparative antitrust law at Fordham and has written extensively on antitrust and sports, including a comparative perspective.

1. **Let's start with a general question about convergence and divergence in the sports antitrust area. As both U.S. courts and EU enforcement authorities continue to focus on this subject, do you see an eventual convergence on either analytical frameworks or outcomes?**

When we look at competition law and enforcement applied to sports, we see a long and sometimes arduous history in the U.S. (e.g. the single-entity debate), yet a much more recent and relatively vibrant emergence of the topic in the EU. That is not surprising and for reasons that cut across numerous antitrust subjects.

Most importantly, the U.S. enforcement of antitrust laws — whether private or public — takes place in the courts and is only as aggressive or innovative as courts are willing to accommodate. Hence, even if, politically or culturally, there were a desire for more scrutiny and enforcement of the Sherman Act as applied to amateur and professional sports, nothing can be done in the U.S. absent litigation in court or through legislation.

Not so in the EU. There, in its administrative system, enforcement policy and decisions can move forward at a relatively rapid pace, subject only to fairly limited appeal rights. And with the recent EU focus on sports (e.g. broadcast rights and player restraints), decisions to enforce can emerge quickly and often with industry-altering outcomes. While the General Court and the Court of Justice do occasionally review sports-related decisions, the real action is with the front-line enforcers at DG Comp and in the Member States.

Another major difference lies in the historically divergent statutory language and enforcement policies and philosophies between the two jurisdictions, which we also see in the sports-related cases and investigations themselves. For example, the EU has a principle of "fairness" built into its statutory framework. Moreover, in my view, the EU has a greater concern with concentrated market structures as well as behaviors that "distort" competition in the actor's primary market as well as related markets. This type of "leveraging" doctrine was summarily discarded in the U.S. Supreme Court in *Trinko*. The contrasting result in the EU is both the predilection and discretion to be much more aggressive and regulatory-like in considering how to enforce its antitrust laws in a way, in their view, that "levels the playing field" from the supply side and also protects consumers.

At the same time, however, ever since the *Intel* decision in the Court of Justice a few years ago, the EU has been trending (perhaps reluctantly for some) toward an "effects"-based analysis (like our rule of reason) as opposed to categorical condemnations (like our *per se* rules), referred to as restraints "by object" in the EU.

Hence, in addition to the very interesting question of whether different jurisdictions are addressing similar questions in the sports/antitrust field, there always remains the need to closely assess whether the different enforcement systems and policies will lead to disparate outcomes for similar conduct.

2. **There is enormous legal and cultural debate surrounding amateurism and whether, for example, the Sherman Act should be used to ensure that NCAA student athletes are "paid" for their play. And, of course, we now have decisions in the Ninth Circuit that recognize "amateurism" as a legitimate collaboration objective, yet also reject certain limits on education-related "grant-in-aid." In your view, is the court striking the right balance?**

The subject of whether student athletes should be paid for their play is one of the most polarizing ones being debated across the U.S. (and elsewhere) today, from dining room tables to courtrooms. On the one hand, people see the commercial value created by amateur sports (at all levels, but most dramatically in the big NCAA sports) and some naturally argue that the players should share in that beyond education-related financial aid. On the other hand, many people believe that student athletes are compensated with scholarships, various forms of aid, educational support and degrees (with future earning power). In their view, "pay for play" would change the nature of the amateur product itself. And then, on top of that debate, is the question of how to bring, if at all, the enforcement power of the Sherman Act into play in an area that for decades had been left outside the scope of the Act — intentionally if one reads the dicta in *NCAA* correctly.

Yet, when one breaks it down, there is a real question of whether this is truly or properly an antitrust debate or, instead, a legislative one. We see, for example, the NCAA struggle with trying to define precisely what type of financial aid and support is education-related so student athletes have the maximum of what other students can get because, after all, they are students as well as athletes. And as long as courts view "amateurism" as an essential aspect of the collaborative product — which they seem to even when the NCAA "loses" — one could argue that antitrust courts should have no role in managing how the NCAA or other bodies define the scope of their jointly created product. From this perspective, the vigorous cultural debate on "paying" student athletes perhaps belongs in a different arena — whether it is within the NCAA itself or the appropriate legislative body.

However, if the courts are going to continue to invoke the Sherman Act in this politically charged area, they likely need a better approach than the simplistic assertion that schools are merely "monopsony cartels" and that the market for players needs to be completely free of self-regulation or collectivized around labor-relation laws and exemptions. I also see that in the articles to follow there is one from John Bigelow & Ken Elzinger, who argue with analytical force that these markets — again if viewed as such from antitrust perspective — are "two-sided," with organizations like the NCAA acting as an intermediary between fans and student athletes. What we cannot have, I suggest, is a free for all where the minor sports get marginalized or eradicated and schools can't "compete" if they try to keep the "student" part of the "student-athlete" intact.

A final thought is that a very small percentage of student athletes end up playing professional sports. Moreover, several sports allow athletes to make that professional choice out of high school (e.g. baseball, tennis, soccer). And even for those sports where some time in college appears to be a must, we should not undervalue a college education and degree that is available to those 97 percent plus, and the life experience and earning power it can bring along the way.

3. **Restrictions on player movement and salaries (e.g. a salary cap) have long been an issue in the U.S., but now are working their way to the E.U. and Japan, among other jurisdictions. How do you see that playing out?**

The subject of salary caps or restraints on player movement is quite interesting, historically, as it parallels the transition from *per se* to rule of reason treatment. I'm sure that many practitioners who do not work in this area might assume that, absent the non-statutory labor exemption, salary caps or free agency restraints are easily condemned in the U.S. But this hasn't been the case for a while. As the courts focused more on effects and the relationship between input (players) and output (the entertainment product) marketplaces, they began to focus on the benefits of those "restraints" on things like competitive balance among teams over time (which goes to product quality) and the financial viability of teams (which promotes fan loyalty or venture product stability). In fact, in the *Williams* case (which eventually turned on the non-statutory labor exemption), Judge Duffy held, in the alternative after a one-day trial, that the salary cap at issue passed the rule of reason without the exemption — a little known nugget. And, of course, *American Needle*, in its interesting end-of-opinion dicta, highlighted that some restrictions, especially those that appear necessary (and specifically referencing competitive balance), may pass muster on a defense-oriented "quick look." Going forward, then, challenges to player restraints at a minimum are going to be full rule of reason battles in the U.S.

Jurisdictions outside the U.S., by contrast, are late in coming to this issue, and only recently (and along the path of *Intel*) are transitioning to an effects-based analysis for these type of labor restraints. For example, Benoit Keane's article below has a thorough and interesting discussion of the recent *Saracens* decision in the UK just on this topic. As he highlights, much like the U.S.'s *NCAA* decision, among others, *Saracens* is likely to transform how enforcers (at least in the UK, which, at that point, was still an EU Member State) analyze sports restraints at the venture level, though we must await further European decisions to see how this will play out in the EU and its Member States.

4. **The packaged broadcast of professional sports contests has become enormously lucrative, and both in the U.S. and the EU there have been challenges to the league-level control of broadcast licensing as well as exclusive deals with distributors. Is this an area where standard antitrust principles can apply, and shouldn't fans have the option to view games of their favorite team without having to buy a league package? Where does the debate on this stand?**

This is an ongoing, vigorous debate in the U.S. courts today, and from a different angle in the EU as well. The U.S., in the wake of *NCAA* and *American Needle*, is focused primarily on the horizontal issue: should leagues be permitted to control the distribution and sale of broadcast rights (with less concern over exclusive, vertical distribution), while the EU appears perfectly willing to accept the justifications for venture coordination on broadcasts (essentially, investment incentives and the avoidance of free-riding), but is quite focused on the scope and duration of exclusivity.

From a purely analytical perspective, the whole debate is somewhat of a surprise to me (apart from there being so much money at stake). What we are talking about here is the venture product itself (live viewing of the games via broadcast), a venture "product" that no team can create by itself and never could. From this perspective, I always thought that *Bulls II* had it right (in dicta, suggesting single entity for broadcast arrangements), and it seemed to me that both *Dagher* and *American Needle* implicitly support that view — more so in *Dagher* as, for the broadcasts of league games, no team can act as a competitive firm outside of the venture itself and, quite unlike *American Needle*, teams have nothing to license (in contrast to IP, e.g. for hats) absent the cooperatively-created venture product.

The *Sunday Ticket* case in the Ninth Circuit, of course, takes a much different view, treating terms as if they create, or at least "own" in some fashion, the broadcast rights for all of their home games, independent of what the venture may allow contractually. Oddly, the case also treats the subject under the "quick look" rubric, which is ironic given *American Needle's* discussion of likely procompetitive justifications, especially for those relating to coordination that is necessary. If the Supreme Court does not take the case (and it is entirely possible that it may), I would anticipate seeing the litigation working its way through the quick look doctrine (e.g. addressing free rider issues and investment incentives), and then on to the full rule of reason and all of its complexities (including the challenge of proving harm to consumers as well as constructing a "but for world").

The assessment of collective broadcast restraints in the EU is a different beast. In the 2003 *UEFA Champions League* decision, the Commission accepted the notion that teams are not truly competitors for broadcast rights, and that a joint selling arrangement is essential to the league's existence. And the Commission acknowledged and accepted that the joint selling arrangement had provisions that prevented teams from selling media rights in parallel against the league. Indeed, as to these horizontal issues, the Commission's analysis highlights the analytical flexibility and enforcement discretion flexibility inherent in the EU's administrative system.

But that same discretion turned back on the leagues on the vertical issue of exclusivity. Hence, whereas in the U.S. (and Canada) long-term exclusive distribution of broadcast rights are not uncommon (sometimes even over 10 years, justified by investment incentives and the avoidance of free-riding), the EU in *UEFA* essentially created a presumptive 3-year limitation on exclusivity with restrictions on scope as well (e.g. non-live media rights and ancillary products). Member States have generally followed the same approach. The contrast with the U.S. highlights how quickly the EU can address a subject area once it has it in its sights and also get to resolution. That just is not possible in the U.S. common law system, which can be good or bad depending on who you are rooting for.

5. **More recently, there is a lot of discussion surrounding the notion of "game data," both the raw data (e.g. for gaming companies) and data used by third parties and developers for related products (video games, etc.) What type of antitrust issues arise in this setting and is there likely to be divergence across jurisdictions?**

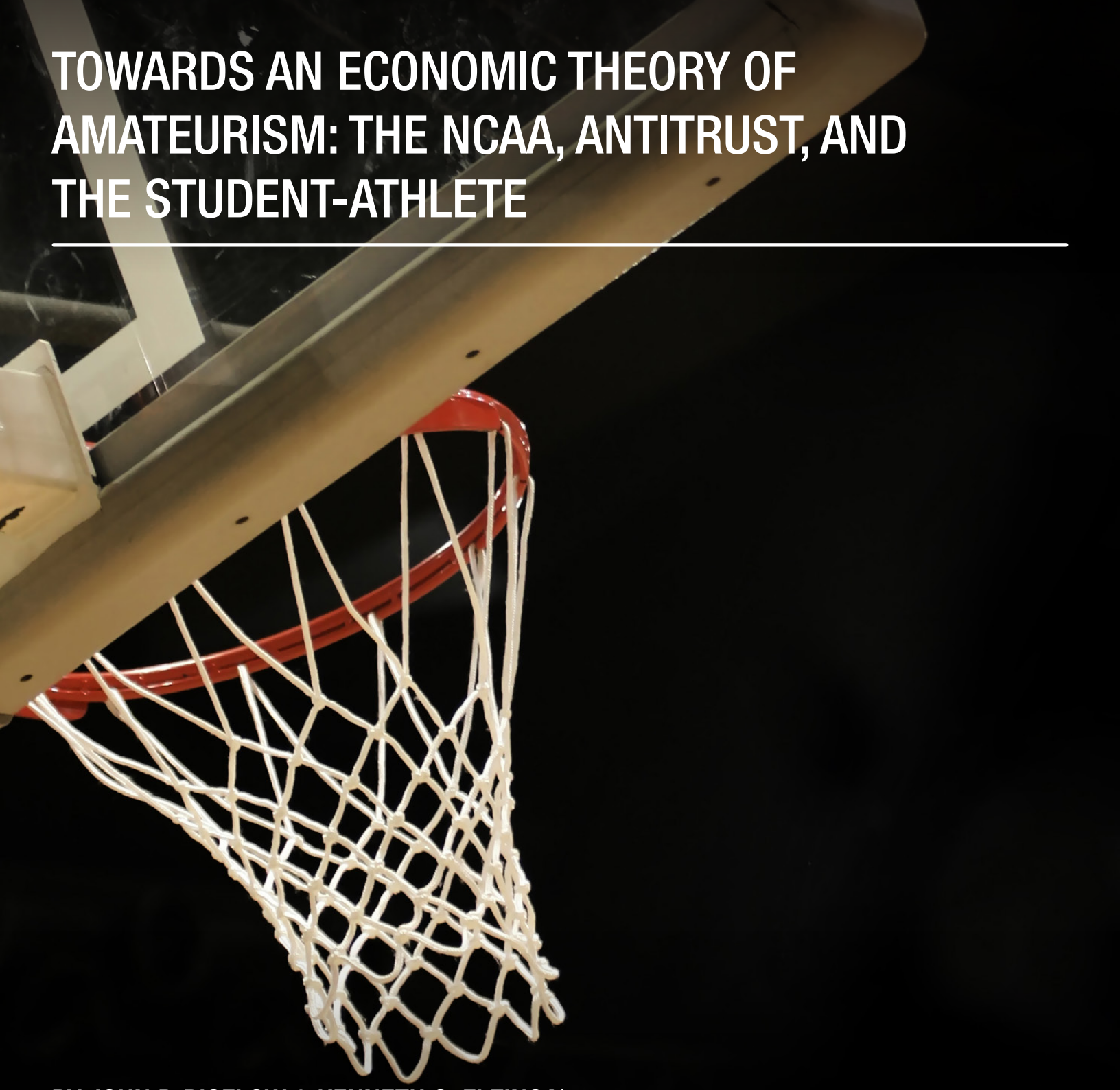
The question of how the antitrust laws should apply to sports-generated data is a very interesting one, but in large part because it does not neatly fit into any particular category. It also has an overlap with IP law, which raises its own challenges in the U.S and underscores some differences between U.S. and EU law and policy.

We knew, for example, that the Supreme Court in *American Needle* treated team-owned copyrights (for licensing) as the property of independent economic firms for purposes of Section 1 (leaving the merits aside). But we also know that some products do not exist at all independent of the collaboration or venture, which in turn (and as we already discussed) can have significant implications for single entity arguments, effects analyses, and justifications. I tend to think that sports-generated data falls on the side of products that can only be created collectively in the first instance and therefore that leagues (or amateur collaborations) as a venture can collectively decide how to use, distribute, or sell that data. But, of course, there are many types of data as well as sources, so much of the analyses may turn on specific facts.

It would also seem to be the case, at least in the U.S., that collaborations and leagues that generate the data through play would have no "duty to deal" with third parties, even if viewed as "essential" to some product that the third-party has in mind or exists. Absent an *Aspen*-like prior course of dealing, U.S. law simply won't impose that duty; nor, highly likely would it resurrect the all but dead "essential facilities" doctrine. And this is true even if the venture is "leveraging" the possession of that data into related "markets." Again, *Trinko* killed that theory for want of a statutory hook. Absent *per se* or "quick look" analysis (which is not for this), Section 1 requires "market power" in the relevant market, and Section 2 requires monopolization or a dangerous probability of obtaining one.

But, as with other areas we have discussed, EU enforcement and law is likely to take a different path — or at least practitioners should be ready for it. These same doctrines are alive and well at DG Comp and the Member States, and one can easily see the real potential for different outcomes, absent demonstrable justifications (e.g. free-riding concerns) for assessing sports data issues across the pond.

TOWARDS AN ECONOMIC THEORY OF AMATEURISM: THE NCAA, ANTITRUST, AND THE STUDENT-ATHLETE



BY JOHN P. BIGELOW & KENNETH G. ELZINGA[1]

1 Dr. Bigelow is Executive Vice President of Compass Lexecon. Professor Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia. Professor Elzinga was an expert witness on behalf of the Defendants in *In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 375 F.Supp.3d 1058 (2019) (hereafter "GIA Cap"), and Dr. Bigelow worked on behalf of the Defendants in that matter as well. This paper is not sponsored by any party to that litigation.

I. INTRODUCTION

If amateur athletics had its own 4-digit SIC code, it would count as a major sector of the economy. From children enrolled in Little League baseball to septuagenarians running half-marathons, millions of Americans devote countless hours to playing, watching, and administering amateur sports without financial remuneration. The tradition of amateur athletics is venerable. The modern Olympic movement touts the Olympic games of Ancient Greece as its forebearer. However, amateurism in sports is not well understood by economists, perhaps because the essence of amateurism is that the participants do not get paid. In intercollegiate sports, where student-athletes often receive financial aid, confusion and disagreement over the distinction between being paid to play and receiving financial aid have contributed to the controversy over whether student-athletes should be paid, and has made intercollegiate sports the object of antitrust litigation.

A. The NCAA

Most intercollegiate athletic competition in the United States is organized through The National Collegiate Athletics Association ("NCAA") and is governed by its rules. The NCAA's operative philosophy is that athletes are to be students and amateurs.[2] The NCAA expresses this in Article 1.3 of its constitution, which describes the organization's "Fundamental Policy," and Article 2.9, which describes the "Principle of Amateurism":

> 1.3.1 Basic Purpose. [*] The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.[3]
>
> 2.9 The Principle of Amateurism. [*] Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[4]

To ensure that student-athletes are genuine amateurs, the NCAA has provisions intended to rule out "pay for play," i.e. to ensure that student-athletes are not being paid to compete. The rules do not forbid financial aid to student-athletes, who can receive financial aid towards their tuition, other educational expenses, and living expenses while enrolled as students. However, the amount of allowable aid is capped to ensure that financial aid does not become a backdoor means of paying student-athletes, thereby violating the NCAA's principle of amateurism. The current cap is, with some exceptions, the institutions' Cost of Attendance ("COA") as reported by each institution to the U.S. Department of Education for financial aid purposes generally. That is, the COA is determined by each school with respect to *all* its students, not just student-athletes. Schools that make or allow payments to student athletes in excess of allowable amounts are subject to sanctions that can include having student-athletes declared ineligible to compete, forfeiture of games, monetary fines, or suspension of whole programs.

2 Under NCAA rules student-athletes are subject to a variety of academic eligibility requirements intended to ensure that student athletes are academically qualified for admission to their schools in the first place, that they are enrolled in *bona fide* degree programs where they are subject to the same academic requirements as other students, and that they are making progress towards their degrees.

3 *NCAA Division I Manual August 2016-17*, National Collegiate Athletic Association, Indianapolis, IN 2016-17, Article 1.3.1 (hereafter "2016-17 Manual"). The asterisks printed in sections of the NCAA constitution indicate to readers the voting procedures required for amendment of each section. Asterisks indicate that a particular provision is a "Dominant Provision," which is defined as: "Dominant provision—Legislation that is derived from the constitution in the 1988-89 Manual (the Manual format that was employed until the membership approved the revised format at the 1989 Convention). All such legislation is identified by an asterisk (*) and requires a two-thirds majority vote of the total membership (present and voting) for adoption or amendment." (2016-17 Manual, § III).

4 2016-17 Manual, Article 2.9.

B. The Monopsony Cartel Hypothesis

The conventional wisdom among some economists is that the NCAA rules limiting the amount that student-athletes can be paid are the machinations of a monopsonistic cartel whose purpose is to suppress the "wages" of athletes "hired" by schools to compete on their behalf.[5] According to this view, amateurism is a ploy to keep student-athletes from receiving a share of the value that their skill and their bodies produce for the sports programs in which they are an essential labor input.

The adherents of this view see the "market" for student-athlete services in simple terms: the universities and colleges that compete on the playing field are the *buyers* of athletic services and the young men and women who play sports are the *sellers*. By way of participation in the NCAA, the buyers have agreed on rules that cap the amount the sellers can be paid. Through the NCAA, the buyers monitor one another's behavior and have institutionalized processes for penalizing any buyer that exceeds the agreed-upon cap. Considered in this manner, the NCAA is reduced to a textbook example of a monopsony cartel: an agreement among otherwise horizontally competing buyers to suppress the price of a labor[6] input they all employ.

C. Questioning the Conventional Wisdom

There are, however, implications of the Monopsony Cartel Hypothesis that do not stand up to inspection. Among the implications, one is qualitative, another theoretical.

The qualitative implication is that student-athletes are heavily exploited, allowed only a minimal income that is just adequate for subsistence (or in the case of more extreme critics, not even adequate for subsistence). For example, in an article entitled "He Shouldn't Have to Eat Ramen," Kessler writes, "the average I-A student-athlete cannot subsist on a full grant-in-aid alone."[7] The author characterizes the practices of the NCAA and its member institutions as a "blatant and novel form of exploitation," that serves "the supposedly inherent good that is 'amateurism,'" and insists that "any justification for [the NCAA's practices] … is merely a ruse to maintain the current unfair economic distribution."[8]

One reason this characterization of student-athletes' meager living conditions does not stand up is that the amount of financial aid allowed under NCAA rules generally is similar to or better than the amount of financial aid provided to the broad population of students. Non-athlete students who work at the library or the cafeteria do not receive more aid than student-athletes, and they do not have the benefit of training tables, tutors, and other perks routinely provided to student-athletes.

