

POLICY ROUNDTABLES

Competition Issues Related to Sports

1996

Introduction

The OECD Competition Committee debated competition issues related to sports in October 1996. This document includes written submissions from Australia, Denmark, the European Commission, France, Germany, Ireland, Mexico, the Netherlands, Portugal, Spain, Switzerland, the United Kingdom and the United States, as well as an aide-memoire of the discussion.

Overview

Satellite television with dedicated sports channels considerably increased the market for sports broadcasts. Sports bodies and event organisers perceive that they have market power to influence competition among TV channels and the market for sports equipment. Sports federations and leagues have significant powers to regulate the activities of sports professionals. The roundtable has shown the difficulty of reconciling aspects of sport operations that are inherently anti-competitive with competition policy.

Four areas of concern were discussed: i) sale of exclusive broadcasting rights; ii) competition between different leagues; iii) sponsoring and exclusive supply arrangements between manufacturers of sports equipment and clubs, including the use of standards for equipment; and iv) retention and transfer systems used in players' contracts.

Related Topics

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COMPETITION ISSUES RELATED TO SPORTS

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition Issues related to Sports which was held by the Committee on Competition Law and Policy in October 1996.

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

This compilation is one of several published in a series named “Competition Policy Roundtables”.

PRÉFACE

Ce document rassemble la documentation dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur les questions de concurrence dans le domaine des sports, qui s’est tenue en octobre 1996 dans le cadre du Comité du droit et de la politique de la concurrence.

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

Cette compilation fait partie de la série de l’OCDE intitulée “Les tables rondes sur la politique de la concurrence”.

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AUSTRALIA*

Introduction

Competition law issues are raised frequently and in a variety of ways when sport is the subject of litigation in Australia. This paper, however, will largely limit itself to a discussion on the implications for competition law of restrictive rules of sporting bodies and restrictions imposed on players. This is done for two reasons: first, this is an area where there has developed a significant body of Australian case law; second, tracing the legal developments in this area will set the background for a detailed discussion of Australia's most recent, and arguably most notable case where questions of sport and competition intersect, *News Limited v Australian Rugby League Limited*, otherwise known as "the Superleague case"[1].

When restrictions of some form or another are imposed by sporting bodies on players, competition issues often arise because "the history of professional sport, both in Australia and overseas, reveals a tendency to regulation in ways which interfere with the freedom of players to contract"[2]. This is particularly so given the assertion that there is a need for some balance between the aim of sporting bodies to make competition more even and the desire of players to be free to seek the greatest reward for their skills and services. The common law doctrine of restraint of trade[3] has been invoked, in addition to provisions of the Trade Practices Act 1974, in numerous cases where players have been dissatisfied with the drafting and transfer rules of their particular sport[4]. The common law doctrine, although not sufficient to discourage nor limit restrictive trade practices in Australia[5], was preserved by s. 4M of the Trade Practices Act in so far as that law is capable of operating concurrently with the Act.

Since the 1970s there have been numerous attempts to regulate many Australian sports, particularly rugby league and Australian rules football, which are Australia's two major professional football codes, with the aim (or stated aim) of making the competition more even. At the same time, a line of cases, beginning with *Buckley v Tutty*[6], has resulted in professional employment codes being revised from "archaic codes of eligibility and employment"[7] to more acceptable and competitively-driven regulatory schemes. While recognising that sport is an important social institution and that it is a legitimate objective of sporting bodies to ensure teams fielded in competitions are as strong and well-matched as possible, there is nevertheless a need to reconcile the unique aspects of sport with competition policy. As in the United States, Australian sporting bodies are being compelled to restructure their player allocation systems due to pressure exerted on the system by competition law[8].

However, it should be said that it may be reasonable to impose some element of restraint upon professional players, whether it be by laying down some qualifications for club membership, or by imposing some restrictions on player transfers or on the extent to which a club may entice players away from another club[9].

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* This note is prepared by Professor Alan Fels, Chairman of the Australian Competition and Consumer Commission.

Player drafting and transfers

Restraint of Trade

Like other jurisdictions, Australia has seen case law develop on the drafting and transfer of players in particular sporting competitions. In *Buckley v Tutty*[10], a transfer system, under which New South Wales[11] Rugby League players were effectively tied to their clubs (even if the players were not contracted to play with the club or their contracts had expired) and could not play for any other without the consent of their club, was declared invalid by the High Court of Australia. Under this system, if a player was placed on a transfer list, any club could attain his services by paying a transfer fee which was entirely at the discretion of the club with which the player was previously registered, and under which the player received only a small percentage. The Court held that the doctrine of restraint of trade applied: the transfer rules went further than necessary to protect the reasonable interests of the League and its members and were therefore in unreasonable restraint of trade. As a consequence of this case, less restrictive transfer systems have evolved.

Zoning

The system of 'zoning', under which an area is divided into 'zones' with players required to play for the particular club in whose zone they reside, was tested in the Courts in *Hall v Victorian Football League*[12]. Hall wished to play Australian rules football for a particular club in the Victorian league with which his father had a long association. However, the State of Victoria (as well as parts of adjacent States) was parcelled into zones by the 12 league clubs, so as to 'residentially encumber' every male in the State, if he were ever to play in the league, to play for the club in whose zone he resided. Hall brought an action against the league and club in which he was 'zoned', who defended the action by arguing that if there was a restraint, it was no more than reasonable. This system, it was argued, fostered talent, created supporter loyalties and enabled the league to maintain a reasonably even competition without the wealthier clubs dominating the competition[13]. The Court held that the restraint could not be said to be no more than reasonable and the plaintiff was entitled to relief.

Application of the Trade Practices Act

The constitutional question of whether the Trade Practices Act applied in circumstances where a player's transfer was restricted was raised in *Adamson v West Perth Football Club*[14]. The Act's application depended upon the Court finding that a sporting organisation was a 'trading corporation'. The High Court held that it was, and the Trade Practices Act has since played a fundamental role in the determination of these sorts of cases.

Football was not the only sport to figure centrally in legal reforms in this area. The sport of cricket figured in *Hughes v Western Australian Cricket Association*[15], which was a significant case in that it broke new ground in applying the competition conduct rules of the Trade Practices Act to sporting employment[16]. Another barrier to the application of the Act fell - the relevant sporting rule in this case met the criteria established under the Act for an exclusionary provision (although the test for substantially lessening competition was not made out in this case).

In *Hughes*, a decision by the Western Australian Cricket Council to amend its rules so as to include an automatic disqualification of players in certain circumstances was held to have constituted an exclusionary provision under s.4D of the Trade Practices Act, as it had the purpose of preventing,

restricting or limiting the acquisition of the services of particular sportspersons by any club. In this case, some prominent Australian cricketers were prevented from playing district cricket in Western Australia due to their participation in a 'rebel' tour of South Africa. Nonetheless, the understanding between the district cricket clubs and the Western Australian Cricket Association that contained the exclusionary provision was held not to have had the purpose nor the likely effect of lessening competition within the meaning of the relevant provision of the Act. The Court said that the absence of a number of outstanding players from district cricket did not lessen competition between clubs, for all clubs were deprived of access to their services. It might lessen spectator interest, but would not lessen competition in the market in which the services of cricketers were sought by clubs in circumstances involving a financial incentive.

Despite the failure of the claim under the Act, the applicant succeeded on an associated claim that the understanding had amounted to a common law restraint of trade. It is well established that the doctrine of restraint of trade may operate in the case of sportspersons who derive income from the sport they play. The operation of the rules went beyond a restraint reasonably related to the objects of the Cricket Council and those who comprised its membership, and was void. That consideration was reinforced by reference to the public interest which lay in having every opportunity to see first class cricketers in action.