Moreover, from an economic perspective, the financial aid to a student-athlete is not fully measured by the student's standard of living during the four years as a student. Financial aid provides the student-athlete with an opportunity to acquire an undergraduate degree – with all the economic returns this accumulation of human capital provides over a lifetime – at minimal or no expense to the athlete or the athlete's family. That is not a textbook example of penurious exploitation.

The theoretical implication of the Monopsony Cartel Hypothesis is that the number of student-athletes must be suppressed. This is an economic corollary to the proposition that the wages of the student-athletes have been suppressed. Both follow from the elementary economics of monopsony, illustrated in Figure 1 (and which, in similar form, can be found in virtually every undergraduate price theory textbook).

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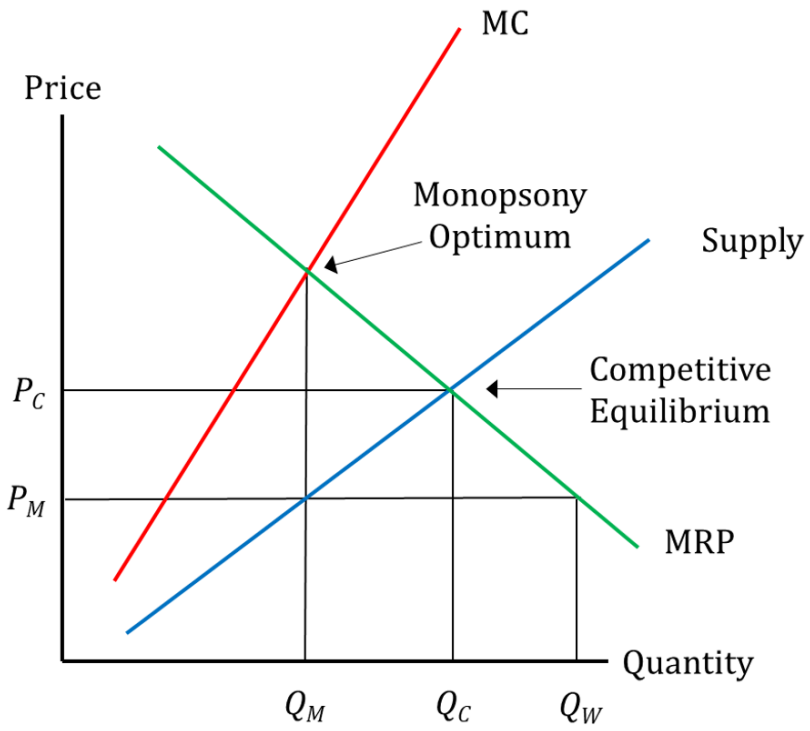
5 Economists have expressed this opinion both in professional publications and in the popular press. For examples of the former see: Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior* (Chicago: University of Chicago Press, 1992), pp. 20-4; Armen A. Alchian & William Allen, *University Economics, 3rd ed.* (Belmont: Wadsworth Publishing Company, 1972), pp. 443-4; Edgar K. Browning & Mark A. Zupan, *Microeconomics Theory & Applications, 7th ed.* (New York: John Wiley & Sons, 2002), pp. 502-3; Lawrence M. Kahn, "Markets: Cartel Behavior and Amateurism in College Sports," *The Journal of Economic Perspectives* 21, no. 1 (2007): 209-26, p. 210; Brad R. Humphreys & Jane E. Ruseski, "Monitoring Cartel Behavior and Stability: Evidence from NCAA Football," *Southern Economic Journal* 75, no. 3 (2009): 720-35, p. 720; Robert W. Brown, "Measuring cartel rents in the college basketball player recruitment market," *Applied Economics* 26, no. 1 (1994): 27-34, p. 27; and Allen R. Sanderson & John J. Siegfried, "The Case for Paying College Athletes," *Journal of Economic Perspectives* 29, no. 1 (2015): 115-37, p. 119. For examples of the latter see Gary S. Becker, "College Athletes Should Get Paid What They are Worth," *Business Week*, September 30, 1985, p. 18; Gary S. Becker, "The NCAA: A Cartel in Sheepskin Clothing," *Business Week*, September 14, 1987, p. 24; and Robert Barro, "The Best Little Monopoly in America," *Business Week*, December 9, 2002, p. 22

6 Monopsony, the exercise of market power by a buyer or group of buyers isn't limited to labor markets, although labor markets are often used in textbook examples.

7 William O. Kessler, "He Shouldn't Have to Eat Ramen: A Modest Pay-For-Play Proposal for NCAA Student-Athletes Participating in Traditionally Profitable Sports," *Willamette Sports Law Journal*, 3 no. 1, (Spring 2006): 56-76, http://hdl.handle.net/10177/5582, last visited February 18, 2020 (hereafter, "Kessler"), p. 61.

8 Kessler, p. 56.

Figure 1



When the market for an input or factor of production is competitive, equilibrium occurs where the supply curve (shown in blue) of the input intersects the marginal revenue product ("MRP," shown in green),[9] which serves as the demand curve for the input. Thus, in Figure 1, the competitive equilibrium price is P_C and the competitive equilibrium quantity (volume) is Q_C.

By contrast, a monopsonist (or, in this example, a monopsonistic cartel) maximizes its profit by purchasing the monopsonized input only up to the point where the marginal cost of the next unit of input is equal to the monopsonist's marginal revenue product. For the monopsonist, the marginal cost of the input ("MC," shown in red) exceeds the price because the monopsonist is facing the upward sloping supply curve, so in order to purchase an additional unit of the input, the monopsonist has to be willing to pay an increased price not only for the incremental unit of input, but also for all the infra-marginal units of input (i.e. the units the monopsonist was buying already). The monopsonist's optimum occurs at quantity Q_M and the monopsonist pays price P_M. That is how the monopsonist increases its profit by suppressing the price it pays for the inputs it purchases. In the process of doing so, it also suppresses the volume of the monopsonized input purchased in the market.

Under the conventional wisdom of the Monopsony Cartel Hypothesis, the input whose price (or wage) is allegedly suppressed is the student-athlete. But, along with the purported price suppression, the economic theory of monopsony would imply that fewer student-athletes are "hired," i.e. admitted to NCAA schools and fielded on teams in NCAA competition than would be the case absent the NCAA's amateurism rules. In other words, the conventional wisdom implies that if the NCAA's amateurism rules were lifted and competition for their services meant schools paid more to student-athletes than they currently receive, the volume of student-athletes playing for the schools would *increase*. That is, schools would field more players either by increasing the size of their teams or by fielding more teams. Among all the debates over the likely consequences of increasing payments to student-athletes, no one (to our knowledge) has seriously suggested that dropping the NCAA's amateurism rules and increasing payments to student-athletes will incentivize schools to increase the ranks of their student-athletes. However, if one accepts the argument that payments to student-athletes are too low because of a purported NCAA-engineered cartel, that is what economic theory implies. Namely, if the "price" paid by schools for student-athletes were to increase because the restrictions imposed by the purported monopsony cartel were dropped, schools would actually hire more, not fewer student-athletes.

The confusion disappears when one unpacks how a cartel actually works. Consider again Figure 1, which shows the effect of a monopsony cartel on price and volume. The competitive price and quantity P_C and Q_C are both greater than their monopsony-cartel counterparts, P_M and Q_M. The firms in the cartel have a collective incentive to participate in the cartel because monopsony equilibrium is more profitable for them. That is, each firm in the cartel earns greater profits in the monopsony cartel equilibrium than in the competitive alternative.

9 The marginal revenue product of an input is the incremental revenue earned by the firm from purchasing an incremental unit of the input. The definition assumes, of course, that the input is used to produce additional output and that output is sold, which gives rise to the increment to revenue.

However, maintaining the cartel equilibrium requires discipline, because if all the other firms abide by cartel pricing, each individual firm has a private incentive to undermine the cartel. That is, if all its rivals adhere to the cartel price, an individual firm could offer suppliers a slightly better price than the cartel price. This would attract suppliers to the firm deviating from the monopsony price, which would make the offer profitable to the deviating firm but would reduce the profits of the other members of the cartel. Other members of the cartel would then need to increase their own prices to retain their share of the market. Cartels routinely worry about this problem, and successful cartels must have means of disciplining wayward members (or cheaters) who deviate from the cartel price in order to avoid unraveling of the cartel agreement. Proponents of the Monopsony Cartel Hypothesis point to the NCAA rules and disciplinary process as confirmation of their view.

What the cartel-proponents overlook is that the whole point of cartel discipline is to ensure that volume is suppressed. An upward-sloping supply curve means that the only way a monopsony cartel can maintain a low price is to enforce a reduced volume. Consider Figure 1 again. At the monopsony price (P_M) the supply that is forthcoming is Q_M. But when the price is P_M, firms would (absent the cartel agreement) like to purchase Q_W. That means the market is in a position that would (in the absence of cartel discipline) be described as excess demand. At the cartel price, the volume of supply that is forthcoming is less than the buying firms would prefer to buy (acting unilaterally) at that price if they were freed from the restrictions of the cartel.

Qualitatively, what would this situation look like in practice? On the supply side, it would mean that prospective athletes would be holding back their "supply," i.e. their willingness to enroll in NCAA schools as student-athletes, because the financial rewards for doing so are insufficient to make it attractive. On the demand side, it would mean that coaches and athletic directors would be lamenting the insufficiently small number of qualified athletes willing to play for their schools as student-athletes, and chafing against the "price limits" of the amateurism rules which prevent them from addressing the shortage of student-athletes by offering prospects more money.

This description bears no resemblance to the world of intercollegiate athletics, where far more potential student-athletes would like to play than there are available spots on a team, and where the problem for coaches and athletic directors is not finding enough players to fill a shortage but rather choosing among a large number of prospects willing and eager to play intercollegiate sports at the prevailing COA levels. To be sure, there is and will always be competition for the best players, but that observation does not span the gulf between what a cartelized market for student-athletes would look like and the current reality. In short, the conventional wisdom of the NCAA-as-Monopsony-Cartel does not square with the facts on the ground of intercollegiate athletics.

II. AMATEURISM

If the NCAA is not a monopsonistic cartel, that invites the question, why does the NCAA need rules limiting what its members can pay student-athletes? The answer lies in the nature of amateurism and how markets satisfy demand for non-professional sports, i.e. sports entertainment not offered by organizations such as the National Football League, the National Basketball Association, the National Hockey League and Major League Baseball.

A. Demand for Amateur Athletics

It is evident that there is demand for amateurism, especially as it relates to athletics. One need only consider the volume of resources expended on high school athletic programs, and amateur sports organizations like Little League baseball,[10] Pop Warner football[11] and others[12] to show the sizable demand for amateur athletics. Demand for amateur athletics encompasses both participant-demand, i.e. the desire to take part in amateur athletic competition, and spectator-demand, i.e. the desire to watch amateur athletic competition.[13]

10 https://www.littleleague.org/, last visited February 20, 2020.

11 https://www.popwarner.com/, last visited February 20, 2020.

12 A cursory search of the internet reveals the existence of a wide range of organizations that are either established to promote amateur athletics in various sports or that include promotion of amateur athletics among their activities. Some examples are: U.S. Youth Soccer: https://www.usyouthsoccer.org/; USA Hockey: https://www.usahockey.com/youthhockey; U.S. Basketball: https://www.usab.com/youth/development.aspx; USA Track and Field: https://www.usatf.org/programs/youth; U.S. Figure Skating https://www.usfigureskating.org/; U.S. Sailing: https://www.ussailing.org; and the U.S. Equestrian Foundation: https://www.usef.org (All websites last visited 2/20/2020). Additionally, interest in amateur athletics spans a very wide range of competitive activities. "[A]mateur sport activities astonishingly include competitions as diverse as throwing bison dung, spitting cherry pits, running marathons, body building, motorcycle races, and sky diving." (Lada Helen V. Kurpis, Carl S. Bozman & Lynn R. Kahle, "Distinguishing between amateur sport participants and spectators: the List of Values approach," *International Journal of Sport Management and Marketing* 7, nos. 3/4 (2010): 190–201, DOI: 10.1504/IJSMM.2010.032550, p. 191).

13 Consider, by way of only one example, the thousands of participants *and spectators* who show up for local running events.

B. Competition and Cooperation

In the world of athletics, the relationship between competition and cooperation is complex. On the one hand, athletes and teams compete in the games themselves. Here, collusion would be anathema to the values of athletic competition. On the other hand, cooperative activity is essential to organize athletic competition. The rules of play and the scheduling of contests must be established and agreed upon. If a series of contests are to be held with the collective results determining a championship, the scoring and evaluation of the outcomes of individual contests must be agreed upon. In addition, all parties must agree on who is eligible to compete.

Where the rules are concerned, it is often more important that all parties agree upon and understand a common standard than the precise details of what that standard is. Consider, for example, the NCAA rule governing the ball in baseball.

> The Ball
>
> SECTION 11. The ball is a sphere weighing not less than 5 nor more than 5¼ ounces avoirdupois and measuring not less than 9 inches nor more than 9½ inches in circumference. It shall be formed by yarn wound around a small core of rubber, cork or combination of both and covered by two pieces of white horsehide or cowhide tightly stitched together. The coefficient of restitution (COR)[14] of a baseball cannot exceed .555.[15]

This definition is very detailed. It specifies the materials from which the ball must be made and gives its weight within plus or minus 5 percent and its circumference within less than plus or minus 6 percent. It even specifies an upper limit on its coefficient of restitution, a measure of how "elastic" the ball is in a collision. The game of baseball would not be very much different if all parties agreed that it would be played with a 6½ ounce ball or one that was 8¾ inches in circumference. However, players who have learned the game with balls meeting the rule described above would be thrown off (pun intended) by having to play with a ball that did not meet the expected specifications. In short, the game of baseball is more consistent, and therefore fairer, if all parties know that important parameters will remain consistent.[16]

The detail in which athletic organizations, both amateur and professional, specify their rules offers insight into the economic logic of the NCAA capping grant-in-aid and allowances for student-athletes. Athletics are about competition, and athletes and fans who appreciate competition set store on that competition being "fair," which means that all parties are clear on what the parameters of competition are to be. That accounts for the detail with which the rules are specified. The NCAA baseball rules are published in a 125-page document with sections specifying the size and shape of the playing field; the specification of game equipment (balls, bats, and gloves); the size and shape of home plate and the pitcher's mound; the roles of coaches, team managers, the scorer, the umpires, medical personnel; and the use of tobacco products. And this list goes on.[17] The compensation of student-athletes who play baseball at the intercollegiate level is no more and no less a part of all the other rules that define the sport of intercollegiate baseball. By way of contrast, Little League baseball and Major League Baseball have different rules within their organizations that define compensation and eligibility, just as they define other elements of how the game is played.

In short, athletic competition that will attract athletes and spectators requires rules that are sometimes complex. This means teams that compete on the field or court must cooperate organizationally in order to meet the preferences of other market constituents, such as spectators and advertisers.

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14 Greg Bernhardt, "What is the coefficient of restitution?" *Physics Forums*, July 24, 2014, https://www.physicsforums.com/threads/what-is-the-coefficient-of-restitution.763082/, last visited February 21, 2020.

15 National Collegiate Athletic Association, *2019 and 2020 NCAA Baseball Rules*, (Indianapolis, National Collegiate Athletic Association, October, 2018), p. 15 http://www.ncaapublications.com/productdownloads/BA20.pdf, last visited February 21, 2020, (hereafter, "NCAA Baseball Rules"). Bold in original.

16 One gets a sense of how strongly athletes feel about things like specifications of the ball by considering the "Deflategate" controversy in the world of professional football. That controversy involved allegations that the New England Patriots and their quarterback, Tom Brady, knowingly used underinflated footballs in the American Football Conference Championship game against the Indianapolis Colts on January 15, 2015. For that offense the league fined the Patriots $1 million, took away two draft picks, and suspended Mr. Brady for four games. ("Deflategate Timeline: After 544 Days, Tom Brady Gives In," *ESPN*, https://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady, last visited February 21, 2020). Before the case was fully resolved it was heard in the Federal District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. The case finally ended when Mr. Brady decided not to appeal an adverse decision in the Court of Appeals to the Supreme Court.

17 NCAA Baseball Rules.

C. The Constituencies

The entity (e.g. league, conference, or association) that organizes athletic competition faces a situation in which the participation of multiple constituencies is essential to the sustained competition on the court or field of play. The organization must bring these constituencies together, and in considering how to bring them together must consider the dependence of each constituency's willingness to participate on the participation of the other constituencies. For example, the willingness of a team to participate necessarily depends on the participation of other teams. Some athletes are likely to be attracted by the attention of fans, so their willingness to participate depends on the participation of fans. By the same token, spectator interest in watching contests will depend on the athletes participating and the teams or leagues of which they are a part.

III. MULTI-SIDED PLATFORMS

A. Network Externalities

This situation of inter-related demands is what economists call "network externalities," a term often used when discussing "platforms" where the effect of one group's participation in the platform affects the demand of other groups to participate in the same platform. An example of a platform outside the world of athletics is payment cards, where the willingness of cardholders to use cards depends on the willingness of merchants to accept them and *vice versa*.[18]

Markets in which platforms with two constituencies share network externalities are referred to as two-sided markets, an area that has received considerable attention in the literature since the early 2000s.[19] An important implication of two-sided market theory is that the managers of the platform assign prices to each side of the platform with a view towards how those prices will affect one side's participation and how that participation will, in turn, affect the participation of the constituents on the other side of the platform. Two-sided platform pricing can look very different from pricing in conventional (one-sided) markets because the price-cost relationships often differ from what one would find in one-sided markets.

The same lesson applies with even more complexity to multi-sided platforms. Those who manage a multi-sided platform must determine the optimal pricing to each constituency served by the platform – with a view towards the effect of each constituent's participation on the demand of the other constituencies.

B. Amateur Athletics as a Multi-Sided Platform

The multi-sided platform model can be helpful in understanding the organization of amateur athletics. The various teams, the athletes, the prospective fans and advertisers make up the main constituents served by the platform, which is the organization administering competition. In the case of the NCAA, these roles correspond to the member schools, their teams, their non-athlete students, their alumni, and other potential fans. For schools in "big-time" competition, television broadcasters can be regarded as an additional constituency.

From an economic perspective, the NCAA is the organizing entity at the center of the platform for most intercollegiate athletic competition in the United States. It falls to the NCAA, then, to master the complexities of multi-sided platform pricing. As described earlier, the NCAA institutionalizes a strong emphasis on amateurism, i.e. on the idea that student-athletes are *bona fide* students who play the game as an avocation, not a profession. The NCAA's rules on amateurism are as detailed as the rules governing the conduct of a baseball game. Both sets of rules are important to the platform's sustainable equilibrium.

Based on economic logic, one would expect the NCAA to devote attention and effort (both of which are costly) to those aspects of the game that are consequential to the success of the association of schools and teams it is organizing. When the NCAA devotes time and attention to the size, weight, construction materials and coefficient of restitution of a baseball, it does so because ensuring consistency in the properties of a baseball will promote confidence among athletes and fans that NCAA-sanctioned competition in baseball is fair. By the same token, devoting detailed attention to the rules of eligibility for competition in the game will promote confidence that NCAA-sanctioned competition is fair. If one school in a game brings a team of genuine student-athletes who are working on degrees and meet their school's academic requirements but

18 Other such platforms include auction houses and web-sites and computer operating systems.

19 For early descriptions of the literature see Jean-Charles Rochet & Jean Tirole, "Two-Sided Markets: An Overview," https://pdfs.semanticscholar.org/1181/ee3b92b2d6c1107a5c899bd94575b0099c32.pdf, last visited February 23, 2020 and Jean Charles Rochet & Jean Tirole,"Two-Sided Markets: A Progress Report," *The RAND Journal of Economics* 35, no. 3 (2006): 645–67.

their opponent fields a team unconstrained by academic qualifications and whose members were recruited and paid to play, the contest will not be regarded as fair. This will reduce the demand for the contest by spectators and advertisers alike. Fairness aside, schools that genuinely want to include intercollegiate athletic competition in the experience of their *bona fide* students will not be able to compete with teams from a school that has professionalized athletics. The attention and effort that the NCAA devotes to ensuring amateurism serves to put an economist on notice that the rules are important to the NCAA's sustainable equilibrium.

C. A Theory of Amateur Athletics

Managing a multi-sided platform is an exercise in managing externalities. While network externalities must be managed to ensure participation from all constituencies, there are other externalities of which the platform manager (here, the NCAA) must be aware. Consider the position of an individual school. Even a school that recognizes the value of amateurism to the platform also will be aware of private incentives that tempt it to undermine amateurism. For an individual university or college, athletic success may bring tangible rewards in the form of increased contributions from alumni, increased visibility to prospective students, larger ticket sales, and enhanced prestige in the community.

Such a school might consider that the gains that could come from achieving athletic success by recruiting and paying "ringers" would outweigh the costs that the school would incur. That would more likely be the case if the cost of the damage done by professionalizing a team was borne not just by the team that did so, but also was borne in part by other schools with which the offending school competes. In this situation, the offending school exerts a negative externality on the other schools (and their constituencies) with which it competes on the court or field of play. Left unconstrained, individual schools would have an incentive to engage in too much of this activity, in the process creating a market failure in which the value of the platform as a whole is reduced and all constituencies are worse off in the resulting equilibrium.