Drafting Systems

Later, in *Adamson v New South Wales Rugby League*[17], an internal draft system was examined by the Full Federal Court of Australia under the Trade Practices Act. The internal draft allowed players in the New South Wales Rugby League Premiership competition to lodge applications to be placed on an internal draft (following a failure to come to terms with the current club following expiry of a playing contract), which constituted an offer under the rules to any club to employ that player on the terms contained therein. Drafting was said to be an acceptance of that offer. Clubs were entitled to draft players in reverse order of their finishing position in the previous year's competition. The scheme operated in the context of a League imposed 'salary cap' on the total player payments of any one club[18]. The applicants (222 players initially commenced the action) had claimed the rules contravened s.45 of the Act (which prohibits agreements which contain exclusionary provisions or which have the purpose or would be likely to have the effect of substantially lessening competition) and were invalid as constituting an unreasonable restraint of trade. The effect of the draft rules was that a footballer who had previously played in the competition for a club was not free to contract with any other club unless selected by that club at an Internal Draft Meeting[19].

The Court found the Competition Rules of the New South Wales Rugby League which provided for the internal draft operated as an unreasonable restraint of trade, overruling the first instance finding that the draft had done no more than was reasonable to protect the legitimate interests of the League. It found that the internal draft rules did little to protect the interests of the respondents (the League which controlled the game in New South Wales and the 16 clubs), but did 'much to infringe the freedom and the interests, economic and non-economic, of the players'[20]. The Court was concerned that non-economic effects of the restraint ought not be disregarded, saying 'they may not be as easy to evaluate as economic effects; but they may be just as significant, especially in the case of a restraint on a person's ability to choose an employer'[21]. The Court held that the claim could not be brought under s.45 of the Trade Practices Act which prohibits making or giving effect to exclusionary provisions that restrict the supply of services by players to clubs, as the arrangement in question did not involve the supply of 'services' within the meaning of the Act, since contracts of service are excluded from the definition of "services".

The Superleague Case

One of the most notable and reported cases in the history of Australian sport happens to be the most recent: the case is *News Limited v Australian Rugby League Limited* ("the Superleague case")[22], a decision by Justice Burchett in the Federal Court of Australia. This case is the subject of an appeal that may have been decided by the time this Roundtable gets under way[23]. This decision and its commercial implications is said to be of particular importance given the recent reference of the UK Premier League to the Restrictive Trade Practices Court and the Bundeskartellamt's investigation of the German Bundesliga[24].

It is first worth mentioning briefly an interesting precursor to the Superleague case which involved Kerry Packer's World Series Cricket organisation. In 1977, this organisation contracted a large number of first class international cricket players to play special matches in Australia and abroad. Different cricket organisations responded in different ways, leading to litigation in various jurisdictions. In *Greig v Insole*[25], an English case, actions brought by players and World Series Cricket were heard together. The players brought an action on the basis that changes in the rules effectively banning them from playing English county cricket would be in restraint of trade. World Series Cricket alleged the tort of inducing breach of contract, an allegation that was also to be made in the Superleague case. The Court held that the bans were not reasonable, and that World Series Cricket was entitled to declarations that changes in the rules were an unlawful inducement to players contracted with World Series to break their contracts [26].

Background to Superleague

The case is pertinent for it deals with one of the issues that makes reconciling sports with competition law so difficult - namely that sport leagues and clubs require or claim they require cooperation and restrictions between them that are inherently anti-competitive[27]. The case is also illustrative (albeit indirectly) of the commercial considerations (especially regarding broadcasting rights) that lend so much importance to the role of competition law in sports.

Essentially, the case revolved around News Ltd's proposal to establish a 'Superleague' to replace the national rugby league competition, which is run by the Australian Rugby League and the New South Wales Rugby League ('the League'). The Superleague competition was to be shown on Pay TV in Australia and overseas. Although Pay TV did not figure centrally in the arguments in the case, its outcome (and that of the appeal) will have dramatic implications for the parties to the case[28]. The case arose from the rivalry between pay TV operators: Rupert Murdoch's News Ltd is related to the Foxtel consortium that would have the Pay TV rights to the proposed Superleague competition, and it had hoped to trump Australia's second Pay TV operator and owner of the rights to the League competition, Optus Vision (partly owned by Kerry Packer's Publishing and Broadcasting Ltd)[29]. News Ltd had originally contended in negotiations with the League that it was interested in "only seeking a slice of the television cake"[30].