From a platform perspective, the NCAA's amateurism eligibility rules are instituted to protect against this form of market failure. While the rules may superficially resemble cartel-restrictions on price competition, they serve a different objective – namely, the procompetitive purpose of ensuring that the platform is able to compete. Network externalities and the theory of multi-sided platforms provide an analytic framework within which the economics of markets can explain the features of amateur athletic organizations.

IV. THE NCAA GRANT-IN-AID LITIGATION

It is instructive to consider how this economic analysis can be applied to the antitrust litigation that was brought against the NCAA, alleging that the NCAA and eleven athletic conferences operated a monopsonistic cartel. We are referring to *In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*. Because the Judge ruled against the NCAA in that case, it is instructive to compare the Judge's ruling with the ideas developed here. As an aside, this case is a different lawsuit than the *O'Bannon* case involving the NCAA that was tried before the same judge.[20]

A. The Price Effect

In the *GIA Merits* case, the Judge agreed with the Plaintiffs'[21] allegation that the NCAA constituted a cartel that suppressed the compensation of student-athletes.

> In a market free of the challenged restraints, competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result. Student-athletes would receive offers that would more closely match the value of their athletic services . . . This evidence shows that student-athletes are harmed by the challenged compensation limits, because these rules deprive them of compensation they would receive in the absence of the restraints.[22]

20 *O'Bannon v. National Collegiate Athletic Association*, 7 F.Supp.3d 955 (2014). See also *Edward C. O'Bannon Jr., et al. v. National Collegiate Athletic Association,* 802 F.3d 1049 (9th Cir. 2015) (hereafter "*O'Bannon* Appeal"). One of the issues in the *O'Bannon* case was whether student-athletes could sell their Names, Images or Likenesses ("NILs") to, say, a video game, and retain their amateur status. The NIL issue has been in the news lately because the Governor of California recently signed a bill that would allow all athletes in California "to be compensated for use of their [NIL]" without fear of being punished by the NCAA, notwithstanding the NCAA's rules to the contrary. (Alan Blinder, "Paying College Athletes: Answers to Key Questions on New Law," *The New York Times*, https://nyti.ms/2nO3jQt, last visited February 27, 2020.) Additionally, news reports indicate that state lawmakers "in more than two dozen states" are expected to debate whether student-athletes should be able to profit from their NILs, and the U.S. Congress may take up the matter as well. (Alan Blinder, "After California Law, Statehouses Push to Expand Rights of College Athletes," *The New York Times*, https://nyti.ms/2sl7UMB, last visited February 23, 2020.

21 The case was brought on behalf of three classes of Plaintiffs: FBS football players, Division I Men's Basketball players, and Division I Women's Basketball players.

22 GIA Cap at 1068.

Not only did the Court conclude that the challenged practices were anticompetitive, it also accepted Plaintiffs' attribution of the anticompetitive effects to monopsony power.

Plaintiffs' experts' analyses also show that Defendants are able to artificially compress and limit student-athlete compensation as described above because they possess monopsony power in the relevant market.[23]

This part of the decision came in the first stage of the three-step rule of reason process in which it is Plaintiffs' burden to show that the challenged practices have an anticompetitive effect. If Plaintiffs meet that burden, then it is Defendants' burden in the second stage to demonstrate that the challenged practices have some procompetitive effect. If the Defendants meet that burden, then it becomes Plaintiffs' burden in the third stage to demonstrate that there are less restrictive means of achieving the same procompetitive effects.

The premise of the first part of the decision is that an anticompetitive effect is demonstrated by showing that prices (payments) to student-athletes are lower than they would be absent the challenged practices, which are the NCAA's amateurism rules. By such a standard, any cap on athletic scholarships would be deemed to have an anticompetitive effect unless it was superfluous, i.e., not binding. By definition, a rule that defines and enforces amateur status is a rule that limits the amount paid to an athlete.[24] As the Ninth Circuit Court of Appeals recognized in deciding an appeal of the earlier *O'Bannon* case, "not paying student-athletes is *precisely what makes them amateurs*."[25]

From an economic perspective, this approach is faulty because it misapprehends the meaning of anticompetitive effect. As a matter of economics, a restraint or practice is anticompetitive if it limits competition that would otherwise take place in a market. When a multi-sided platform sets prices so as to increase its volume over the platform, it is acting in a procompetitive fashion even if for one constituency those prices are high or low relative to prices for another constituency. When the platform includes multiple entities acting together, as is the case with intercollegiate athletics where the NCAA and universities and colleges combine to operate the platform, it is procompetitive to restrict schools' ability to gain privately by imposing negative externalities on other participants in the platform.

In other words, to relegate consideration of amateurism's procompetitive effects to the second stage of the rule of reason analysis is to make the mistake of imagining that there are distinct procompetitive and anticompetitive effects that can somehow be separated from one another. This kind of imagined bifurcation can encourage misleading conclusions. For example, in the Ninth Circuit's decision in the *O'Bannon* case, the Court of Appeals rejected an argument advanced by the NCAA that Plaintiffs in that case had not shown an anticompetitive effect because they had not shown that the challenged practices restricted output. The Court of Appeals rejected that argument, reasoning as follows:

> First, the NCAA's contention that the plaintiffs' claim fails because they did not show a decrease in output in the college education market is simply incorrect. Here, the NCAA argues that output in the college education market "consists of opportunities for student-athletes to participate in FBS football or Division I men's basketball," and it quotes the district court's finding that these opportunities have "increased steadily over time." See *O'Bannon*, 7 F.Supp.3d at 981. But this argument misses the mark. Although output reductions are one common kind of anticompetitive effect in antitrust cases, a "reduction in output is not the *only* measure of anticompetitive effect." Areeda & Hovenkamp ¶ 1503b (1) (emphasis added).
>
> The "combination[s] condemned by the [Sherman] Act" also include "price-fixing... by purchasers" even though "the persons specially injured ... are sellers, not customers or consumers." Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). At trial, the plaintiffs demonstrated that the NCAA's compensation rules have just this kind of anticompetitive effect: they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component.[26]

The Court was correct that reductions in *output* are not the *only* measure of anticompetitive effect. Anticompetitive effects also can be accomplished through reductions in quality or delaying of innovation. But the Court was incorrect to segue from that conclusion to a discussion of the effects of monopsony on price, and to conclude that this price effect was somehow separate from the effect of monopsony on quantity (or output).

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23 GIA Cap at 1068.

24 By "amount paid" we ignore the economic value of the human capital the student-athlete has received upon completion of a college degree.

25 *O'Bannon* Appeal at 1076, italics in original.

26 *O'Bannon* Appeal at 1070-1.

As demonstrated earlier, the effects of monopsony on price and quantity are not two separate effects. They are, in fact, the same effect – movement along a supply curve. As illustrated in Figure 1, a monopsony achieves its effect by moving the market equilibrium down an upward-sloping supply curve. Doing so causes both price and quantity to fall, not because there are two separate effects. Rather, the observed change in price and the observed change in quantity are two symptoms of the same effect caused by the monopsonist's conduct. If a reduction in price were seen with no quantity effect or with a quantity effect that moved in the opposite direction, it would mean that something other than the exercise of monopsony power is going on. For a Court to accept a price reduction with no accompanying reduction in quantity as evidence of an anticompetitive monopsony is economics in error.

For this same reason when the District Court in the GIA litigation reasons that suppression of price is a sufficient basis to conclude that the challenged practices have a monopsonistic anticompetitive effect, the Court is mistaken because it is failing to understand the mechanism of monopsony.

B. Amateurism as Arbitrary or as Pretext

In addition to giving the procompetitive effect of amateurism short shrift in its analysis of the allegedly anticompetitive effects of the amateurism rules, the Court displayed skepticism with regard to the NCAA's commitment to amateurism. The Court reviewed a variety of payments in excess of the basic grant-in-aid that student-athletes can receive under various circumstances, and concluded:

> Yet this compensation, some of which is unrelated to education and some of which is provided in cash or a cash-equivalent, is not considered to be "pay" and student-athletes who receive it remain amateurs.
>
> These payments and benefits are, without a doubt, justifiable and well-deserved. They are relevant to the analysis of Defendants' consumer-demand procompetitive justification for two reasons. First, the rules that permit, limit, or forbid student athlete compensation and benefits do not follow any coherent definition of amateurism, including Defendants' proffered definition of no "pay for play," or even "pay." The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it.[27]

In other words, amateurism is whatever the NCAA says it is. That is supposed to be a withering criticism. But from an economic perspective it is hardly a criticism at all, because the rule is not unjustified or anticompetitive simply because it has some arbitrary features. After all, a baseball weighs between 5 and 5¼ ounces only because the NCAA says it does, and has a circumference of between 9 and 9½ inches, only because the NCAA says it does. Yet, nobody would suggest that the NCAA is insincere or engaging in pretext with respect to its rules for the size and shape of a baseball.

In the grant-in-aid litigation, both Plaintiffs and the Court noted changes in NCAA amateurism rules over time, although neither contended that those changes were themselves anticompetitive. The changes were adduced merely to suggest that the NCAA was insincere in its commitment to amateurism. However, those changes do not necessarily imply pretext or insincerity. Over time, the rules with respect to baseball bats have changed. Once all bats had to be wooden; now some non-wooden bats are permitted. This hardly means the NCAA was dishonest or pretextual with respect to its rules governing bats.

To switch examples from sports to potables, if the Coca Cola company wants to change the formula for Diet Coke and in the process change what it looks like and tastes like, it can do so – and still call it Diet Coke. In short, Coca Cola gets to define what Diet Coke is. In like fashion, the NCAA defines what the product (amateur intercollegiate athletics) is like. Who else should get to define the term if not the NCAA?

Similarly, when the Court in the GIA litigation decides, in effect, that NCAA amateurism rules are arbitrary,

> [S]ome of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports. That distinction cannot be based on student-athletes not receiving any compensation and benefits on top of grant-in-aid; this is because student-athletes currently can receive thousands or tens of thousands of dollars in such compensation, related and unrelated to education, while remaining NCAA amateurs.[28]

27 GIA Cap at 1074.

28 GIA Cap at 1082-3.

That criticism is insufficient to establish that the NCAA's commitment to amateurism is pretext for market power. After all, the size of the baseball is, to a degree, arbitrary, but the game requires that the size be well defined.

V. CONCLUSION

To characterize the NCAA as a monopsonistic cartel is too clever by a half. The economic theory of monopsony does not fit intercollegiate sports because the output effect that is necessary for the cartel hypothesis to be consistent with economic theory is conspicuous by its absence. In addition, the concept of economic exploitation does not apply when student-athletes receive not only capped grant-in-aid remuneration but also the human capital value of a college degree. For purposes of economic analysis, intercollegiate sports and amateur athletics generally are better viewed as multi-sided platforms. An agreement on the definition of amateurism that constrains payments to student-athletes makes economic sense for the operation of the platform in the same way that it makes economic sense for the colleges and universities who are members of the NCAA to agree on the characteristics of the equipment used on the court or field of play.

THE EQUITABLE FUTURE OF INTERCOLLEGIATE ATHLETICS

BY MICHAEL D. HAUSFELD, SARAH R. LAFRENIERE & EDUARDO A. CARLO[1]



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I. THE RISING TIDE

Should college athletes be compensated? If so, how? And, for what? While these questions, and the NCAA's response to them, are presently under immense scrutiny, the discussion around college athlete compensation is hardly new. Over the past decade, individuals and organizations at all levels have recognized the fundamental unfairness in the way college athletes have traditionally been compensated (or rather, uncompensated) despite the economic boon their participation in college sports presents for their universities, the NCAA, the networks, and others. Tellingly, the industry of intercollegiate sports brought in $14 billion in revenue in 2019, more money than any other sports league in the world, except for the NFL.[2] The last decade has incited a sea change in attitudes toward the NCAA and its amateurism policy — specifically in the context of college athlete compensation — with courts, private entities, and now legislators pushing for better treatment, both economically and academically, for these athletes.

The NCAA's cloak of "amateurism" can no longer be used to justify its failure to equitably compensate college athletes for the use of their name, image, and likeness ("NIL"). Nor can it be used to continue denying student athletes comprehensive academic opportunities and other much-needed services. After years of incremental improvements through litigation, legislatures are finally picking up the mantle — recognizing that change through the courts has been too slow, and that college athletes have waited too long. The following article highlights this discussion within the courtroom, identifies and explains the critical turning point, and proposes a framework for how legislatures, including Congress, should approach their efforts to finally achieve an equitable system of intercollegiate athletics.

II. COURTROOM PERSPECTIVES OF AN EVOLVING DISCUSSION

The topic of College athlete compensation has been litigated multiple times before.[3] However, not until the 2009 case, *O'Bannon v. NCAA*, did any courts rule on the NCAA's antitrust liability *vis-à-vis* athlete compensation. In *O'Bannon*, current and former Division I college athletes alleged that the NCAA, its member institutions, and its commercial partners violated federal antitrust laws by unlawfully foreclosing them from receiving any compensation related to the use of their NILs in television broadcasts, rebroadcasts, and videogames. The Northern District of California found the agreement between the NCAA and its member institutions to cap compensation to grant-in-aid, rather than the higher "cost of attendance," constituted a violation of Section 1 of the Sherman Act. The U.S. Court of Appeals for the Ninth Circuit agreed with the district court and affirmed its finding that the NCAA violated antitrust laws. The practical effect of *O'Bannon* has been that college athletes can now each receive up to $5,000 more every year as part of their scholarship package.[4]

Building on the success of *O'Bannon*, Judge Claudia Wilken of the Northern District of California ruled in *Alston v. NCAA* that the NCAA's scholarship rules are, in part, illegal. Specifically, Judge Wilken ruled that the NCAA cannot bar schools from offering players "compensation and benefits related to education" in excess of their scholarship money and cost-of-attendance payments. Highlighting the limitations of litigated solutions, this ruling still fails to provide any mandatory compensation for college athletes, nor does it address their academic well-being. The decision is also pending appeal by both parties before the Court of Appeals for the Ninth Circuit.[5]

III. CALIFORNIA'S PIONEERING LEGISLATION

Courtroom successes have triggered significant progress for college athletes, as the public discourse evolved from whether college athletes should be compensated for their NIL rights to how they should be compensated and, critically, how their rights as students should be protected. This discussion reached a tipping point in 2019 when California Governor Gavin Newsom made a guest appearance on Lebron James's HBO show *The Shop* and signed Senate Bill 206, the Fair Pay to Play Act ("FPTP"), into law.[6] The FPTP — the first of its kind and, undoubtedly, the first of many to come — has significant implications for the rights of college athletes.

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2 Chris Murphy, Madness, Inc. How Everyone is Getting Rich Off College Sports—Except the Players 3 (2019).

3 For example, the 2006 case *White v. NCAA*, sought financial aid up to the full cost of attendance, rather than the present structure of grant-in-aid. No. CV 06-999-RGK (MANx), 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006). The case settled for $218 million before trial. *Id.*

4 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

5 *In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

6 Josh Shrock, *Gavin Newsom Signs 'Fair Pay to Play' Act with Lebron James on 'The Shop*,' NBCSports (Sept. 30, 2019, 9:20 AM), https://www.nbcsports.com/bayarea/ncaa/gavin-newsom-signs-fair-pay-play-act-lebron-james-shop.

The FPTP, which does not become effective until 2023, prohibits universities and the NCAA from interfering with current or prospective college athletes' rights to receive compensation related to their NILs. It also allows college athletes to obtain professional representation related to their participation in intercollegiate athletics. While representing a significant step forward, the law fails to facilitate any means for negotiating such compensation, such as creating a means for athletes to collectively bargain. Nor does the law provide any protections for the health, safety, and academic success of college athletes. Nevertheless, the law has catalyzed immediate and significant reactions throughout the country at the institutional and legislative levels.[7]

IV. THE NCAA FIGHTS BACK

Throughout a decade of litigation and in light of pressing legislative reform, the NCAA has vigorously opposed any efforts to undo its self-serving interpretation of "amateurism," impeding the economic liberty of college athletes in its wake. When it became clear in mid-2019 that the signing of SB206 into law was imminent, the NCAA recognized that the cloak of amateurism would no longer be sufficient to continue denigrating the rights of college athletes. But not for lack of effort, as the NCAA and its allies spent over $750,000 in 2019 lobbying over any potential reforms.[8] As SB206 picked up speed within the California legislature, and support for the bill grew in the public consciousness, the NCAA emphasized its opposition through a public letter sent to Governor Newsom. In a traditional "sky is falling" alarm, the NCAA warned that, if passed, the bill "would erase the critical distinction between college and professional athletics" and that it "would remove [the] essential element[s] of fairness and equal treatment that [form] the bedrock of college sports." The letter ended by urging Governor Newsom to reconsider the "harmful" and "unconstitutional" bill.[9] However, as the Association has begun to (finally) accept that change is imminent, it has also changed its tune in an attempt to retain its influence on the probable outcomes.

Facing an uphill battle legislatively and in the court of public opinion, the NCAA sought to regain control by announcing the creation of the NCAA Board of Governors Federal and State Legislation Working Group to "examine the NCAA's position on name, image, and likeness benefits and potentially propose rules modifications tethered to education." While the formation of the Working Group seemed like a significant shift in its position on compensating college athletes, the NCAA made clear that it "will not consider any concepts that could be construed as payment for participation in college sports."[10]

Eventually, the NCAA announced that its top governing board voted unanimously to permit college athletes the opportunity to *benefit* from their NIL rights, and it "[directed] each of the NCAA's three divisions to immediately *consider* updates to relevant bylaws." Unfortunately, instead of providing insight into what any substantive changes might look like, the NCAA chose to emphasize what these changes will *not* look like, stating that "compensation for athletics performance or participation is impermissible" and that "the [Working] Group's work will *not* result in paying students as employees."[11] Regardless of what change may look like to the NCAA, member schools will not have the opportunity to vote on proposed changes until January 2021. Even as the NCAA begins to recognize that change is imminent, it undoubtedly seeks to use the Working Group (together with its cohort of lobbyists) to delay reform at the state level and regain control and influence over legislative outcomes at the federal level.[12]

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7 Cal. Educ. Code § 67457.

8 Ben Nuckols, *NCAA, 2 Conferences Spend $750,000 on Lobbying*, AP News (Feb. 10, 2020), https://apnews.com/c298c08fbaebfdcfa97943bd5c31fa21?utm_medium=AP_Top25&utm_campaign=SocialFlow&utm_source=Twitter&utm_source=Twitter&utm_campaign=SocialFlow&utm_medium=AP_Top25.

9 *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206.

10 Michelle B. Hosick, *NCAA Working Group to Examine Name, Image, and Likeness*, NCAA (May 14, 2019, 2:40 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness.

11 *Board of Governors Starts Process to Enhance Name, Image, and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

12 *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation Before the Subcomm. on Mfg., Trade, & Consumer Prot. of the S. Comm. on Commerce, Sci., & Transp.*, 116th Cong. (2020).

V. LEGISLATIVE INITIATIVES

The Fair Pay to Play Act precipitated legislative reform efforts at the state and at the national level. To date, over 30 college athlete compensation bills have been introduced across more than 16 different states, all of them introduced since the California bill was passed. While certain bills propose novel methods for compensating college athletes, such as allocating a portion of ticket sales to them, and others seek to speed up the timeline for implementing change, inspiration from California's FPTP Act is evident as many bills mirror the title and text of the California law. Fearing the detrimental effect on intercollegiate athletics that would be caused by a patchwork of 50 different sets of rules, many stakeholders, including the NCAA, have turned to the federal government. Indeed, the NCAA has recently argued that California's bill is unconstitutional given Ninth Circuit precedent recognizing "that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals."[13] Thus far, two bills have been introduced federally, House Bill 5528 (HR5528) and House Bill 1804 (HR1804). The U.S. Senate Committee on Commerce, Science, & Transportation also held a hearing titled *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation* in early February.

House Representative Donna Shalala introduced HR5528 which proposes the creation of a Congressional Advisory Commission on Intercollegiate Athletics ("CACIA") to "investigate the relationship between institutions of higher education and intercollegiate athletics." The CACIA's broad mission would include investigating current policies for fostering academic success of college athletes, the impact of intercollegiate athletics on academic success and academic integrity, and current policies related the use of college athletes' NIL rights.[14] House Representative Mark Walker's bipartisan bill, HR1804, challenges the *status quo* more directly. The proposed Student-Athlete Equity Act would amend Internal Revenue Code Section 501(j)(2) by modifying the definition of a tax-exempt amateur sports organization to exclude organizations—such as the NCAA—that substantially restrict a college athlete from using, or being reasonably compensated for the third-party use of, the athlete's NIL rights.[15] The implications of the bill are obvious as it would have significant financial impacts on the NCAA should it fail to endorse NIL compensation rights.