While News Ltd had proposed to establish a Superleague to replace the national competition, the League had offered 20 clubs admission to the national competition for five seasons on the condition they commit themselves to the League's competition. The League sought Commitment Agreements and Loyalty Agreements to this effect.

News Ltd nonetheless began signing players up for a proposed 12 club Superleague competition, and in about March 1995 commenced an action against the League, alleging that the Commitment

Agreements and Loyalty Agreements that each club had entered into with the League should be set aside under sections 45 and 46 of the Trade Practices Act 1974[31]. These claims were dependent, amongst other things, upon the Court's determination of the relevant market. Amongst other things, News Ltd claimed that the League had abused its significant market power by preventing the entry of the proposed Superleague. Subsequently, a number of clubs aligned with News Ltd, seeking to have the agreements set aside, alleging the tort of economic duress.

The League defended the action and cross claimed on a number of grounds, of which the League's principal claim was an allegation of breach of contract against the clubs.

The League also sued News Ltd for the tort of inducing breach of contract, on the ground that it had intentionally induced the clubs to break their contract. The League sued the clubs for breaches of fiduciary obligations in respect of property which it said they were obliged to hold for a joint venture, consisting of the League and all the clubs, in the organisation of the rugby league competition. It also sued News and the Superleague companies, claiming that they were dishonestly involved in the clubs' breaches of fiduciary obligations. In addition, the League sued in respect of trade marks, registered in its name that related to the clubs, claiming that the clubs were not entitled to use those trade marks for Superleague.

The Decision

The judgement of Justice Burchett, in favour of the League, was handed down on 23 February 1996, following 50 hearing days. His Honour discussed a number of trade practices issues, many of which were fought on the basis of market definition. Aside from market definition (which was discussed by his Honour for some 70 pages), other trade practices aspects that were discussed included exclusionary provisions in relation to the Commitment and Loyalty Agreements; whether the Commitment and Loyalty Agreements had the purpose or effect of substantially lessening competition; and whether the League had misused its market power in breach of s.46 of the Trade Practices Act.

The arguments by News Ltd were rejected by Justice Burchett, while the League's cross claims were upheld. His Honour did not accept News Ltd's claim that the Commitment and Loyalty Agreements were given pursuant to an exclusionary provision. With regard to the cross claims, Justice Burchett held the League had been successful in proving a breach of contract against the clubs, and that the League had rights with regard to club colours, logos etc. Justice Burchett found all the elements of inducing breach of contract proven, so that the League could succeed on this cross claim against News Ltd. He also held that the Superleague Clubs had not been forced under duress to sign the Loyalty Agreements.

His Honour noted that, even if News Ltd had proven breaches by the League of sections 45 and 46 of the Trade Practices Act, the Court, in its discretion, would have refused to grant relief to News Ltd. Justice Burchett considered that it would have been a 'mockery of the rule of law' to grant this relief without having regard to News Ltd's conduct, which was found to be outside the norms of proper and commercial conduct[32].

Competition Issues

Misuse of Market Power and Market Definition

For the purpose of its argument that there was an illegal misuse of market power under s.46, the central issue considered by Justice Burchett was the definition of the market. The markets alleged by News Ltd were confined to rugby league and it did not attempt to prove a market that included other sports or entertainment. Thus the issue before the Court was whether those markets as argued by News Ltd existed. The basic contention of News Ltd was:

> ... that a major professional sport is, at the least, a market in itself in the sense that it is a market for the product of that professional sport, namely, the games played, the participants in which (on the supply side) include the teams which play and the organiser of any competition in which they play and (on the demand side) fans (whether at the ground or through the media), the media and sponsors[33].

News submitted that for a large number of rugby league fans throughout Australia, no other sport provides an acceptable substitute.

The markets alleged by News were confined to rugby league and were:

-- A 'Rugby League Competition Market' being a market for the supply of the service of conducting national premier rugby league competitions in which a competition organiser supplies a number of particular services to customers, including viewing by spectators at the ground, and a range of rights including television, pay-TV and radio broadcast rights, as well as sponsorship, and merchandising rights.

-- It was also argued that there was a 'Teams Market' being a market for the supply of teams of premier players suitable for participation in the Rugby League premiership competition.

A series of other alternative markets were pleaded as being the relevant market (all confined to rugby league). It is not necessary to examine these further, considering that the market definition issue was decided on the basis of the above two markets.

Justice Burchett's judgement surveyed comprehensively Australian and international judicial authority relevant to the definition of 'market' and the assessment of competition in a market, recognising the need for an approach which allowed for flexibility as market definition issues depend upon factual evaluations.

He stated that the swollen competition of twenty teams, which, according to the argument put by News Ltd, shows a monopolist's control of a narrow market confined to rugby league, may be seen, to the contrary, as evidence of vigorous activity in a market that actually includes Australian rules football, rugby union, soccer, basketball, as well as cricket, played in the places where there was a strong presence of rugby league.

The argument presented for News Ltd placed significant weight on the decision of the European Court of Justice in *United Brands Company v The Commission of European Communities*[34] where a single product market in bananas was recognised as distinct from the market for fresh fruit generally. Justice Burchett did not find the *United Brands* authority convincing, believing that the Court's conclusion was based on a very strong and very specific factual situation. Justice Burchett preferred the formulation of

Australia's Trade Practices Tribunal (as it was then known) that the market should comprehend the maximum range of business activities within which there is switching on the supply and demand side given a sufficient economic incentive[35].

News Ltd put considerable weight on a series of US decisions which established a market no wider than the market for a particular sport, e.g. American football. Justice Burchett was concerned that before accepting the relevance of US authority to Australia, the complexity and range of forms of entertainment available in the US must be taken into account. His Honour considered that the scope and scale of sport in America is very different from Australia, and notes that, in the case of baseball alone, *Toolson v New York Yankees Inc.*[36] shows that, as long ago as 1951, there were 52 different leagues with 380 clubs operating in 42 different states, the District of Columbia, Canada, Cuba and Mexico. His Honour also noted that in the US there are a great number of radio and television channels devoted to particular segments of the overall entertainment industry. Buyers who are the operators of stations broadcasting nothing but, e.g., football matches, may well be said to be buying a product for which the right to broadcast a different sport, such as baseball, is not substitutable.

His Honour also made it clear that in his view, in those cases where the American Court was required to make a finding based on the existence of a market, its view about the effect of a sub-market may have been significant. He considered that this aspect of American law is different from the Australian law. The *Trade Practices Act* makes no allowance for the existence of 'sub-markets'. His Honour noted that, in the Australian context, sub-markets are used as a tool of analysis and not as an element of a legal standard to attract liability.

Justice Burchett was unpersuaded by the majority judgement in *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*[37], where it was held that college football broadcasts should be defined as a 'separate market', due to the 'generic qualities differentiating viewers.' He favoured the interpretation of the dissenting judge, Rehnquist J (as he then was) who found the majority's proposition based 'on the ground that college football is a unique product for which there are no available substitutes' to be 'singularly unpersuasive.'

The case of *North American Soccer League v National Football League*[38] was identified by Justice Burchett as supporting a broad market definition. In this case, the judgement of the appellate Court referred to the ruling of the District Court that competition between the individual National Football League teams and the individual North American Soccer League teams 'for the consumer's dollar in their respective localities' was 'subsumed in league versus league competition in the general entertainment market.' It was held that there existed a capital and skill market in which the National Football League and the North American Soccer League were in competition with each other, each being a sports league.

Having considered how the American cases should be considered in the light of Australian law, Justice Burchett then turned to evaluating the particular matter before him. He referred to the comments in the *Arnotts* case that evidence of 'market' may be gained from the way in which industry participants conduct themselves in a particular industry[39]. Applying this principle, Justice Burchett makes the following findings:

-- that various sporting bodies take note of each other in terms of admission fees and the way in which particular sporting organisations try and promote themselves; this conclusion was based on documents of sporting bodies and evidence given at the trial;

-- that various sporting bodies are competing with each other for attendances at games;

-- that various sporting bodies are competing with each other to obtain sponsorship money; and

-- that various sporting bodies are competing with each other for television access against other sports, and also against other forms of entertainment.