Additionally, on February 11, 2020, the Senate Committee on Commerce, Science, & Transportation held a hearing on college athlete NIL rights, receiving testimony from Dr. Mark Emmert, President of the NCAA, Ramogi Huma, Executive Director of the National College Players Association, and others. In addition to legislative fact-finding, the hearing represented general consensus on the need for imminent change but a lack of agreement on how change should occur and who should initiate such reforms. Unsurprisingly, the NCAA was criticized for its inaction despite the obvious attention legislators across the country are paying to this issue. Expressing the collective sentiment of his colleagues at the hearing, Senator Richard Blumenthal stated: "the system is deeply unfair and marred with inconsistencies" and that the "whole system has to be fundamentally reformed…"[16]

While the federal legislature's ultimate role in solving the NIL question remains unclear, its interest in the matter and sense of urgency are both apparent. Senator Chris Murphy has published a three-part series of reports titled *Madness, Inc.*, criticizing the current model of intercollegiate athletics and calling for significant change; Representative Anthony Gonzalez revealed in the Senate hearing that he has begun drafting NIL-focused federal legislation in the House; additionally, there are at least two bipartisan working groups pushing for more action on the subject. The remainder of this article is devoted to discussing what federal legislation should include to achieve a more equitable system of intercollegiate sports.

13 Defendant's Joint Supplemental Brief at 4, *In Re: Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 19-5562 (9th Cir. Feb. 19, 2020) (citing *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-2091 (2018)).

14 Congressional Advisory Commission on Intercollegiate Athletics Act, H.R. 5528, 116th Cong. (2019).

15 Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

16 *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation Before the Subcomm. on Mfg., Trade, & Consumer Prot. of the S. Comm. on Commerce, Sci., & Transp.*, 116th Cong. (2020).

VI. AN EQUITABLE FUTURE

Senator Richard Blumenthal's statements that extensive reform is necessary echo the general sentiment that federal legislation is necessary to address the multitude of failures present in the current system. Such legislation should aim to achieve three clear goals: (1) prevent labor disruption in college athletics and avoid strikes, lockouts, or lawsuits; (2) provide college athletes the right to bargain on issues related to their health, safety, and compensation, including but not limited to NIL rights; and (3) ensure college athletes have the same academic opportunities as all other students. The starting point for achieving these goals is reassessing the relationship between the four key stakeholders — the NCAA, universities, conferences, and college athletes — each with unique interests, rights, and responsibilities shaping their respective roles in the ecosystem of intercollegiate sports.

First, all NCAA rules, except those covering the rules of the game, the number of eligible scholarships, and general eligibility rules for team inclusion, should be abolished. The NCAA should have no responsibility for academics or athlete integration into academics, nor should it have rulemaking or enforcement authority regarding university or individual athlete participation infractions. Additionally, the NCAA should have no authority over economic licensing opportunities or rights of former, current, or prospective college athletes, nor should it be allowed to implement any rules prohibiting pay-to-play from junior high school and beyond.

Next, the inherent and fundamental mission of all universities as academic institutions should be revitalized, in the context of college athletes, by ensuring exclusive authority over academics, advancement, and graduation requirements of college athletes is reserved for universities. Additionally, universities should be responsible for providing academic integration of college athletes with full benefits and opportunities enjoyed by any other scholarship student. Universities should also have exclusive responsibility for setting academic qualifications, grades, courses, and scholarships, as well as protecting college athletes so that athletic schedules do not interfere with academic obligations and commitments. Finally, universities and conferences should share joint responsibility for setting college athlete transfer rules.

Aside from shared responsibility for determining transfer rules, conferences should have authority to set and enforce rules regarding violations of conduct by athletes and universities. Conferences should be required to protect the due process rights of college athletes and universities, including the right to representation by counsel, the right to receive notice, and the right to be heard. Finally, individual conferences should be responsible for establishing rules regarding athletic participation, health and safety, and licensing for athletes within their conference. To be clear, conferences should not continue to set these rules for athletes across conferences except where cross-conference multi-unit licensing rights are involved.

Logically, the world of intercollegiate sports would also change significantly for college athletes. Most importantly, college athletes must be granted the right to establish collective associations, either at the university or the conference level, with the authority to negotiate with universities, conferences, and the NCAA as appropriate. This association or associations must have the right to negotiate regarding benefits and compensation from universities and external sources, conditions in matters such as health and safety, and the demarcation between hours committed to athletic and academic activities. Additionally, college athletes should be granted the right to receive compensation for licensing their NIL rights at the individual or group level, whether locally, regionally, or nationally.

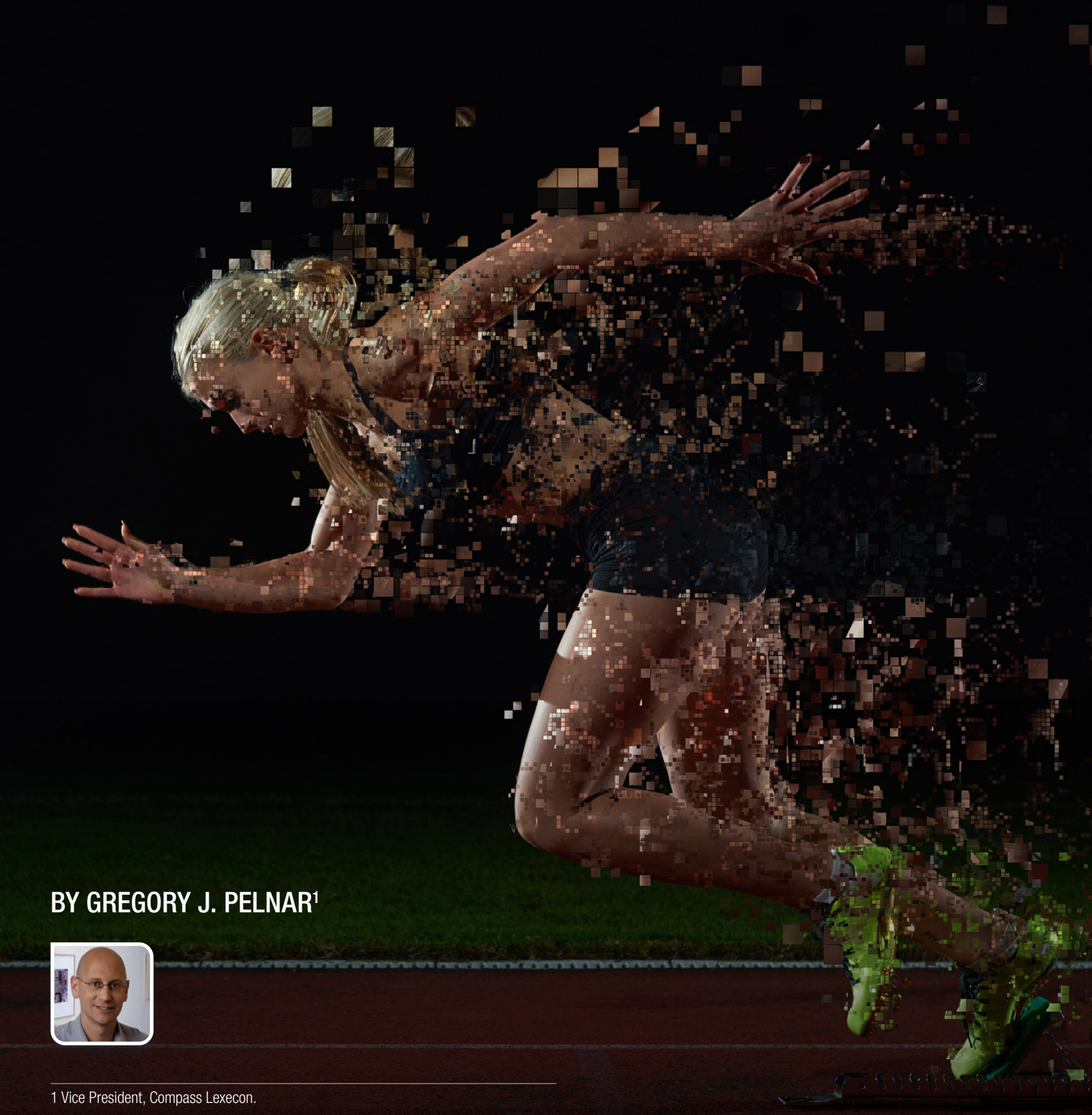
To enable this structure to work, federal legislation should include additional provisions: an arbitration model similar to that behind MLB's salary arbitration for resolving disputes between college athlete collective associations and the other stakeholders; prohibitions on college athlete lockouts by universities and college athlete strikes or holdouts; and, explicit agreement by all stakeholders that college athletes will *not* be considered employees.

The history of sports reform makes clear that bringing about significant change is a monumental task. From the judicial perspective and in the context of college athlete compensation, *White, O'Bannon, Alston* and others are evidence that any meaningful change is mostly incremental and protracted. From the legislative perspective and in a more general context, the legislative history and processes behind Title IX, the Equity in Athletics Disclosure Act, and the Amateur Sports Act exemplify the snaillike pace at which change is at times achieved. However, these same statutes make clear that change is inescapable. The college athlete compensation discussion has undoubtedly shifted from "should this happen?" to "what is the best way to make this happen?"; the NCAA has publicly accepted that their NIL policies needs to be "modernized"; state and federal legislative bodies are drafting, proposing, and even passing bills on the issue and the broader shortcoming of college sports. So, the question remains, what is next?

The three entities that have the greatest potential to create change are the NCAA, individual states, and Congress. The NCAA would logically prefer to drive the change, rather than have it imposed on them, however, it faces significant pressure from state legislatures that are not slowing the introduction of targeted reform bills, and from Congress, which has expressed dissatisfaction over the NCAA's timeline for and resistance to necessary restructuring.[17] State legislators have made clear that they will not be deterred in their pursuit of such reform. Finally, Congress seems ready to act in the face of the need for a nationally unified approach to having a comprehensive, sensible, and workable framework for all athletes, all universities, and all conferences throughout the nation. What will change and who will bring about this change remains unclear. What is crystal clear, however, is that real change is coming.

17 See Joseph N. Crowley, *The NCAA's First Century in the Arena*, 31-32 (2006).

THE ANTITRUST PERILS OF SPORTS DATA FOR U.S. SPORTS LEAGUES



BY GREGORY J. PELNAR[1]

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I. INTRODUCTION

The collection and monetization of sports data raises important antitrust issues for U.S. sports leagues.[2] One concerns the centralization of data ownership at the league, rather than the club, level in possible violation of Section 1 of the Sherman Act. Another concerns the possible leveraging of a league's monopoly over the market for its games to the market for data related to those games in possible violation of Section 2 of the Sherman Act.

In the next section, I provide some background on the sports data industry, such as the types of data collected, who collects it, and how the data are used. I then discuss data-related theories of competitive harm as applied to U.S. sports leagues.

II. THE SUPPLY AND DEMAND FOR SPORTS DATA

The term "sports data" generally refers to all facts and information pertaining to a sports event or sporting competition.[3] Suppliers of such data include sports leagues, individual clubs, and third parties. Some data can be replicated by third parties; others cannot. Users of sports data include clubs, the media, sports gambling operators, sports video game makers, and sponsors. Some data are bought and sold; some are not.

A. Supply

Some sports data are created by the leagues themselves, such as season schedules, or via league investments, such as wearable technology. Some are created by individual clubs, such as scouting reports, and are treated as trade secrets.[4] Still other data are assembled by third parties, such as STATS. A key legal determinant of whether a third-party can legally assemble data that competes with the league's data is whether the third-party is using the league's data collection technology to assemble the data. In *Morris Communication v. PGA Tour*, the court concluded that Morris wanted access to the product of the Professional Golfers' Association ("PGA's") proprietary technology without compensating the PGA so it could sell it for a fee to others, which would be a classic example of "free-riding," and thus ruled that there was a legitimate procompetitive reason for the PGA's restriction.[5] Similar reasoning was used by the court in *NBA v. Motorola* which concluded that a Motorola handheld pager for displaying updated information about professional basketball games in progress did not constitute a misappropriation of "hot news" that is the NBA's property. However, the court suggested that if Motorola had been free riding off the NBA's data collection technology to offer its service, the court's ruling would be different.[6]

The types of sports data can be divided into several categories: fixtures, event data, performance data, and refined data.[7] Fixtures are the vital, yet mundane, decisions of leagues regarding such things as season schedules (e.g. when the season will start and end, how many games will constitute a season, who will play who when and where). Such data are easily replicated by third parties. Event and performance data include the vast array of data collected during the conduct of a sporting event and includes both external circumstances about the event (e.g. weather, attendance) and data regarding game performance (e.g. points scored). Much of these data can also be replicated by third parties by, for example, using trained observers to collect the information. However, not all performance data can be replicated, such as data collected from devices worn by players during the game. For example, the NFL embeds radio transmitters in players' shoulder pads, thereby yielding data that can be used to calculate how fast a specific player runs over certain distances and which areas of the field they favor.[8] The NFL owns the "next generation" data that are captured via the equipment of Zebra Technologies, and Sportradar, the NFL's exclusive data distributor (in which the

2 See Marc Edelman, *Sports Data Policies Could Represent Next Big Antitrust Challenge for Pro Sports Leagues*, FORBES (June 10, 2019), https://www.forbes.com/sites/marcedelman/2019/06/10/sports-data-policies-could-provide-next-big-antitrust-challenge-for-pro-sports-leagues/#6b1fa24b3284; John Holden, *Integrity Fee Issues for NBA and MLB Run Deeper than They Appear*, LEGAL SPORTS REPORT (May 10, 2019), https://www.legalsportsreport.com/32378/holden-nba-mlb-integrity-fee/; Ryan M. Rodenberg, *Antitrust Standing after Apple v. Pepper: Application to the Sports Betting Data Market*, 64 ANTITRUST BULLETIN 584-93 (2019); and Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTSHANDLE (June 4, 2019), https://sportshandle.com/sports-betting-data-antitrust/.

3 Christian Frodl, *Commercialisation of Sports Data: Rights of Event Owners over Information and Statistics Generated about Their Sports Events*, 26 MARQUETTE SPORTS LAW REVIEW 55 (2015), at 56.

4 Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH. & LEE L. REV. 1567 (2017).

5 *Morris Communication Corp. v. PGA Tour*, 364 F.3d 1288 (11th Cir. 2004).

6 *NBA v. Motorola*, 105 F.3d 841 (2nd Cir. 1997).

7 Frodl, *supra* note 3, at 57-59. For a different categorization of sports data, see Rodenberg, *supra* note 2, at 588-89.

8 Daniel Kaplan & Eric Fisher, *NFL Buys Stake in Stats Firm: Europe's Sportradar Will Replace Stats LLC*, STREET & SMITH'S SPORTS BUSINESS JOURNAL (April 20, 2015), https://www.sportsbusinessdaily.com/Journal/Issues/2015/04/20/Leagues-and-Governing-Bodies/NFL-sportradar.aspx.

NFL has an equity stake of undisclosed size), sells the data, which can be used for such things as creating a heat map showing movements of an individual player. Other leagues have player-tracking systems as well.[9]

Clubs also collect performance and biometric data on their players. For example, MLB clubs use wearables like Readiband (which, e.g. can track how much sleep a player gets), pressure plates to track players' explosiveness and strength, and pitch-recognition software to improve hitters' ability to quickly identify balls as they leave an opposing pitcher's hand.[10] The line between a player's privacy and a club's need for at least some performance and biometric information about that player is blurred. Kristy Gale defines athlete biometric data ("ABD") as "[a] measurable and distinguishable physical characteristic or personal behavioral trait used to recognize one's identity, including but not limited to name, nicknames, likeness, signatures, pictures, activities, voice, statistics, playing and performance records, achievements, indicia, data, and other information identifying a particular athlete" and argues that ABD is usefully characterized as intangible property belonging to those who contribute the ABD.[11] However, in *CBS Interactive v. NFL Players Association*, the court ruled that the operator of a fantasy football website that used professional football players' names and statistics did not violate any right of privacy.[12]

Another way to categorize sports data is raw versus refined.[13] Raw data refers to the single event or performance data collected. Refined data uses raw data as an input to produce aggregated information in the form of statistics. Ownership of sports data has been the subject of litigation, with leagues asserting that certain data are their intellectual property ("IP") and therefore subject to federal (e.g. copyright) and state IP protections. One area where this issue has arisen is sports gambling. Some leagues have argued that they have an intellectual property right to sport gambling proceeds and lobbied states legalizing sports gambling to mandate payment of an "integrity fee" equal to 0.25 percent of the wagered amount by the bookmaker to the league. Marc Edelman argues that state-sponsored sports gambling does not infringe the leagues' federal and state law intellectual property rights.[14]

B. Demand

Demand for sports data comes from clubs, the media, the video gaming and trading card industries, fantasy leagues, sponsors, and the gambling industry, among other users.[15] Clubs use sports data to analyze athlete and team performance. The print media uses line-ups, scores, and league tables, while the broadcast media uses all those plus real-time graphics. Makers of video games, such as FIFA 14 and Madden NFL 20, both produced by EA Sports, incorporate sports data into their software. Trading cards include player statistics. Fantasy leagues use sports data to assign points to participants based on actual player performances in games. League sponsorship agreements provide sponsors such as IBM with access to sports data. The sports betting industry relies on fixture lists as well as event and performance data to create bets. Companies like Sportradar specialize in the collection and distribution of live sports betting data and sell it to online betting companies such as Bwin and Betfair.

The demand for sports data has been recently spurred by the U.S. Supreme Court's decision in *Murphy v. National Collegiate Athletic Association* ("NCAA") that held that the Professional and Amateur Sports Protection Act ("PASPA") violated the tenth amendment of the U.S. Constitution, thereby preventing the federal government from using PASPA to block states from legalizing commercial sports gambling.[16] At least 12 states have legalized such gambling, with three – Tennessee, Illinois, and Michigan – going so far as to mandate that bookmakers buy and use official league data to determine certain wagers.[17] The NBA and MLB had lobbied for such a requirement, arguing that only if bookmakers

9 See, e.g. Ira Boudway, *The NBA Will Now Track Every Player's Movements*, BLOOMBERG (Sept. 6, 2013), https://www.bloomberg.com/news/articles/2013-09-06/the-nba-will-now-track-every-players-movements.

10 Rian Watt, *New Technologies Are Forcing Baseball to Balance Big Data with 'Big Brother'*, VICE (May 27, 2016), https://www.vice.com/en_us/article/8qygbp/new-technologies-are-forcing-baseball-to-balance-big-data-with-big-brother.

11 Kristy Gale, *The Sports Industry's New Power Play: Athlete Biometric Data Domination. Who Owns It and What May Be Done with It?*, 6 ARIZ. ST. SPORTS & ENT. L. J. 7 (2016), at 11.

12 *CBS Interactive v. NFLPA*, 259 F.R.D. 398 (2009).

13 Frodl, *supra* note 3, at 59.

14 Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 15 NEW YORK UNIVERSITY JOURNAL OF LAW & BUSINESS 1 (2018).

15 Frodl, *supra* note 3, at 63-65.

16 *Murphy v. NCAA*, 138 S.Ct. 1461 (2018).

17 Keven Draper, *Sports Betting Has Arrived to Transform the N.F.L. Or Not.*, NEW YORK TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/sports/football/sports-betting-nfl.html; Matt Rybaltowski, *Implications of Landmark Sportradar Lawsuit Unclear on US Sports Betting Market*, SPORTSHANDLE (March 4, 2020), https://sportshandle.com/sportradar-2020-landmark-suit/.

use official data can leagues ensure the integrity of sports betting and maintain consumer confidence in the game, but most states chose not to mandate the use of official league data.[18] An attempt by Senators Hatch and Schumer to pass a federal law (the Sports Wagering Market Integrity Act of 2018) mandating the use of official league data for sports betting purposes failed.

According to a joint report by the Nielsen Company and the American Gaming Association, the direct and indirect impact of legal sports betting on the four major U.S. leagues will be more than $4.2 billion per year in additional revenue.[19] Most of the revenue increase ($3.28 billion) is projected to come from an indirect impact on media rights, sponsorships, merchandise, and ticket sales. The second largest contributor to the revenue increase is direct TV advertising from gaming services ($596 million), followed by direct sponsorship revenue from gaming services ($267 million). The additional revenue from the sale of data and video is projected to be only $89 million. The NFL is projected to experience the largest revenue increase (in absolute terms): $2.3 billion, of which only $30 million will come from league data and product revenue for third-party gambling services. The corresponding figures for the three other leagues are: MLB ($1.1 billion, $28 million), NBA ($585 million, $25 million), and NHL ($216 million, $6 million). Thus, for the four major U.S. sports leagues, direct revenue from the sale of sports data is projected to account for less than 5 percent of the revenue generated by legal sports betting. An important implication is that, to the extent that official league data are a necessary input to the production of legal sports betting, the leagues have a strong incentive to sell the data since the indirect revenue generated by the sale is projected to far exceed the direct revenue from the sale of data itself.

III. DATA-RELATED THEORIES OF COMPETITIVE HARM AS APPLIED TO SPORTS LEAGUES

Given their approach to sports data, some sports leagues may find themselves accused of violating either Section 1 or 2 of the Sherman Act. Potential plaintiffs include sports data distributors and sports betting operators.

A. Potential Violations of Section 1 of the Sherman Act

Sports leagues that have collectivized the ownership and sale of sports data at the league level, such as the NBA and MLB, may be accused of a conspiracy in the restraint of trade of sports data in violation of Section 1 of the Sherman Act. The plaintiff may be a third-party such as STATS which finds that it must compete with a league's exclusive distributor of sports data. Alternatively, the plaintiff may be one of the league's clubs seeking to sell its sports data so as to avoid having to share the revenue with the league's other clubs. It is even possible that the plaintiffs could be both a large-market team and the third-party to which it wants to sell its sports data.