These findings lead Justice Burchett to a conclusion that the markets based on rugby league, as alleged by News Ltd, were not correct.

With regard to market power and the issue of monopolisation, his Honour concluded that, applying the principles expounded in the case law concerning market definition to the circumstances in evidence, the applicant failed to establish any of the (narrower) markets alleged by it. His Honour adopted a broad market definition, which included at least rugby league, rugby union, Australian rules football, soccer and basketball. The fact that a 'core crowd' of rugby league fans would never find another sport substitutable for league did not mean that no other sport was in fact substitutable for rugby league[40].

If News had succeeded in confining any relevant market to rugby league, it would clearly encounter less difficulty in demonstrating the League's market power than it would if the boundaries of the market were more widely set. However, the League had no substantial degree of market power. Even if it did, it did not take advantage of its power for any of the purposes proscribed by s.46. It followed that the claim based on s.46 could not be sustained.

Did the parties to the Loyalty and Commitment Agreements make exclusionary provisions in breach of the Act?

News claimed that the identical terms of each of the Commitment and Loyalty agreements sent to all clubs by the League constituted an illegal 'exclusionary provision' under s.4D of the *Trade Practices Act*. For a finding of an exclusionary provision, s.4D requires that it be shown that a provision of a "contract, arrangement or understanding ... between persons any two or more of whom are competitive with each other ... has the purpose of preventing, restricting or limiting the supply of services or the acquisition of services..."

His Honour held that none of the requirements for an illegal 'exclusionary provision' were made out. First, there was not sufficient evidence of a required 'contract, arrangement or understanding' between the clubs.

News had argued that the clubs were competitive in providing services to competition organisers, maximising revenue, sponsorship returns and merchandising rights, as well as competing for players. However, since the clubs were not seeking, and were not likely to seek, in competition with each other, the services of rugby league players except upon the terms of employment contracts expressly excluded from the services to which the Act relates, his Honour concluded they were not relevantly competitive within the meaning of s.4D of the Act. In his opinion, the control conferred by the clubs on the League in various ways shows that the teams were not set up to compete as commercial entities, to supply their teams or to acquire a competition organiser. Instead the clubs agreed to abide by decisions made by the League reposing in it a number of discretions[41]. The joint venture nature of the League was held to preclude the concept of competition between the clubs within the League[42].

In addition, the requirement that there be a 'purpose of restricting the supply or acquisition of services' was not made out. His Honour held that the purpose of the Commitment and Loyalty

Agreements was to preserve the quality of rugby league competition through the joint participation of the clubs, which is not a proscribed purpose but rather a commercially proper and reasonable purpose.

Therefore, each agreement made directly between a club and the League, by which the club was admitted and agreed to play, could not be described as an exclusionary provision.

Did the parties to the Commitment and Loyalty Agreements make provisions having the purpose or effect of substantially lessening competition in breach of the Act?

News Ltd had also claimed breaches of the Act in that there was a contract, arrangement or understanding which has the purpose, or would be likely to have the effect of substantially lessening competition. Just as he found the claims failed to establish an exclusionary provision, Justice Burchett found the claims under this heading failed as there was no contract, arrangement or understanding, nor was competition substantially lessened.

The Orders Made

A large number of final orders were made by His Honour in March 1996, the effect of which was to prevent Superleague from starting its proposed competition until 31 December 1999, and from engaging the services of any player or coach to participate in any competition not authorised by the League. Those clubs, players and coaches who defected to Superleague were restrained from playing in any unauthorised competition.

The Full Federal Court granted a stay of proceedings in respect of some of the orders: the essence of the Full Court's decision is that Superleague players are not compelled to play in the League's competition should they choose not to do so[43].

As it happened, the League has played its 1996 season with the participation of the clubs which originally defected to Superleague. However, what the future holds for rugby league in Australia will depend upon the appeal decision by the Full Federal Court, which should close the chapter on the Superleague saga.