In some respects, the former scenario is similar to that of the *American Needle* case. In December 2000, the NFL decided to offer an exclusive license for NFL team trademarks to use on headwear and apparel, rather than granting multiple licenses as it had done previously. Reebok was chosen for the exclusive license and American Needle, which previously had a license, sued the NFL alleging that the exclusive license constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The case ultimately went to the U.S. Supreme Court, which in 2010 ruled that "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1" and "[t]he legality of that concerted action must be judged under the Rule of Reason."[20] Now substitute "sports data" for "trademarks," "Sportradar" for "Reebok," and "STATS" for "American Needle," and one has a hint of the arguments and issues that would arise in such an antitrust action.

But does the Supreme Court's *American Needle* decision mean that the outcome of such an antitrust challenge is clear? STATS wins, the NFL loses? Not necessarily. A rule of reason analysis must be conducted. Possible anticompetitive effects of the collective sale of sports data must be investigated, as well as the potential procompetitive effects.

In a Section 1 case brought against Major League Baseball, the outcome may be simplified (or made more complex) by MLB's antitrust exemption with respect to the "business of baseball." If sports data fall within the scope of the business of baseball, MLB's antitrust exemption applies and MLB prevails. However, the Curt Flood Act passed by Congress in 1998 removed employment-related agreements from the exemption and in 2014 a court ruled that MLB's antitrust exemption does not extend to territorial broadcast restrictions (e.g. blackouts).[21] Thus, MLB cannot be sure that courts will not find sports data to be outside its antitrust exemption as well.

18 Matt Rybaltowski, *Shakedown Fees: NBA, MLB Demanding Nevada Sportsbooks Pay More or Get Cut Off*, SPORTSHANDLE (May 2, 2019), https://sportshandle.com/nba-mlb-demands-data-fee-nv-sportsbooks/.

19 Nielsen Company & American Gaming Association, *How Much Do Leagues Stand to Gain from Legal Sports Betting?*, https://www.americangaming.org/wp-content/uploads/2018/10/Nielsen-Research-All-4-Leagues-FINAL.pdf.

20 *American Needle v. NFL*, 560 U.S. 183, 186 (2010).

21 *Laumann v. NHL*, 56 F.Supp.3d 280 (S.D.N.Y. 2014).

As for a Section 1 challenge brought by a club, there is certainly some precedence. For example, in 1997, the New York Yankees accused the MLB and its member clubs of engaging in a concerted action "to combine and conspire together to restrain competition in the business and licensing of Club trademarks and of retail and wholesale baseball merchandise sales, and to misappropriate rights and revenues belonging to the Yankees and adidas."[22] In 1990, the Chicago Bulls challenged the NBA's restrictions on the number of games that could be broadcast on superstations such as WGN, characterizing the NBA as a cartel whose television restriction limited the output of broadcast games in violation of Section 1 of the Sherman Act.[23]

A Section 1 challenge by the U.S. Department of Justice is another (albeit seemingly remote) possibility. However, there is a precedent. In 1953, the DOJ challenged the NFL's restrictions on telecasts in clubs' home territories. In 1961, Congress passed the Sports Broadcasting Act exempting agreements concerning the sponsored telecasting of NFL, NBA, NHL, and MLB games from the antitrust laws. Congress could similarly pass a "Sports Data Act" antitrust exemption covering agreements concerning official league data of the four sports leagues.

There are other possible Section 1 theories of harm related to sports data. For example, one might put Sportradar at the center of a hub-and-spoke conspiracy. The company has about 90 percent of the U.S. sportsbook operator market, is partially owned by the NFL and three NBA owners (Michael Jordan, Mark Cuban, Ted Leonsis), and according to its own website has exclusive distribution rights agreements with the NFL, NHL, MLB, and Nascar, and has a non-exclusive betting data distribution rights agreement with the NBA.[24] Whether such a theory even makes economic sense may depend, in part, on the extent to which data from different leagues are substitutes. That is an empirical question.

One could argue that if a sports league sells data to a distributor, which in turn sells it to a sports betting operator, the latter is an "indirect purchaser" and thus denied antitrust standing by *Illinois Brick*.[25] However, the sports betting operator may be considered a direct purchaser under *Apple v. Pepper*.[26]

B. Potential Violations of Section 2 of the Sherman Act

A Section 2 challenge to a league's approach to sports data would likely allege that the league is leveraging its monopoly over league games to create a monopoly over league-related data. The exact mechanisms by which the league is alleged to do so may vary. For example, the league may be accused of preventing third-parties from collecting data, degrading the usefulness of the third-party's data by requiring use of official league data, or denying access to an "essential facility" (e.g. next-generation sports data) for offering in-game betting. Some data practices of sports leagues may be covered by the state action immunity doctrine, such as the NBA's and MLB's successful lobbying that resulted in Tennessee, Illinois, and Michigan including a requirement for the use of official league data in their sports betting laws.[27]

The plaintiff may be a third-party attempting to collect and sell sports data in competition with a league. One potential plaintiff is STATS, which was the NFL's partner for collecting and disseminating sports statistics to major media outlets prior to the 2015 season but irked the NFL by licensing NFL statistics in 2010 to New York Life Insurance to build the "New York Life Protection Index" measuring offensive line play around the league even though the insurer was not an NFL official league partner.[28] In Europe, Sportradar has recently legally challenged as anticompetitive a five-year deal between Genius Sports and Football DataCo ("FDC"), the data rights holder for the English Premier League, English Football League, and Scottish Football League, that gave Genius Sports exclusive rights to collect, license, and distribute live data from those three leagues to sportsbook operators.[29]

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22 *New York Yankees Partnership and Adidas America v. MLB Enterprises*, complaint filed in Florida federal court (May 6, 1997), at par. 5.

23 *Chicago Professional Sports Limited Partnership & WGN Continental Broadcasting Company v. NBA*, 961 F.2d 667 (7th Cir. 1992).

24 Rybaltowski, *supra* note 18; Eben Novy-Williams, *NFL Takes First Major Gambling Step with Sportradar Data Deal*, BLOOMBERG (Aug. 12, 2019), https://www.bloomberg.com/news/articles/2019-08-12/nfl-takes-first-major-gambling-step-with-sportradar-data-deal; NBA, *NBA Announces First Betting-Data Partnerships in U.S. with Sportradar, Genius Sports* (Nov. 28, 2018), https://www.nba.com/article/2018/11/28/nba-sportradar-genius-sports-partnership-official-release; and the Sportradar website, https://www.sportradar.com/about-us/our-partners/.

25 *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

26 *Apple v. Pepper*, 139 S.Ct. 1514 (2019). See Rodenberg, *supra* note 2.

27 See, e.g. Rodenberg, *supra* note 2, at 592, and Smiley, *supra* note 2.

28 Danny Ecker, *Stats Loses NFL Deal to Sportradar*, CRAIN'S CHICAGO BUSINESS (April 20, 2015), https://www.chicagobusiness.com/article/20150420/BLOGS04/150429968/stats-loses-nfl-deal-to-sportradar.

29 See Rybaltowski, *supra* note 17.

A rule of reason analysis of a Section 2 claim would entail definition of the relevant product and geographic markets, as well as economic rationales (e.g. efficiencies) for the challenged practices. Product market definition would require an inquiry into the extent to which substitutes exist for the official league data. In the case of next-generation data, there may be no good substitutes. In the case of official and unofficial data for in-game betting, opinions differ, with some reports that unofficial data tend to have a latency of several seconds relative to official data, making the latter much preferable, but with others disputing that data from third-party sources are inferior to official league data.[30] Ultimately, the relevant product market will depend on the empirical evidence. To what extent do bookmakers buy only the official league data feed? To what extent do they rely only on unofficial data? A natural experiment may help answer such questions. Tennessee, Illinois, and Michigan mandate the use of official league data for betting purposes, other states do not. How, if at all, does the usage of official and unofficial data differ across bookmakers in different states? As sports betting grows in popularity, the data needed to answer such questions will become available.

The relevant geographic market may arguably be an individual state, the entire U.S., or the world, depending on the Section 2 allegations. For example, in the case of sports betting, different states have different regulations. On the other hand, betting on games of U.S. sports leagues occurs around the world and those bookmakers need sports data, either official or unofficial.

Efficiency rationales for the challenged practices would likely be an important part of a rule of reason analysis. As noted above, the prevention of free-riding in the collection of sports data has been recognized by courts as a sound economic reason for restricting data collection by third-parties. Also, there could be a negative externality on consumers (e.g. fans) if betting-related events raise questions about the legitimacy of game outcomes. There may be transaction cost savings from bundling next-generation data, over which the league has a monopoly, with other types of league data that compete with data collected by third-parties. Once again, efficiency rationales may differ depending on the specific allegations.

IV. CONCLUSION

Data-related theories of competitive harm are being widely discussed as they apply to digital platforms such as Google and Facebook, and some other industries, including agriculture.[31] Much less attention has been paid to possible competitive harm related to sports data, but that has begun to change as states legalize sports betting and some make the use of official sports data a legal requirement. A data-related antitrust challenge to a sports league sometime in the next few years should not come as a surprise.

30 See, e.g. Rybaltowski, *supra* note 18.

31 See, e.g. Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* (2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en; and Thomas J. Horton & Dylan Kirchmeier, *John Deere's Attempted Monopolization of Equipment Repair, and the Digital Agricultural Data Market – Who Will Stand Up for American Farmers?*, CPI ANTITRUST CHRONICLE, volume 1(1), 21-27 (January 2020).

GAME-CHANGER: WHY THE *SARACENS* DECISION WILL TRANSFORM THE GOVERNANCE OF SPORT

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I. INTRODUCTION

Sport is known for its game-changing moments, a point when the entire flow of a game shifts in a new decisive direction. However, there are also moments in law when a decision is delivered that changes the legal landscape. The judgment of the European Court of Justice concerning Jean-Marc Bosman's challenge to the football transfer system was one such case. A game-changer: the principles of EU freedom of movement became enshrined into the governance of football and sport. In November 2019, a panel led by the former UK Supreme Court judge Lord Dyson delivered its decision in the *Saracens* case that may likewise come to be seen as a game-changer in the regulation of sport. The Panel not only rejected a claim that the salary cap operated by the Premiership rugby league infringed EU and UK competition law but also recognized it as being beneficial to the sport. This article analyzes the *Saracens* decision,[2] explaining how it has busted a number of myths relating to salary caps in a way that could transform the governance of sport.

II. BACKGROUND TO THE *SARACENS* CASE

Saracens is a rugby club with an illustrious history. It competes in the most important rugby club competition in England, run by Premiership Rugby Limited ("PRL"), and has won numerous domestic as well as European titles. In 1999, the PRL adopted a salary cap following a series of high-profile club collapses arising from wage inflation in the early years of the professional rugby era. The objectives of the salary cap are: "(i) ensuring the financial viability of all Clubs and of the [...] Premiership competition; (ii) controlling inflationary pressures on Clubs' costs; (iii) providing a level playing field for Clubs; (iv) ensuring a competitive [...] Premiership competition; and (v) enabling Clubs to compete in European Competitions."[3]

The Premiership Rugby Salary Regulations (the "Salary Regulations") limited the total salaries each club is permitted to pay in each salary cap year (referred to as the "Senior Ceiling").[4] In the 2016/17 salary cap year, the Senior Ceiling was set at GBP £6 million.[5] According to the charge sheet brought by PRL, Saracens had undeclared salary of GBP £1.4 million and exceeded the Senior Ceiling by GBP £1.1 million. In the 2018/19 salary cap year, PRL alleged Saracens exceeded the Senior Ceiling of GBP £6.4 million by GBP £0.9 million.[6] The case centered around the question whether property co-investments made by connected parties of Saracens with a number of players constituted salary for the purpose of the Salary Regulations.

In accordance with the relevant procedural rules, an independent disciplinary panel (the "Panel") was appointed to consider the charges brought by PRL against Saracens. In addition to Lord Dyson, the Panel consisted of two senior lawyers with considerable competition and sports law experience. Before examining the merits of the charges, the Panel first addressed the claim by Saracens that the salary cap regime infringed EU and UK competition law as otherwise PRL's charges could not be validly maintained.[7] It is this competition analysis which forms the focus of the present article.

III. NO "BY OBJECT" INFRINGEMENT

The competition challenge to the salary cap was based principally upon Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which states that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[8]

2 *Saracens Limited v. Premier Rugby Limited*, Decision of the Disciplinary Panel, November 4, 2019 (the "*Saracens* decision").

3 Salary Regulations 2.2. See also https://www.premiershiprugby.com/about-premiership-rugby/about-us/salary-cap/.

4 Each Salary Cap Year runs from July 1 in one year until June 30 in the following year. There are a number of exceptions to the salary cap, in particular for two marquee players whose salaries are excluded from the cap.

5 Salary Regulations 3(1)(a) in the Salary Cap Year 2016/17.

6 *Saracens* decision, Appendix 1 – The Charge.

7 The Panel considered that there was no substantive difference between EU and UK competition law for the purpose of the case.

8 Although arguments were also raised under Article 102 TFEU, these did not differ substantively. See *Saracens* decision, paragraph 110.

Saracens concentrated their attack on the salary cap being a "by object" infringement of EU competition law. Experience shows that certain collusive behavior, such as price-fixing by cartels, are so likely to have negative effects upon competition – in particular on the price, quantity or quality of goods and services – that it is not necessary to conduct an analysis of the actual effects upon the market. In general, any decision by an association of undertakings which infringes competition "by object" will not satisfy the conditions to qualify for an exemption pursuant to Article 101(3) TFEU as a hardcore restriction of competition and will be "*automatically void*" in accordance with Article 101(2) TFEU.[9]

Saracens sought to have the salary cap declared void by arguing that it is by nature harmful to the proper functioning of normal competition between clubs for the services of players. To support its claim, Saracens quoted an authoritative sports law text book on the subject of salary caps and competition law: "Obviously salary caps restrict the ability of clubs to compete with each other for the services of players, and would therefore appear to be anti-competitive."[10]

Rather than accepting the assertion that a salary cap infringes competition "by object," the Panel went back to basics by examining what constitutes a "by object" infringement citing in particular the legal test set out in *Cartes Bancaires*, where the European Court of Justice held that "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part."[11] In addition, the Panel noted that regard may also be had to the intention of the parties. It applied this test to the PRL's salary cap.

By contrast to the experience of dealing with price fixing cartels and other classic "by object" infringements, the Panel stated that there has been "no judgment of a court or decision of an EU competition authority in which a regulation akin to a salary cap was held to be an object infringement."[12] Moreover, the Panel observed that a similar "by object" competition law claim against financial fair play ("FFP") rules in *Queens Park Rangers v. English Football League*[13] was likewise rejected: "the decision [...], while concerning rules on FFP (limiting the amount of investment owners may make in clubs) rather than a salary cap, strongly indicates that rules of this nature aimed at promoting financial stability are not of such a nature as to reveal a sufficient degree of harm to competition absent an examination of their effects."[14]

In the Panel's view, none of the objectives of the Salary Regulations implementing the salary cap "can reasonably be described as having the purpose of restricting competition." To the contrary, the Panel found that the objectives were "*consistent with EU law*": the objective of protecting financial stability had been recognized in the *QPR* case while the objective of competitive balance had been endorsed by the European Court of Justice in the *Bosman* judgment[15] as well as by the European Commission.[16]

Interestingly, Saracens argued that the salary cap would only be permissible as a "by object" infringement if adopted pursuant to a collective bargaining agreement (i.e. an agreement between representatives of trade unions and players). This is indeed considered to be the traditional route to ensuring the legality of salary caps. It is a particular feature of U.S. sports – and is the oft-cited reason as to why salary caps are legal as a matter of U.S. antitrust law.[17] Although the Panel accepted that a collective bargaining agreement would fall outside the scope of EU competition law, it dismissed the notion that a collective bargaining agreement is the only way to ensure the legality of a salary cap: "However, it does not follow that other types of agreements concerning wages and salaries are therefore to be categorised as restrictive by object, and, as

9 See European Commission, Guidelines on the application of Article 81(3) [now Article 101(3) TFEU] (2004) OJ C 101, at paragraph 46: "*[S]evere restrictions of competition are unlikely to fulfil the conditions of Article [101(3) TFEU]. Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article [101(3) TFEU]. They neither create objective economic benefits nor do they benefit consumers. [...] these types of agreements generally also fail the indispensability test under the third condition.*"

10 Lewis & Taylor, *Sports Law & Practice*, § F.2.206 - § 2.212.

11 Case C-67/13 P, *Cartes Bancaires*, EU:C:2014:2204 at paragraphs 53 and 54. *Saracens* decision, paragraph 23.

12 *Saracens* decision, paragraph 32.

13 *Queens Park Rangers v. English Football League* [2017] ("QPR"). The Football Disciplinary Commission in that case was led by a former UK Supreme Court judge Lord Collins of Mapesbury and senior competition lawyers Mr James Flynn QC and Mr Thomas de la Mare QC.

14 *Saracens* decision, paragraph 33.

15 Case C-415/93 *Bosman* EU:C:1995:463. The Panel cited paragraph 106 of the judgment where the European Court of Justice stated: "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."

16 *Saracens* decision, paragraphs 34–37.

17 The leading professional sports league case in the evolution of the non-statutory labour exemption was *Mackay v. NFL*, 543 F.2d 606 (8th Cir. 1976) where the U.S. Court of Appeals (Eighth Circuit) held that a collective bargaining agreement is exempted from antitrust attack provided three conditions are met: (1) the terms of the agreement primarily impacted only the parties to the collective bargaining relationship; (2) the terms were mandatory subjects of bargaining; and (3) the agreement was the result of good-faith, arm's-length negotiations.

with the previous point, no authority to that effect was cited to us. What authority there is indicates that agreements impacting on wages and salaries are not restrictive by object."[18]

The Panel rejected the view that other less restrictive alternatives may be available or even that a test of strict necessity ought to be applied in terms of assessing the proportionality of the salary cap. Citing the rulings of the European Court of Justice relating to the regulation of professions and sport in particular[19], the Panel found that "organisers of sports competitions have a margin of appreciation to identify appropriate measures to achieve legitimate objectives."[20]

The Panel examined the intention behind the salary cap, finding nothing in the history of the salary cap to suggest an intention to restrict competition. In evidence, Saracens' owner and CEO had even accepted the necessity of a salary cap.[21] "That candid acceptance of the desirability of a salary cap in some form," the Panel stated, "puts the final nail in the coffin of Saracens' case on object."[22]

The Panel concluded that there was no "by object" infringement.

IV. NO "BY EFFECT" INFRINGEMENT

In assessing the effect of the salary cap upon competition, the Panel stressed that market definition is "an essential element in determining actual or potential anti-competitive effects."[23] The Panel found that Saracens had failed to conduct such a market assessment of its proposed market for the services of English qualified elite players which is geographically limited to England and wider worldwide market for the services of non-English-qualified elite players. It was particularly critical of the "*unsatisfactory*" economic evidence provided by Saracens which failed to define the market or analyze the impact of the salary cap upon the specific situation of rugby.[24]

Having reviewed the economic evidence presented by the PRL, the Panel found that "there is simply no evidence ... as to any adverse impact caused by the salary cap on the ability of elite rugby clubs to recruit players on the global market." To the contrary, the large number of non-English players in the PRL indicated that the salary cap was not a constraint on recruitment.[25] As for the claim that the salary cap hindered the ability of English clubs to compete in European club competitions, this was found to be "at odds with Saracens' tremendous success on the pitch in recent years, being a European Champions Cup semi-finalist every year but one since 2012/13 and winning three of the last four European Champions Cup finals."[26]

The Panel also observed that it is necessary to conduct "*a realistic counterfactual*" in the assessment of the effect upon competition.[27] In particular, the effect of the salary cap has to be compared with that which would have prevailed had it not been entered into, an exercise requiring an assessment of the competitive landscape that would exist in its absence. The Panel considered that it was not realistic that no form of financial regulation would have been in place or that clubs would compete on an unfettered basis for players' services, as Saracens contended. The alternative of no regulation, as proposed by Saracens, was not realistic because it "has led to financial ruin for some clubs in the past and is too big a risk for the PRL and clubs, including Saracens, to accept."[28] Moreover, as the Players Association representative testified, "it is not a risk that the players ... wish to run either because players are left financially high and dry when a club folds."[29]

18 *Saracens* decision, paragraph 40.

19 Notably Case C-309/99 *Wouters* EU:C:2002:98 and Case C-519/04 *Meca Medina* EU:C:2006:492.

20 *Saracens* decision, paragraphs 44 and 45.

21 Mr Wray, Saracens' owner, stated that "I think there's a lot of things going wrong with the current salary cap, but I think you asked me if I think there should be a salary cap, and the answer is yes." The Panel expressed their surprise at these statements which in their view revealed "such a disconnect between the case on object advanced by Saracens' legal team before the Panel and this evidence, as it emerged in cross-examination, from both Saracens' owner and its CEO." See *Saracens* decision, paragraph 50.

22 *Saracens* decision, paragraph 50.

23 *Saracens* decision, paragraph 59.

24 *Saracens* decision, notably paragraphs 64, 67 and 80.

25 *Saracens* decision, paragraph 85.

26 *Saracens* decision, paragraph 86.

27 *Saracens* decision, paragraphs 55 and 89.

28 *Saracens* decision, paragraphs 102–104.

29 *Saracens* decision, paragraph 99.

Having reviewed the genesis of the salary cap, the history of financial problems as well as Saracens' own support for the cap at the time, the Panel concluded that "the counterfactual to the present salary cap would in all likelihood be some other form of financial self-discipline imposed by clubs on themselves through the PRL."[30] This financial regulation, whether it was a form of financial fair play or other measure, would have sought to achieve the same objectives as the salary cap. Moreover, the pressures on clubs had "*not obviously diminished*"[31] since the introduction of the salary cap. It is against such a realistic counterfactual that any effects analysis of the impact of the salary cap should have been conducted.

V. BENEFITS OF A SALARY CAP

Having dismissed the arguments against the salary cap, the Panel ruled that the salary cap was, in fact, beneficial to competition: (i) the clubs and the Premiership have remained financially viable with none folding despite generally being loss-making; (ii) the salary cap and salary costs are under constant review; (iii) the Premiership competition benefits from competitive balance (a variety of clubs are successful, not just the one with the biggest financial backer), which leads to a competition which is more attractive to spectators and television audiences; (iv) clubs benefit from a level playing field so far as fixed salary cap is concerned; and (v) clubs have competed successfully in European club competitions.[32]

Accordingly, the Panel dismissed the competition challenge to the charges brought by PRL. It went on to uphold the charges brought against Saracens, finding that the PRL had a margin of discretion to find that the co-investments constituted undeclared salaries. The Panel upheld the financial penalties and imposed points deductions upon Saracens in view of its "*flagrant and reckless failure to comply*" with the salary cap.[33] As has been widely reported, Saracens subsequently entered into a voluntary agreement to accept an additional 70 points deduction following its failure to adhere to the disclosure of its accounts for the current salary cap year, resulting in its relegation for the next season (2020/21).[34]

VI. COMMENTARY

The reason why the *Saracens* decision is a game changer is that it busts many of the myths hindering sports organizations from adopting salary caps and greater forms of financial regulation.

The first myth to go is the claim that salary caps can only be adopted if there is some form of collective bargaining agreement in place. What the decision articulates clearly is that a collective bargaining agreement is just one possible route to antitrust compliance. It certainly provides possible immunity from an antitrust challenge. However, this does not necessarily mean that a salary cap would infringe EU or UK competition law in the absence of a collective bargaining agreement. This finding is important because in many sports it is simply not realistic for a collective bargaining agreement to be put in place (e.g. due to the lack of credible social partners). This decision shows that sports organizations are not necessarily blocked from proceeding with financial controls, such as salary caps, as a matter of EU competition law. That being said, the support of the Players Association for the salary cap in *Saracens* underlines the importance of having buy-in for such salary control measures from players.

The second myth-busting element of the decision relates to the claim a salary cap or indeed other forms of financial regulation infringe competition "by object." The strength of this myth was evident from Saracens' claims which, as the Panel observed, raised the "by object" plea as its principal argument with the "by effect"' analysis only being a fallback consideration that was supported by very limited economic evidence.[35] However, the *Saracens* decision shows precisely why the "by object" claim is unsustainable in view of the *Cartes Bancaires* doctrine: where a measure pursues a legitimate objective it cannot be generally viewed as infringing competition by object. The rationale in *Saracens* follows similar

30 *Saracens* decision, paragraph 101.

31 *Saracens* decision, paragraph 97.

32 *Saracens* decision, paragraph 107.

33 *Saracens* decision, paragraphs 301 *et seq.* in particular paragraph 318.

34 Premiership Rugby Press Release, "Update on Saracens Rugby Club, dated January 28, 2020, available at https://www.premiershiprugby.com/news/update-on-saracens-rugby-club. See also *The Guardian*, "Saracens docked a further 70 points and chief executive resigns," dated January 28, 2020, available at https://www.theguardian.com/sport/2020/jan/28/saracens-docked-70-points-chief-executive-resigns.

35 *Saracens* decision, paragraph 21. The Panel stated at paragraph 69: "We were left with the impression that Saracens' competition case had originally nailed its colours to the anti-competitive object infringement mast, and that the case on appreciable anti-competitive effect was advanced as a somewhat secondary line of attack, being more reliant on what could be gleaned from PRL's factual and expert evidence than on the very limited evidence led by Saracens."

decisions relating to financial fair play rules. In addition to the *QPR* case referenced by the Panel in *Saracens*, the Court of Arbitration for Sport held in the *Galatasaray* decision concerning the UEFA financial fair play rules[36] "do not have as their object the restriction or distortion of competition: their object is the financial conduct of clubs wishing to participate in UEFA competitions."[37] These cases confirm that financial stability is a legitimate feature of professional sport, and cannot be equated in any way with classic "by object" infringements of competition.

The third myth-busting element of the decision is that sports regulations, in particular financial regulations, can only be viewed in a negative light from a competition law perspective. The *Saracens* decision is illuminating as it stated that the objectives are not just legitimate in justifying any possible restriction to competition but are actually beneficial to competition. The decision recognizes that sport, given its specific characteristics, requires financially stable teams in order to foster strong competition between clubs. This was a point also made by the Court of Arbitration for Sport ("CAS") in *Galatasaray*, in which it recognized that financial rules in sport simply ensured that clubs acted along market economy principles.

There is no doubt that of all the forms of financial regulation, salary caps are the most controversial. This is ultimately why the *Saracens* decision may come to be viewed as a game-changer. That the decision was delivered by a heavyweight panel following a thorough competition analysis means that its authority is not in question. In many sports, financial fair play rules were viewed as the legally safe alternative way to secure the financial health of sport – but these measures are not necessarily as effective as a cap in addressing certain market failures. The recent demise of English football club, Bury FC, is an example of the financial ruin that can arise in the absence of adequate regulation.[38]

The case is also a warning shot to clubs seeking to game the system. The Panel was clearly unimpressed that Saracens was a repeat offender and had threatened a competition claim in the past. The devastating manner in which the support for the salary cap from senior officials within Saracens came to light and the criticism of the lack of proper evidence to support central planks of the competition claims may give others pause for thought before running speculative competition claims to simply avoid a disciplinary sanction. The *Saracens* decision shows that no club, however illustrious, is above the laws of the game.

The *Saracens* decision provides sports organizations with much greater legal clarity as to why caps on salary and other forms of remuneration in sport are not necessarily prohibited under EU competition law and, if correctly designed, can actually be beneficial to competition. The emphasis of the Panel upon the margin of discretion available to sports organizations to address such challenges in sport is particularly welcome. It opens up a range of new tools to sports organizations to ensure that sport is not put at risk by speculative and exploitative practices. That is why Saracens rugby club is now joining Jean-Marc Bosman as a game-changer for the governance of sport.

36 The Union of European Football Associations ("UEFA") applies detailed financial fair play rules for its European club competitions, the UEFA Champions League and the UEFA Europa League. The break-even requirement set out in the UEFA Club Licensing and Financial Fair Play Regulations requires a club to break-even over a period of three years or, put differently, the football related expenses of a club must not exceed its football related income, subject to an acceptable deviation of EUR 5 million over the assessment period.

37 CAS/2016/A/4492 *Galatasaray v. UEFA*, paragraph 63.

38 Jonathan Taylor QC, *The Bury Review – Report to English Football League Board*, February 20, 2020. See also *The Guardian*, "Bury's demise shows Football League must tighten FFP rules, review says," available at https://www.theguardian.com/football/2020/mar/12/bury-demise-shows-football-league-must-tighten-ffp-rules-review.

STATE AID IN FOOTBALL: FALL-OUT FROM THE GENERAL COURT'S JUDGMENTS IN THE *VALENCIA* AND *ELCHE* APPEALS

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I. INTRODUCTION

Having received the endorsement of the European Courts in support of its policy of treating sporting bodies as "undertakings" that are subject to the EU competition rules,[2] the European Commission has adopted an increasingly aggressive stance since 2007 against various forms of State aid granted by national or regional authorities which support football clubs.[3] Given the enormous financial rewards associated with professional football at the highest level, it is not surprising that football clubs have become a focal point for the enforcement of State aid rules, especially considering the very wide discretion afforded to the Commission in determining that any material benefit can amount to "aid."[4] However, two very recent judgments of the General Court delivered in March 2020, which build upon a judgment of 2019 covering aid dispensed in very similar circumstances, cast doubt upon the methodology relied upon by the Commission to measure economic value in the world of football.

In its 2016 Decision,[5] the Commission found that the Spanish Instituto Valenciano de Finanzas ("IVF") had granted unlawful State aid to three football clubs, namely, Valencia FC, Hércules FC and Elche FC. The aid took the form of bank loan guarantees. All the affected football clubs appealed the Commission's Decision to the General Court in Luxembourg. Following its Ruling of March 20, 2019 in Case T-766/16, *Hércules Club de Fútbol v. Commission*, the General Court also delivered judgments in Cases T-732/16, *Valencia Club de Fútbol v. Commission* and T-901/16, *Elche Club de Fútbol v. Commission* on March 12, 2020. As in the *Hercules Case*, the General Court ruled in favor of the football clubs and annulled the Commission's Decision. The judgments confirm the increased appetite of the General Court to delve more deeply into the economic logic underpinning the Commission's analysis of State aid measures, rather than deferring to the Commission's discretion in interpreting ambiguous economic evidence and focusing narrowly on procedural faults in the Commission's investigatory process.

II. THE 2016 COMMISSION DECISION

In its decision, the Commission identified a total of four measures constituting unlawful State aid to the football clubs in question. Two of those measures concerned a leading club in Spain's Primera División, Valencia FC. The first measure consisted of IVF providing a guarantee for a bank loan given to Fundación Valencia by the Spanish bank, Bankia, to finance the acquisition of the shares in Valencia FC, thereby in effect providing a capital injection to the football club. The benefit included a guarantee which covered 100 percent of the loan, together with the interest generated by the transaction and the transaction fees. By way of a counter-guarantee, IVF received a second-rank pledge on the shares of Valencia FC owned by Fundación Valencia, thereby following Bankia in terms of priority. In 2010 and 2013, IVF increased its guarantee to Fundación Valencia by 6 million and 4.9 million respectively, in order to increase the value of Bankia's initial loan. A counter-guarantee was then again granted to IVF in the form of pledged shares in Valencia FC.

In the case of Elche, a football team in Spain's Second Division, IVF provided two bank loan guarantees for a total of 14 million euros to Fundación Elche. The purpose of the loans was to finance the acquisition of shares in Elche FC by Fundación Elche, which was therefore also characterized as the grant of a capital injection into that football club. As a counter-guarantee, Fundación Elche offered to IVF an annual guarantee premium of 1 percent and a pledge on the shares of Elche FC owned by Fundación Elche.

Both Fundación Valencia and Fundación Elche were non-profit organizations whose purpose was to promote the sporting, cultural and social activities of their respective football clubs. In assessing whether the loan guarantees constituted State aid within the meaning of Article 107 TFEU, the Commission found that the beneficiaries of the loan guarantees were in practice not Fundación Valencia and Fundación Elche but the respective football clubs in which they sought to buy a controlling interest, given that the two organizations were merely being used as financial vehicles to increase the capital of the two clubs.[6]

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2 See, for example, Case T-679/16 *Athletic Club v. Commission*, Case T-865/16 *Fútbol Club Barcelona v. Commission* and Case T-791/16 *Real Madrid Club de Fútbol v. Commission*.

3 See, for example, Commission Decision of July 4, 2016 on the State aid SA.41617 - 2015/C implemented by the Netherlands in favor of the professional football club NEC in Nijmegen, C(2016) 4048 final and Commission Decision of July 4, 2016 on the State aid SA.29769 (2013/C) implemented by Spain for certain football clubs, C(2016) 4046 final.

4 According to Article 107(1) TFEU, any form of support granted to an undertaking will constitute State aid within the meaning of that provision where it is imputable to a Member State and granted through State resources, confers a selective advantage, distorts competition and affects trade between Member States. For the notion of ''aid", refer to the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262/1, 19.7.2016. Consistent with the breadth of this notion, the Commission's Decisions have found that State aid to football clubs can, *inter alia*, take the form of waiver of claims, bank loan guarantees, purchase of a club's stadium and land swap deals.

5 Commission Decision (EU) 2017/365 of July 4, 2016 on the State aid SA.36387 (2013/C), OJ L 55/12, 2.3.2017.

6 See Paragraph 68 of the Decision, OJ L 55/12, 2.3.2017.

In addition, the Commission found that both Valencia and Elche should be considered as "firms in difficulty" at the time of receiving the guarantees, due to their increasing losses and diminishing turnover.[7] Nevertheless, this situation did not amount to a situation of *"extreme difficulty"* within the meaning of points 2.2 and 4.1 (a) of the 2008 Guarantee Notice,[8] because the clubs had recently reduced their losses.

Following a cursory analysis of the Guarantee Notice, the Commission considered that the respective measures conferred economic advantages to Valencia and Elche since the two football clubs would not have otherwise been able to obtain the same advantages on the same market terms. The Commission then went on to analyze the compatibility of the loan guarantees under the *Rescue and Restructuring Guidelines*,[9] reaching the conclusion that they constituted incompatible State aid because not all of the criteria set forth in the *Guidelines* had been fulfilled.[10]

III. THE GENERAL COURT'S JUDGMENTS

A. Valencia FC Ruling

On appeal, the General Court analyzed whether Valencia FC was indeed a "firm in difficulty" at the time the State guarantees had been granted. Valencia claimed that the Commission had not taken into account the "*specific business model of football clubs*" in its assessment, by having ignored relevant factors such as the market value of the club's football players, the number of season ticket holders, and the likely commercial price of the club in the case of a resale.[11] The Commission, for its part, argued that the rather high sales price of certain football players did not necessarily mean that the team, as an undertaking, was not "in difficulty." To support its position, the Commission concluded that in case of a so-called "fire sale" of the club's most valuable players, other teams would be likely to take advantage of its financial situation in order to obtain lower prices for those players. Furthermore, injuries can reduce the market price of a player.[12] The Court sided with the Commission in this respect and held that no manifest errors had been committed with respect to this part of its assessment.

As regards the first bank loan guarantee granted to Fundación Valencia, however, the Court held that the Commission had committed a manifest error of assessment precisely because it had wrongfully assumed that, since Valencia FC was a firm in difficulty at the time the guarantees were received by the club, no equivalent guarantee premium or corresponding guarantee premium benchmark could have been identified on market terms.[13] Furthermore, the Commission had not carried out a sufficient assessment of whether there was a market price for a similar non-guaranteed loan. Instead, it had merely concluded that "*not enough operations of similar nature can be found for a significant comparison*." Thus, by not calculating the market price consistent with the reference rates of point 4.2 set out in the 2008 Guarantee Notice, the Commission had committed a manifest error of assessment.

With respect to the second bank loan guarantee of 6 million euros, Valencia argued that the Commission had wrongly calculated the value of the pledged shares of the club that Fundación Valencia had granted to IVF in the form of a counter-guarantee. In its Decision, the Commission concluded that the value of the shares was "close to zero," since the club has been operating at a loss and had negative equity.[14] Following a detailed analysis, the Court held that the Commission had not taken into account the positive impact of the 2009 recapitalization process, which had increased the registered capital of the club from 9.2 to 101.7 million euros, and its own equity from -59.2 to 17.9 million euros.[15] Instead, in its valuation of the counter-guarantee, the Commission had used as its reference point the financial situation of Valencia FC *prior* to the first measure of 2009. In doing so, the Commission had committed manifest errors in its analysis, with the Court even expressing doubts as to wheth-

7 Paragraphs 77-79 of the Decision, OJ L 55/12, 2.3.2017.

8 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155/10, June 20, 2008.

9 Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty, OJ C 244/2, 1.10.2004.

10 The key criteria set forth under the Guidelines are: (i) the beneficiary must be a "firm in difficulty"; (ii) the grant of aid must be conditional on the implementation of a restructuring plan, which must restore the long-term viability of the company; (iii) compensatory measures to ensure that the positive effects of the aid outweigh the adverse ones must be imposed; (iv) the aid must be limited to the minimum, meaning that the plan must also involve ''own contributions"; and (v) the "one time, last time" principle must be respected, meaning that aid can be granted only once every ten years.

11 Case T-732/16, paragraph 51.

12 Case T-732/16, paragraph 87. A dramatic high-profile case in point is Panathinaikos F.C., one of Greece's most famous football clubs, which has found itself in financial difficulties for a number of years, thereby obliging it to sell many of its players under "fire sale" conditions (and thereby perpetuating its financial crisis).

13 Case T-732/16, paragraph 125.

14 Case T-732/16, paragraph 198.

15 Case T-732/16, paragraph 197.

er or not the measure conferred an economic advantage to the football club.[16]

B. Elche FC Ruling

In its second judgment, the General Court also held that the Commission had committed manifest errors in its assessment of whether an economic advantage had been conferred upon Elche FC.

Even though the Court reaffirmed the Commission's finding that the beneficiary of the aid was Elche FC and not Fundación Elche, it held that the Commission should nevertheless also have taken into account the economic and financial situation of Fundación Elche in its assessment.[17] This was a relevant factor that needed to be taken into account when evaluating the risks assumed by the State guarantor, since it was Fundación Elche that was benefiting from the loan guarantees and was responsible under its contractual obligation with IVF.[18]

Furthermore, the Commission had committed a manifest error in its assessment by failing to take due account of the recapitalization of the football club when assessing the valuation of the counter-guarantees offered by Fundación Elche to IVF. As a counter-guarantee, Fundación Elche had pledged its shares of Elche FC to IVF, the value of which the Commission again had found to be "close to zero." According to the Court, a private market investor in the same situation as IVF would have taken into account the recapitalization of the club when assessing the value of the pledged shares. Moreover, as an additional counter-guarantee, Fundación Elche had granted to IVF a mortgage on a six-hectare block of land valued at around 600 million euros.[19] Accordingly, the Court held that by failing to take into account the mortgaged land, the Commission had committed a manifest error in its assessment.[20]

Last but not least, the Court was critical of the Commission's wrong assumption that no private market operator would have been willing to act as a guarantor in this case, simply based on the fact that Elche FC was a "firm in difficulty." Instead, according to the terms of its own Guarantee Notice, the Commission should have sought to identify a corresponding guarantee premium benchmark.[21] In the absence of such a benchmark, it should have drawn a comparison with a similar non-guaranteed loan. As occurred in the *Valencia* ruling, the Commission was found to have failed to conduct an in-depth analysis and had merely asserted that not enough operations of a similar nature could be identified in order to draw a meaningful comparison.[22]

IV. LEGAL IMPLICATIONS OF THE RULINGS

The Rulings of the General Court provide clarity on a number of important issues that often arise in State aid disputes involving indirect support for football clubs. For example, it is now clear that, when aid is delivered through a financial vehicle, as occurred in the cases of Fundación Valencia and Fundación Elche respectively, the financial situation of the vehicle must also be taken into account when assessing the financial risk being incurred under the bank loan guarantees. This is because it is the financial vehicle, and *not* the actual beneficiary football club, that is responsible for the repayment of the loans.

Furthermore, in those situations where counter-guarantees are offered in the form of shares in a football club, the Commission must take into account the impact of the loan on the financial situation of the club when assessing the value of the shares. This is particularly important since the greater amounts of money injected into the club will, more often than not, give rise to a chain reaction which means the acquisition of better players, which should lead to better performances on the football field and ultimately to a better overall financial performance by the club.

Another important clarification of principle made by the Court, this time in agreement with the position espoused by the Commission, is that when assessing whether a football club can be characterized as being "in difficulty" under the Rescue and Restructuring Guidelines, the Commission must rely upon the book value of the club's players and not on their current market value, which might significantly drop in the case of injuries to the players or where the club is forced to sell them under "fire sale" conditions.

16 Case T-732/16, paragraph 205.

17 Case T-901/16, paragraph 93.

18 Case T-901/16, paragraph 84. Note also that the Fundación Elche held its own equity of 1.4 million euros at the time; refer also to paragraph 22 of the Decision.

19 Case T-901/16, paragraph 71.

20 Case T-901/16, paragraph 120.

21 Case T-901/16, paragraph 132.

22 Case T-901/16, paragraph 133.

When analyzing the existence and the amount of the aid, the Commission must also determine whether a reference price can be found on the market, or at least identify a corresponding guarantee premium benchmark. Where such figures are not available, the Commission must then seek to compare the price with that of a similar non-guaranteed loan. In any event, the Commission must demonstrate that it has conducted a thorough review of the market before concluding that the club would not have obtained a loan on the market on as favorable terms. In practice, this will mean that the Commission must conduct market studies before adopting a decision as to whether an advantage had been conferred on the football club in question.

Although it may appear to many that the Commission has lost the battle before the Court, it has not necessarily lost the war. In both judgments, the Court did not rule on the overall merits of the Commission's decision-making in terms of the final result, but simply held that the Commission committed manifest errors in its method of assessment. The Commission therefore has the possibility of re-opening a formal investigation procedure in each case, in order to rectify its own mistakes. We should therefore not be too surprised if the results of the new investigation again support the view that the two football clubs have received incompatible aid, although we can also expect that the amounts of aid that would need to be paid back will be lower than originally estimated. The two rulings are similar to that of the General Court in *Hércules v. Commission*, where the Commission had also failed to take into account counter-guarantees offered to IVF by one of the main shareholders of the club and had not explained why it had failed to do so. The Court annulled the decision on the ground that the Commission had failed to state reasons, which might again mean that the Commission has not had its last word in this matter.

In arriving at its conclusions, the Court has raised the metaphorical bar for the Commission to substantiate its case that a football club has benefited inappropriately from the grant of State aid:

- *First*, by obliging the Commission to take into account the financial position of the vehicle through which a loan is granted to a football club, the level of financial risk incurred under the loan might in fact be underestimated. This is especially the case if the financial vehicle through which the loan is granted is itself supported directly or indirectly through some other form of government funding or other indirect support. It will not come as a surprise to many football fans that intermediary financial vehicles are often designed to act as "straw men" in order to support clubs in their ambitious re-financing plans. In the real world, banks, politicians and even national leagues are well aware of the "straw man" nature of such vehicles. This is tolerated widely in the sector, because, unlike many other fields of State aid practice, competitors do not derive any great benefit from the demise of their famous competitors because that fame fuels fan rivalries and fills stadiums with season ticket holders.

- *Second*, by insisting that players' book values, rather than current market values, are the relevant criterion in determining whether the football club is "in difficulty," the Court is arguably elevating legal certainty above market realities. The world of football is awash with players who are either bargains or a luxury at certain times in their careers, and book value arguably only tells one something about the value of a player at one particular narrow window of their career. Moreover, the reference to book values might have very little to do with the relative success of a club in any given season and its potential to access large prize money and media rights in subsequent seasons, based on performances in the current season. Book values can also be deceptive indicators of "value," as can be seen by the often-deployed business model of buying a player in League A (e.g. Belgium) for X million Euros and selling them for 4X million Euros two years later to a wealthier League B (e.g. England).

- *Third*, the Court has been clear insofar as it expects the Commission, when determining a reference price, to conduct a thorough market review. In the eyes of the Court, the failure of the Commission to identify the real value of bank loans or guarantees in similar circumstances constituted a major gap in its analysis.

The net result is that the Commission's forensic analysis will now need to be more painstaking, yet will arguably be nevertheless just as vulnerable to legal challenge in light of the uncertain nature of the commercial balancing exercises now expected to be performed by the Commission in its analysis.

V. IMPLICATIONS OF THE RULINGS UNDER THE CURRENT COVID-19 STATE AID TEMPORARY FRAMEWORK

The implications of the two appeals might be more widely relevant in the immediate future since, due to the current COVID-19 pandemic, football clubs across all leagues are taking immediate and heavy hits to their budgets. Football clubs across Europe are currently not playing any matches and therefore not receiving any revenues from broadcasters and match-day ticket sales.[23] Thus, financial support which may take many forms, including bank loan guarantees, can be expected in the very near future. The European Commission has already classified the pandemic as an "*exceptional occurrence*" under Article 107(2)(b) TFEU.[24] However, in order for State aid to be authorized under Article 107(2)(b) TFEU, a causal link must be identified between the scheme and the "exceptional occurrence" which is being funded. It remains to be seen whether potential drops in the number of season ticket holders, the continuing high prices of players and reduced money received from TV contracts due to the poor economic prospects being faced will be capable of being causally linked to the COVID-19 outbreak under the logic of the General Court's analysis.

On March 19, 2020, the Commission adopted a Temporary Framework[25] for State aid measures to support the economy, valid until December 31, 2020. This also includes State guarantees for loans taken by companies from banks and direct grants of up to 800,000 euros. These measures will no doubt provide some comfort to SMEs, but will probably fall far short of plugging even some holes in the bank balances of most European football clubs, in what has been for some time the most expensive and lucrative team sports environment in the world.

At the time of writing, it is fair to say that the financial damage that many football clubs will suffer will go well beyond the immediate impact of the pandemic and is likely to have long-term repercussions. Thus, despite the crumbs of comfort offered to the Valencia and Elche football clubs by the General Court judgments, the long arm of EU State aids law is likely to continue to rein in the excesses of European football clubs. However, in so doing, it arguably threatens to undermine the bedrock of the sport as much as pruning the excesses of its elite clubs.

23 The economic implications of the pandemic can already be seen. Barnet FC, which plays in the UK's 5th tier, has already made all its non-playing staff redundant, while leading European football clubs such as Barcelona, Juventus and Tottenham Hotspur have decided to temporarily reduce the salaries of their players.

24 See State Aid SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19 C(2020) 1698 final. In its Decision, the Commission has approved an aid scheme compensating private legal entities organising events understood to account for more than 1000 people for the lack of attendance due to the legal restrictions imposed by the government. For those small clubs living "hand to mouth" with gate takings of less than 1,000 spectators, the future looks grim.

25 Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final.

CALL OF DUTY: THE YET UNKNOWN BATTLEGROUNDS OF EU COMPETITION LAW AND ESPORTS

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I. INTRODUCTION

Electronic sports ("esports") or professional video gaming is taking the world (of sports) by storm. Since the first chess game was developed for computers in the 1950s, competitive video games have evolved, and now sell out world-leading venues such as the Staples Center, and are being taught in schools and universities. Most importantly, esports has become an industry in its own right, with a global annual revenue estimated at $1.5 billion in 2019. So far, this relatively new yet booming sector has not received much antitrust attention. In an era where "big tech" is scrutinized more than ever by antitrust regulators and the organization of traditional sporting events is an increasingly fertile ground for antitrust litigation, this will no doubt change soon.

In this paper, we discuss the core areas where EU Competition law is most likely to challenge existing practices in esports.

With structures and actors similar to traditional sports, esports is widely expected to raise analogous antitrust issues. However, the very status of esports as "sports" under Union law is contested. Moreover, it is important to consider the differences in terms of how traditional sports and esports are organized. In particular, the absence of sports governing bodies in the traditional sense as well as the fundamental role played by game publishers and their IP rights in shaping virtually all aspects of the esports value chain means that the competition-IP interface is likely to play a very prominent role in future antitrust enforcement in this sector.

II. THE ESPORTS INDUSTRY

In a nutshell, esports can be described as a competition between human players (two or more individuals or teams) within the framework of a video game.[2] The first computer games were created soon after the development of the first modern computers and the first video games tournaments took place in the early 1970s in the United States. An increasingly beloved (teenage) pastime in the 1980s, esports evolved to its current professional status and popularity with the boom in internet connectivity in the 1990s.

Esports can be broadly divided into the following genres:

– *first-person shooters* are weapon-combat focused and allow the player to experience the game from the perspective of the player character (protagonist). Prominent first-person shooter games on the esports circuit are Counter Strike, Call of Duty and Halo;

– in *real-time strategy* ("RTS") games, players aim at controlling areas of a map by resource gathering and base building and ultimately destroying opponents' assets. This includes civilization building games (such as the Age of Empires series) and war simulations (Warcraft). The *Multiplayer online battle arena* ("MOBA"), an established subgenre of RTS, are games between two teams in which each team member controls a single game character. MOBA games focus less on managing assets and more on developing the abilities of the game characters, where the player has the same goal of destroying the base of the opponents while protecting their own. One of the most popular esports games, League of Legends, belongs to this genre, as well as World of Warcraft;

– *fighting games* are based on close combat of on-screen characters. Examples include Mortal Kombat and Super Smash Bros;

– *sport simulations* simulate traditional sports, like EA Sports' FIFA (football) and NHL (ice hockey);

– *battle royales* are survival games where the goal is to be the last person or team standing, having eliminated all other competitors. Popular battle royale games include Fortnite and PlayerUnknown's Battleground;

– *digital collectible card games*, allow players to acquire game pieces (cards, avatars, icons) into a personal collection with the ultimate goal of defeating an opponent. Hearthstone is one of the most popular games of the genre.

The emergence of (free) media platforms and online streaming services like YouTube and Twitch has enabled the creation of an ever-growing international audience, estimated at about 500 million in 2020. Nowadays, collegiate esports tournaments are commonplace, esports competitions are selling out landmark sports venues like the Staples Center in Los Angeles or the O2 in London, and the International Olympic Committee has even debated their possible incorporation into future Olympic events.

2 See a detailed discussion in Holden, Kaburakis & Rodenberg, JLas Vol. 27, No. 1, 2017, p. 46 et seq. as well as Abanazir, E-Sport and the EU: the view from the *English Bridge Union*, The International Sports Law Journal (2019), 18:102-113.

The large audiences have also boosted revenue, which mainly comes from advertising and brand investment. Over the last decade, esports has experienced year to year revenue growth of up to 40 percent. The largest markets worldwide in terms of income are the U.S., Canada, and China. However, Europe is quickly catching up with an expected growth in revenue of 300 percent between 2019 and 2023 and an expected increase in audience of 23 percent, with Germany being a key growth market.

This growth might be even steeper due to the Covid-19 pandemic as traditional sports events are brought to a halt and crowded arenas unlikely to return very soon. By contrast, the esports industry is better equipped to go remote and is set to increase its share of the revenue pie during the crisis. In fact, traditional sports are trying to capitalize on the popularity of esports during the lockdown and some have temporarily replaced their leagues with esports competitions – for example, over one million viewers tuned in to watch La Liga's FIFA 20 esports tournament.

The esports ecosystem has evolved together with its economic growth and its actors have grown in sophistication. As with "stick and ball" sports, each game is organized as a competition between professional players who are members of a team usually specializing in a single game. Similar to "traditional" sports teams, esports teams organize coaching, sponsorship contracts, travels and pay players' salaries. The professional players compete in tournaments and leagues arranged by organizers and held in sold out arenas. These tournaments and leagues are broadcast to viewers by online streaming services and through online platforms. Advertisements are run in order to promote products and brands to the viewers. In the largest esports competition, DOTA 2: The International, the prize money for each member of the winning team can top the prize money for winning an ATP Grand Slam. Sponsorship and advertising account for approximately 60 percent of the total revenue in the esports sector.[3] Over time, a gambling industry has also evolved around esports. However, sports governing bodies such as federations and associations, which play a crucial role in traditional sports, are only just emerging.

Instead, the decisive actor for each game is its developer or publisher, who enjoys intellectual property ("IP") protections on most of its aspects. Based on these IP rights, publishers can, first of all, establish and change the rules of the game at their own discretion. They also tend to have the final say on infringements of rules and dispute resolution. Second, publishers (can) control who access their intellectual property, e.g. which teams and players[4] are allowed to compete in their game and who can organize, broadcast and distribute tournaments, as well as how and where. In many ways, it can be argued that the publishers combine the roles of sports governing bodies and league organizers in traditional sports. They set the rules and determine who can participate in the game.

III. THE "SPECIFICITY" OF ESPORTS

In order to identify potential EU competition law issues of esports, it is necessary to analyze whether esports can be considered "sports" at all within the meaning of Union law. This is a key legal issue since case-law from the EU courts shows that the "specificity" of sport must be taken into account when applying EU antitrust rules.

In 2009, the amended Treaty on the Functioning of the European Union ("TFEU") enshrined this principle and explicitly recognized the "specificity of sport" in its Article 165. This provision states that the Union shall take "account of the specific nature of sport." The European Commission defines the "specificity of sports" as the "inherent characteristics of sport which set it apart from other economic or social activities" and also states that sport "makes an important contribution to the European Union's strategic objectives of solidarity and prosperity."[5]

As far as EU competition law is concerned, it is important to point out that a core "specific" element of sports contradicts the standard assumption that market operators aspire to a monopolistic position as the ultimate indicator of success. In sport, an actor (whether club, team or individual) cannot be successful without its competitors. The rivalry itself is what attracts the audience, especially in team sports. Real Madrid generates much more revenue from playing archrival Barcelona or Liverpool than from playing a second-tier team. Sports rivals will therefore have a long-term interest in each other's sporting skills and economic viability in order to ensure a balanced competition with an uncertain result. Consequently, successful competitive sports require not only adherence to a common set of rules but also a certain degree of economic cooperation between rivals (instead of unbridled economic competition, which is the ideal in traditional markets).

3 See https://gimegatrends.com/articles/esports-market-in-europe-predicted-to-reach-e670m-by-2023-as-germany-leads-the-way/.

4 E.g. https://www.sportbusiness.com/news/konami-blocks-two-laliga-players-from-charity-fifa-20-tournament/.

5 European Commission, White Paper on Sport, COM(2007) 391 final, p. 2 et seq.

Moreover, the EU has recognized the important societal role of sport in health, education, active citizenship as well as social inclusion, integration, the fight against racism and violence etc.[6] In order to maintain these functions of sport, the EU has more than once recognized the specificity of sport and has pledged to take it into account "in its actions under the various Treaty provisions."[7]

However, the specificity doctrine does not exempt sports from antitrust enforcement: the European Court of Justice ("ECJ") has established that "the practice of sport is subject to Community law (…) in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty."[8] Nevertheless, in order to cater to the "specificity" of sports and their societal role, the ECJ introduced "sporting rules,"[9] i.e. rules that ensure the "organisation and proper conduct of competitive sport," an additional mandatory proportionality test embedded within the general prohibition of anti-competitive agreements in Article 101(1) TFEU was given.

Acknowledging this high risk of legal uncertainty,[10] the European Commission has published a non-binding categorization of organizational sporting rules as follows:[11]

(i) organizational rules that are likely to comply with EU Competition law, i.e. rules that are inherent and proportionally necessary to the organization of sport:

- selection criteria for sport competitions;
- anti-doping rules;
- "at home and away rule";
- rules on transfer periods;
- nationality clauses for national teams;
- licensing requirements for clubs, i.e. rules on financial management and stability;
- rules concerning multiple ownership of clubs.

(ii) organizational rules that are less likely to comply with EU Competition law, i.e. rules that have been found not to be inherent and proportionally necessary to the organization of sport; these rules could be justified under Article 101(3) TFEU:

- rules on agent licensing;
- limitation of the legal challenge of decisions taken by sports association;
- transfer fees for expired contracts;
- rules limiting the employment of foreign players.

6 *Idem*. p. 3 et seq.

7 European Council's Declaration on the specific characteristics of sport, December 2000 (Nice Declaration), para. 1.

8 C-36/74, *Walrave*, ECLI:EU:C:1974:140, para 4, confirmed in C-13/76, Donà, ECLI:EU:C:1976:115 and C-415/93, Bosman, ECLI:EU:C:1995:463, settled case law.

9 C-519/04, *Meca-Medina*, ECLI:EU:C:2006:492, paras. 40 et seqq.

10 Many national competition authorities have adopted the approach of the ECJ, see EC Final Report on Specificity of Sport, 2016 page 34-39.

11 European Commission, Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport, COM(2007) 391 final, 2.2.1.

(iii) other connected commercial activities that are unrelated to the "specificity" of sport and undoubtedly fall within the scope of EU Competition law:

- ticketing arrangements;
- joint selling of media rights;
- joint buying of media rights.

With many of the above-mentioned features present also in the esports ecosystem, it becomes necessary to determine whether esports should be categorized as "sports" within the meaning of Union law. Though the jury is still out, we believe that esports are unlikely to enjoy the privileged position of traditional sports and may therefore be more at risk to antitrust enforcement.

The ECJ has noted that the competitive core of an activity cannot be considered sufficient to define that activity as "sport." In the context of VAT exemptions, the Court has determined that what sets apart sports from other purely economic activities is "a not negligible physical element." This led the Court to reject a claim that bridge amounts to a "sport."[12]

Whether a "not negligible physical element" is specific to esports is questionable. Undoubtedly, esports are based on fine motor skills and hand-eye coordination, just like Olympic disciplines like archery or shooting. However, the basic difference between esports and archery or shooting lies in the fact that the physical element in esports does not impact the "real" world where they take place, only the virtual world. Some legal commentators argue that the physical element inherent in sports requires that "the actual physical element produces the outcome"; accordingly, the fact that real-life actions produce effects in the virtual world would be insufficient to establish a meaningful "physical element" in esports.[13]

It has also been argued that esports generate fewer societal benefits than traditional sports, and that esports competitions focus on consumption and profit maximization rather than on positive externalities like social integration or cultural preservation. Furthermore, a number of esports involve (virtual) violence and success is measured in terms of "annihilating" the opponent. According to the critics,[14] this may contribute to a rise of violent conduct in real life and poor mental health of players, thus distancing esports even further from the positive cultural and social impact attributed to traditional sports.

All in all, we think it is unlikely that esports will be deemed to amount to "sport" under EU Competition law and enjoy the privileges and "specific" justifications of restrictive conduct that are available to normal sports. Rather, esports would be treated as any other economic activity and as such be fully scrutinized under EU Competition law, including its selection criteria for gamers, anti-doping rules, or any licensing requirements for clubs. This does not mean however that such aspects of the game will automatically be deemed anti-competitive and prohibited. Rule-making bodies outside sports in a narrow sense may also have a legitimate interest in organizing such ancillary aspects in order to protect the integrity of the game, and the European courts are likely to confer such bodies a certain margin of discretion in this respect.[15]

But where rule-making powers are used to foreclose competition, antitrust enforcers will stand prepared to intervene and may show even less deference than to traditional sports governing bodies.

12 C-90/16, *The English Bridge Union v. Commissioners for Her Majesty's Revenue & Customs*, ECLI:EU:C:2017:814.

13 Abanazir, The International Sports Law Journal (2019), 18:107.

14 *Idem*. 18:110.

15 See, as regards the rule-setting by professional association, C-309/99, Wouters, ECLI:EU:C:2002:98 and, specifically in a sports context, C-519/04, *Meca-Medina*, ECLI:EU:C:2006:492.

IV. DEFINING THE RELEVANT MARKET

The definition of the relevant market is key to any competitive assessment, as it sets the framework for measuring the competitive forces at play and whether a market actor holds a dominant position. Absent market power or other market failures, the self-disciplining mechanisms of the free market will ensure efficient outcomes.

In traditional sports, the markets have been defined around a single type of sport, with even narrower markets for specific activities like event organization, broadcasting, and transfers of players.[16] There is much to suggest that the same approach will be taken in esports and that narrow product markets will be delineated for a particular game.

Indeed, similarly to conventional sports, esports competitions are organized for individual games and players also tend to specialize in one game only. What is more, studies have shown[17] that viewers are unlikely to switch between esports given the attachment to specific teams and/or players and the complexity of learning new rules in order to be able to follow the game. Further, most viewers seem to watch a particular game being played in order to enhance their own skill at playing that same game. Moreover, the publisher, as the rule setter and holder of the key IP rights, will wield significant influence over access to this market.

The market for a single game can be further sub-divided into various vertical markets depending on specific activities – organization of competitions, broadcasting, teams, transfers of players, advertisement, viewers, viewer/user data, and selling the game outside of professional competitions.

In the end, however, the exact market definition will depend on a case by case analysis that must be informed by economic analysis considering features such as network effects and the multi-sided nature of these markets (spectators and advertisers). In addition, it is important not to lose sight of the strong link to the market for the sale of the games where publishers arguably do fiercely compete with each other, not least in the innovation space.[18] Is this rivalry sufficient to ensure that the conduct of the publisher and other market agents within the ecosystem of a particular esport is guided by efficiency considerations? In this sense, given the relatively short-lived nature of most video games, any market power in esports will often be transitory and gone in the blink of an eye when compared to established traditional sports like football.

In terms of geographical markets, it can be easily argued that markets are worldwide, as with online streaming there was never a need for the award of national television contracts. However, narrower geographical markets can be defined where streaming is geo-blocked or in jurisdictions which have different regulations that impact on the market, as well as depending on the geographic scope of tournaments (regional, national, European etc.).

V. SPECIFIC ISSUES AROUND IP RIGHTS

Any use of a video game is subject to the intellectual property rights of the publisher that has developed it. While in conventional sports, the powerful governing bodies (like UEFA in football) might control the organization of events, but they do not have the possibility of going so far as banning individuals from playing football or basketball in their backyard or water polo in their own pool. By contrast, any game publisher could forever ban anybody from ever playing their games.

It can be (and has been) argued that publishers of video games hold "absolute power" over their products and will by definition hold monopoly over the game also when played professionally.[19]

As mentioned, in esports, there are typically no governing bodies that approve of the organization of events like in traditional sports: this role is filled by the intellectual property right holders. Not only organizers, but virtually all downstream actors (players, teams, broadcasters, viewers, advertisers) depend on the publishers for permission to use the respective IP rights in order to be active on the respective downstream markets. This means that IP rights holders can easily control access to the market as well as the conduct of all downstream actors in ways that may raise abuse of dominance issues (Article 102 TFEU). In Union law, the existence of an IP right cannot as such infringe competition law.

16 European Commission, Case AT. 40208, *International Skating Union's Eligibility Rules*, para. 85 et seq. with further references.

17 Miroff, Tiebreaker, An Antitrust Analysis of Esports, Columbia Journal of Law & Social Problems 52 (2), 2019, 198, 204.

18 European Commission, Case in M.7866 – *Activision Blizzard/King*.

19 Abanazir, The International Sports Law Journal (2019), 18:109.

However, competition law can be applied to curtail the exercise of such rights if the effect is to restrict competition, in particular where antitrust enforcement is not deemed to put incentives to innovate at risk.[20]

Moreover, some fear that publishers will have both incentives and the ability to vertically integrate and reduce business opportunities for third parties in the downstream markets.[21] Vertical integration is often a source of efficiency gains. However, the issue becomes more complex if publishers instead of granting licenses e.g. to independent organizers and broadcasters, decide to set up "walled gardens" where they take up these activities exclusively on their own. Competition regulators have struck down analogous practices in traditional sports,[22] which suggests that esports publishers may also face legal challenges if they go down this route. At the same time, publishers may argue that a "walled garden" approach is an efficient way to guarantee the uniform image of the product and stay true to the publishers' creative vision, as well as to reward innovation (publishers invest heavily in game creation),[23] and should therefore amount to a perfectly legitimate business strategy.

In any event, the inevitable friction that will arise between different market actors along the esports value chain as the industry matures is likely to lead to legal challenges concerning matters such as:

– excessive licensing fees;

– refusal to grant licenses;

– exclusivity agreements;

– price discrimination; and

– tying and bundling of services offered at different levels of the market.

Again, such conduct should arguably not be seen as *per se* abusive and might be justified in esports based on considerations (e.g. incentives to innovate) that play less of a role in traditional sports. In the end, regulators and courts must assess each case on its own merits.

VI. CONCLUSION

Once a grassroots movement, the seemingly unstoppable revenue growth of esports, combined with the gatekeeper role played by publishers, is bound to attract the attention of antitrust regulators and create legal disputes involving competition law claims.

Esports are different from traditional sports, and perhaps not "sport" at all in the legal meaning of the term. Accordingly, though existing case-law regarding traditional sports will no doubt be invoked by analogy, we anticipate that antitrust enforcement will largely revolve around the competition-IP interface, where experiences from other innovation-driven industries may prove at least as relevant.

In any event, competition law is likely to have a significant impact on the organization of the emerging esports ecosystem (or ecosystems) and on how publishers and other market actors in this industry interact with each other. As in other nascent markets, legal certainty is a scarce resource, but companies must start weighing up competition law risks as part of their decision-making process.

20 See e.g. T-201/04, *Microsoft v. Commission*, EU:T:2007:289.

21 Miroff & Tiebreaker, An Antitrust Analysis of Esports, Columbia Journal of Law & Social Problems 52 (2), 2019, 190.

22 See European Commission, Case AT. 40208 - *International Skating Union's Eligibility Rules.*

23 A leading listed game publisher like Electronic Arts reported an R&D intensity (R&D spend as a percentage of net revenue) in 2019 of 29 percent, which is very high by any standard. See the company's 2019 Form 10-K Annual Report, page 35. See also Miroff & Tiebreaker, An Antitrust Analysis of Esports, Columbia Journal of Law & Social Problems 52 (2), 2019, 212, 213.

COMPETITION LAW AND SPORTS IN JAPAN: A NEW OLYMPIC LEGACY?

BY SHINGO KASAHARA[1]

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I. INTRODUCTION - HUMAN RESOURCES AND COMPETITION POLICY

A. Diversification of Work Styles

Recently in Japan, working patterns have become more and more diverse, and a certain proportion of workers have increasingly shifted from working as employees, to working as "freelancers" without being directed by any organization. It is said that the underlying reason for this trend is that the traditional Japanese employment system, which provides for lifetime employment and seniority-based promotion, will no longer meet the diversified working needs of industry. Open innovation and the digital economy have also made the use of external human resources more important for companies. In addition, expanding cloud-working and the sharing economy will result in more self-employed workers, including so-called "double-jobbers."

This trend allows people to work flexibly according to their life stages, such as pregnancy and caregiving, and is thus expected to widen the labor supply base amid the rapidly aging population and declining birthrate in Japan. Nonetheless, the decrease in the workforce, as well as changes in industrial structure, have resulted in a shortage of human resources, particularly in business sectors with a growing demand for manpower.

B. A New Role to Play for Competition Policy

Issues relating to human resources traditionally have been dealt with by labor laws. This is not unique to Japan, and competition law enforcement has been very limited in this area worldwide. As self-employed workers increase in numbers, a significant proportion of labor-related contracts have been taking on the nature of transactions between businesses, and thus may fall within the scope of competition law scrutiny. As competition for human resources grows in importance due to the changes referred to above, anticompetitive practices are, concurrently, more likely to happen. Nonetheless, it is still unclear when and how competition law should intervene.[2]

Against this backdrop, the Japan Fair Trade Commission ("JFTC") formed the "Study Group on Human Resources and Competition Policy" within its virtual think tank, the Competition Policy Research Center ("CPRC"). At the Study Group, twelve academics and practitioners from competition law, labor law, industrial organization, and labor economics fields discussed to identify: (i) where and how either competition law or labor law should be applied; and (ii) what types of conduct may be subject to Japanese competition law, or the Antimonopoly Act ("AMA"). Its report was published on February 15, 2018.[3]

The report sets out a basic framework to apply the AMA to concerted and unilateral conducts commonly observed in various human resources markets. It also describes the role of competition law and policy in human resources markets as follows: Sound competition in human resources markets ensures appropriate revenues for workers and the efficient allocation of human resources in society (effects on the "input market"). Such optimal utilization of human resources leads to higher efficiency in product supply, which ultimately benefits consumer welfare (effects on the "output market"). The report also refers to the macroeconomic context, by claiming that competition policy in human resources markets can contribute to the easing of economic disparities and increasing wages.

C. JFTC Advocacy and Other Activities in Human Resources

Since the report was published, the JFTC has been actively holding meetings with a wide range of industries to better communicate the AMA framework and the competition policy approach to human resources. In addition to these advocacy efforts, interviews with companies, trade associations, and workers in various sectors are ongoing, in order to collect information about possible anticompetitive practices. The information gathered has been used to build cases under the AMA and, where necessary, to formulate guidance tailored to certain sectors.[4]

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2 This discussion is also taking place at the international level. The OECD held a related meeting in February 2020. See https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm.

3 https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html.

4 The most high-profile actions by the JFTC are those in show business sectors. See https://asia.nikkei.com/Business/Media-Entertainment/Don-t-block-ex-SMAP-members-watchdog-warns-talent-agency and https://www.japantimes.co.jp/news/2019/08/03/national/media-national/news-outlets-japan-less-afraid-tackle-entertainment-issues/#.XmnvAy2KXow. The JFTC meanwhile announced a list of practices that may violate the AMA, including no-poaching agreements, non-compete clauses and others that impede appropriate mobility of human resources.

II. FACT-FINDING SURVEY IN SPORTS SECTORS

In the course of its information gathering, the JFTC observed that in many sports (both professional and amateur), the bodies that organize and govern leagues or competitions enforce various types of regulations that impose certain restrictions or conditions on player transfers between teams. Though the degree of restriction varies according to the specific regulations at issue, some of them may function as a horizontal agreement to hamper competition both in relevant input and output markets. In this light, to better understand how the regulations are implemented, the JFTC conducted an extensive fact-finding survey by researching the provisions of each regulation and holding interviews with various sports organizations. At the same time, the JFTC called for information from players and other relevant parties from December 21, 2018, to collect information on cases that may raise concerns under the AMA.

The survey concluded that transfer regulations can be categorized into three general categories:

- Banning transfers for an indefinite period or a certain period (e.g. 2 or 5 years) unless the player's current team gives consent.
- Prohibiting in-season moves or limiting the number of transfers during the same season.
- Prohibiting appearance in remaining games of the same season following a transfer.[5]

Regulations of the first type in effect restrict player transfers, since they do not permit a transferring player to appear in games or competitions held by the organization. On the other hand, no regulation was found that prohibits any transfers regardless of conditions or circumstances.

The JFTC found various cases in which the transfer regulations potentially lead to anticompetitive impact, but no in-depth competition analysis was conducted in each individual case. With respect to input markets, there are many players hoping to move from one team to another (e.g. if they are not regularly played in matches), but were not permitted to do so, and thus could not play in events. Some such players were forced into retirement. Reduced player mobility sometimes resulted in situations where a potential new entrant gave up, due to being unable to gather enough players.

It is interesting to note that, compared to professional sports, amateur sports tend to have stricter regulations, and problems arise more frequently. One of the reasons for this is that amateur sports organization bodies and teams tend to preserve an old-fashioned mentality that requires players to respect a teacher-student relationship and dedication to a single team, and pay less attention to the business aspect of their activities.

III. AMA GUIDANCE ON TRANSFER REGULATIONS IN SPORTS SECTORS

The JFTC survey shows that many of the existing regulations may not be sufficiently rational and necessary from the antitrust standpoint, and may restrict competition in the hiring of human resources (namely players). The JFTC also learned that many parties involved in sports activities do not have sufficient awareness and knowledge of the applicability of the AMA to their activities.

In this light, on June 17, 2019, the JFTC released its "Guidance Concerning Regulations on Player Transfers in Sports Business Sectors." The Guidance intends to raise awareness and understanding of the AMA in sports, and hence to better prevent transfer regulations that may produce anticompetitive effects both on input and output markets. The key elements of the Guidance are summarized below.

A. Sports and Competition Law

The Guidance starts with a simple explanation of why competition law applies to sports. Namely, while sports are played for leisure or for other purposes, they often also have an economic aspect (see B. below). As such, each sports team is treated as an "enterprise" under the AMA, and all are considered to compete as businesses as well as sporting rivals.

The Guidance also emphasizes that robust competition for player acquisition incentivizes teams' efforts to improve themselves in terms of performance, salaries, training, and so forth, to better attract good players. This eventually benefits sports fans and overall consumer welfare.

5 These regulations may be applicable concurrently with others.

B. Business Nature of Teams and Venues for Competition

Whether a sports team is deemed to be an enterprise under the AMA varies depending on the specific circumstances. The JFTC classifies sports teams into the following three types, and identifies: (i) what features of team's activities have a business nature; and (ii) where economic competition occurs.

1. Professional Sports Teams[6]

This type of team is obviously a business entity. As participants in a professional sports league such as baseball or soccer, teams compete for the league title. By their nature, professional teams seek to earn profits from admission, broadcasting, sponsorship, etc., and thus compete on the supply side of the market for sports content (the output market). In addition, so as to achieve better business results, the teams compete on the demand side for human resources to acquire excellent players (the input market).

2. School Teams

In such sports as gymnastics and swimming, players often belong to a team that runs a school business. The school provides its members (customers) with training for a fee. Through these services, some members may achieve good results for the team in sports competitions, and those achievements can be used as a form of "advertising" for the school to draw more customers. In this context, competition in the school business takes place among the teams (the output market). Meanwhile, the teams also compete with one another to attract quality prospective players on the demand side for human resources (the input market).

3. Works Teams

Works teams are quite common in the Japanese amateur sports scene. This is the case not only in team sports (e.g. rugby, volleyball and marathon relay race, or *ekiden*), but also in individual sports such as table tennis. Companies have such teams for multiple reasons. Although they may enhance employee welfare and build corporate togetherness, they may also serve a business purpose. A company, through its sporting activities, can develop broader exposure of its name to the public via media coverage, and ultimately enhance its visibility and reputation. This forms part of the sales and promotional efforts for its goods or services. As a result, competition takes place in a certain product market (the output market).[7] On the human resources market side, competition to hire better players is also observed among works teams (or companies) participating in the same sports league or tournament (the input market).

C. Theories of Harm on Transfer Regulations in Sports Sectors

In general, a mutual agreement among competitors to restrict the movement of their employees or other human resources (or not to poach them from competitors) is illegal in principle.[8] Such an agreement set by a trade association is similarly illegal.[9]

With respect to sports, transfer regulations may cease or suppress competition for players (the input market). Such reduced competition could also lead to the cessation or suppression of competition in sports content business markets (the output market) where players are a very substantial input. Moreover, new entry into the output market would be hampered if a potential team cannot gather the necessary number of players.

6 Even an amateur sports team (i.e. no remuneration is paid for players) may be included insofar as the team receives admission fees or other financial value as one of its material objectives.

7 In reality, most companies whose works teams join the same sports league often run different businesses from each other, which means they are in separate output markets. For instance, companies in the Japanese top-tier rugby league are diverse: beverages, automobiles, telecommunication, steel and so on. In such cases, the effect on output markets may not be subject to the AMA, because in Japan cartels have been narrowly interpreted to be limited to agreements among competitors. Nonetheless, they would still violate Article 8(iv) of the AMA, which prohibits a trade association from unjustly restricting members' functions or activities.

8 Article 3 of the AMA (unreasonable restraint of trade).

9 Article 8(i) of the AMA (substantial restraint of competition by a trade association). Even if the conduct does not substantively restrict competition, Article 8(iv) may be still applicable (unjust restriction of members' functions or activities).

D. Basic Framework to Evaluate Transfer Regulations

As noted in the JFTC survey, there are two major purposes for transfer regulations in sports. The first is to provide teams with more incentives to develop their own players by securing the recovery of up-front investments. The second is to maintain or improve attractiveness of a sports competition by balancing the strength of teams. In the antitrust context, both purposes may have procompetitive effects. Therefore, a transfer regulation implemented by a sports organization body (or teams in concert) should not always be regarded as illegal, even where the harms mentioned above emerge. Rather, an individual assessment on the rationality and necessity of each regulation is needed. More specifically, a comprehensive assessment must be made, based on various relevant factors from the standpoints of: (i) whether the purposes of the transfer regulation are rational even from an antitrust perspective; and (ii) whether the details of the regulation are necessary and proportionate to realize those purposes.

The Guidance also offers more detailed explanation of the elements to be considered, as set forth in the table below.

<table>
<tr><th></th><th>Purpose 1
To increase teams' incentives to develop their own players by securing the recovery of up-front investments</th><th>Purpose 2
To maintain or improve attractiveness of a sports competition by balancing the strength of teams</th></tr>
<tr><td>Rationality of purpose</td><td colspan="2">➢ Rationality of the purpose
➢ Quantitative adequacy of the purpose</td></tr>
<tr><td>Examples</td><td>✓ Is the secured recovery indispensable for carrying on the sports business?
✓ Does the cost to be recovered go beyond the degree required to ensure the incentives?</td><td>✓ Is team leveling mandatory for maintaining or improving the attractiveness?
✓ How essential is team leveling for carrying on the sports business?
✓ Does the team homogeneity go beyond the degree required to ensure the attractiveness?</td></tr>
<tr><td>Necessity & proportionality of regulation</td><td colspan="2">➢ Nexus between the regulation and its purpose
➢ Necessity/proportionality of restriction imposed for the purpose
➢ Less restrictive alternatives to realize the purpose</td></tr>
<tr><td>Examples</td><td>✓ Do the details of the regulation (e.g. target players, duration and conditions) stay within the extent necessary to attain the purpose?
✓ Is any less restrictive alternative (e.g. transfer compensation) available?</td><td>✓ Does the regulation truly lead to balancing teams? (Transfer restriction narrows available choices for weaker teams, and may result in entrenching or widening team disparities.)
✓ Do the details of the regulation (e.g. target players, duration, conditions) stay within the extent necessary to attain the purpose?
✓ Is any less restrictive alternative (e.g. transfer compensation) available?</td></tr>
</table>

Again, sports sectors employ a wide variety of transfer regulations and their impacts are quite different from each other. Some directly or indirectly ban transfers for an indefinite period. As a general matter, the evaluation of regulations should be conducted on an individual basis. However, at least as far as such indefinite restrictions are concerned, neither rationality nor proportionality will be found in accordance with the framework set out in the Guidance.

IV. REACTIONS FROM SPORTS BUSINESSES

Along with disseminating the Guidance to the relevant parties, the JFTC has been calling on sports organizations to voluntarily review, and to amend if necessary, transfer regulations either in force or under consideration with reference to the Guidance. One reason not to immediately enforce the AMA is that many parties, especially those in amateur sports, were not sufficiently aware of the antitrust dimension of their regulations. The voluntary reviews can be expected through the increased awareness, and they can improve the situation more effectively.

Presumably in response to the message from the JFTC (or earlier discussion by the Study Group), many sports organizations have lifted or modified their regulations. For example, two works team sports associations, the rugby Top League and the badminton league, eliminated regulations that had imposed a suspension (for one or two years, respectively) on a player transferring without the ex-team's consent. In professional sports, the Japan Pro Boxing Association and the Japan Boxing Commission remedied a longtime unwritten practice that the Commission would not issue a license to a moving boxer unless their former boxing gym provided consent. In addition, the Japan Industrial Track & Field Association once enforced a regulation prohibiting an athlete that transferred without the consent of his/her former team from participating in works team races governed by the Association.[10] From April this year, this exclusion will become applicable only to exceptional cases, and the exclusion term itself will be shortened to a maximum of one year.

V. CONCLUSION

With the JFTC initiatives and the subsequent actions by sporting organizations, it seems that most of the transfer regulations that raise obvious antitrust concerns have been redressed. Still, there remain various regulations that may potentially produce anticompetitive effects, but require far more detailed analysis in line with the framework set out in the Guidance. Some of these potentially problematic regulations are implemented even by major professional sports leagues, and many players and fans have questioned and criticized them. If self-assessment is no longer an effective solution, law enforcement must be the next option where appropriate.

It is certain that current developments have been driven in part by the public atmosphere created through the Tokyo Olympic Games 2020 "Action & Legacy Plan," which is a series of campaigns to pass on the positive benefits (legacies) of hosting the event to future generations.[11] The postponement of Tokyo 2020 due to the tragic worldwide coronavirus outbreak may, for better or worse, serve as "extra time" for further improvements. In this way, current global difficulties could be turned into further legacy of the forthcoming Olympic Games.

10 This restriction is fatal to long-distance athletes because even marathoners normally can receive training opportunities within a works team community, and works teams are often reluctant to hire those who cannot contribute to *ekiden* races.

11 https://tokyo2020.org/en/games/legacy/.

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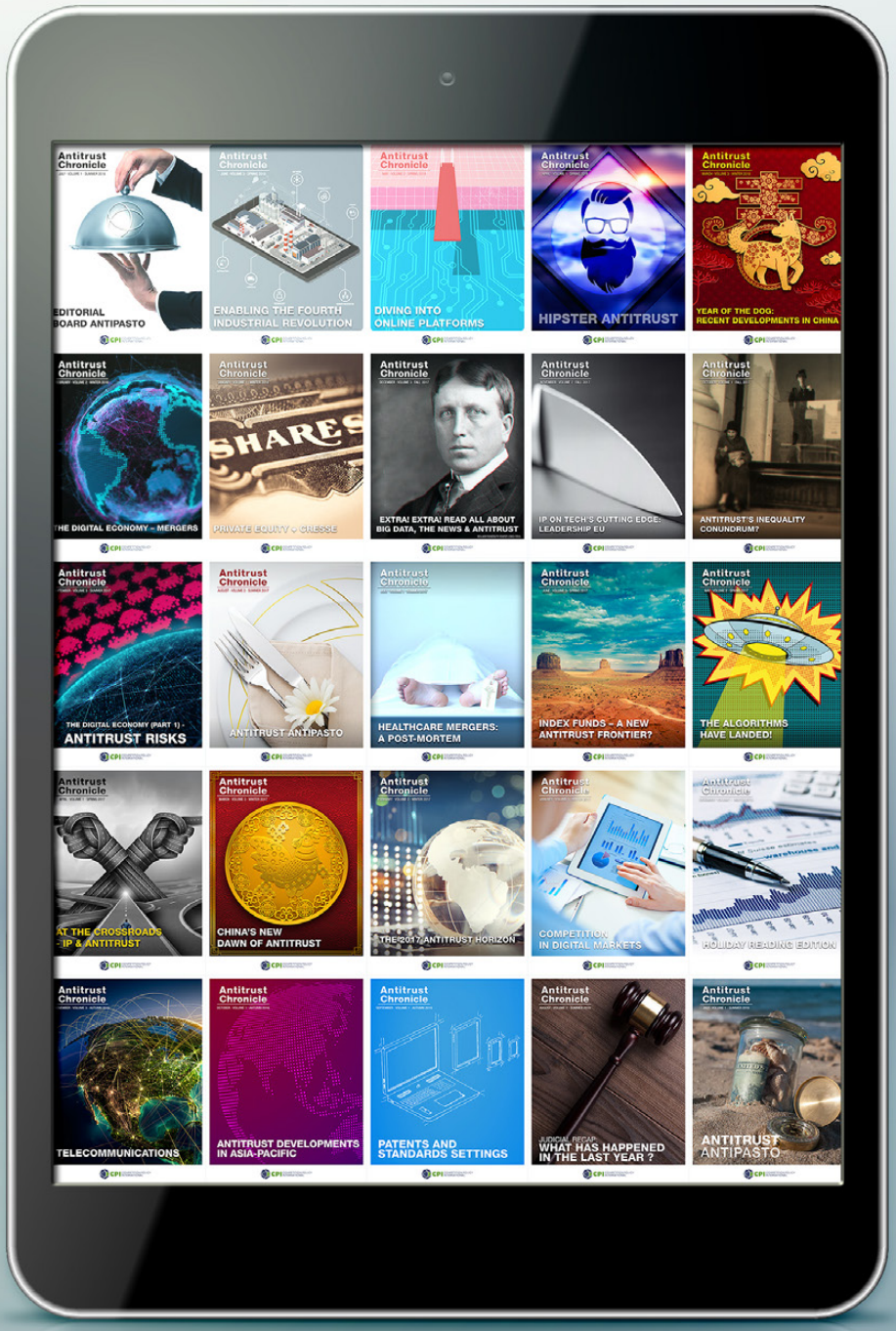


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