NOTES

1. (1996) ATPR 41-466.

2. *Adamson v NSW Rugby League* (1991) ATPR 41-084 at p.52,306.

3. The doctrine holds that restraints of trade are void unless they are reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public: *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 per Lord Macnaghten.

4. See, for example, *Buckley v Tutty* (1971) 125 CLR 353; *Hughes v Western Australian Cricket Association and Others* (1986) ATPR 40-736; *Barnard v Australian Soccer Federation* (1988) ATPR 40-862; *Carfino v Australian Basketball Federation Inc* (1988) 40-895.

5. Corones S., *Restrictive Trade Practices Law*, 1994, p.29.

6. (1971) 125 CLR 353.

7. Kelly G.M., *Sports and the Law*, 1987, p.25.

8. Morris, J., 'Keeping the Game Fair and Square - Antitrust Laws and Professional Sports in America' (1985) 59 ALJ 476, at p.477.

9. *Buckley v Tutty* (1971) 125 CLR 353 at 377.

10. (1971) 125 CLR 353.

11. The most populous of the six constituent States of Australia.

12. [1982] VR 64.

13. [1982] VR 64 at 69.

14. (1979) 27 ALR 475. The case concerned a restraint by State football associations that prevented the transfer of a player from one State to another without a clearance from the State body where the player previously played. The Court held that there was no market established for the purposes of the Trade Practices Act, and that there was no competition between clubs, because the clubs were directed by the State League in all relevant aspects including prices. Any competition in a commercial or economic sense (as opposed to a sporting sense) results from directions given by the League. Although no relief was granted under the Act, relief was granted under common law principles espoused in *Buckley v Tutty*.

15. (1986) ATPR 40-736.

16. Kelly, *op cit*, p.289.

17. (1991) ATPR 41-141, at p.53,005.

18. A 'salary cap' is a limit on the total amount that clubs can pay their players, with penalties prescribed for clubs that exceed this limit. The cap is an attempt to maintain the balance between rewarding players who are primarily responsible for their sport's capacity for revenue generation, with the aim of maintaining an even competition. The system of salary capping is one of the few restrictive practices in this area yet to be judicially challenged in Australia: Berger A., 'If the Cap Fits: Salary Caps, Professional Sporting Leagues and the Restraint of Trade Doctrine', Submission to Research Unit, Faculty of Law, Australian National University, Oct 1995.

19. *Adamson v NSW Rugby League* (1991) ATPR 41-141, at p.53,018, per Wilcox J.

20. *Ibid* at p.53,036.

21. *Ibid*, at p. 53,024.

22. (1996) ATPR 41-466.

23. An addendum discussing the appeal decision will be submitted to CLP Delegates should the decision be handed down in time before the Roundtable.

24. Veljanovski C, 'Sports Leagues Do Not Have Market Power? Murdoch's Super League Setback in an Australian Court', [1996] 4 ECLR 268.

25. [1978] 3 All ER 449.

26. In Australia, the case was argued in *Parish v World Series Cricket* (Unreported, Supreme Court of N.S.W., Kearney J., 17 Nov. 1978), where the governing body of Australian cricket, the Australian Cricket Board, brought proceedings against World Series Cricket. This case was argued on a different basis, namely breach of contract, as the Board claimed to have contracts pre-dating the agreement with World Series Cricket: Kelly, *op cit*, at p.278. The establishment of World Series Cricket also raised sports advertising issues.

27. Veljanovski, *ibid*, at p.269.

28. It has been estimated that News Ltd had committed well over $100 million in its attempt to launch Superleague: see Pengilley W., 'Rugby League on Trial', Aust. & NZ Trade Pracs. Law Bulletin, 11(9) March 1996.

29. Veljanovski, *ibid*, at p.269.

30. (1996) ATPR 41-466, at p.41,655.

31. Section 45 of the *Trade Practices Act* essentially prohibits agreements which have the purpose or are likely to have the effect of substantially lessening competition, while s.46 prohibits conduct by a firm which has a substantial degree of market power for the purpose of damaging a

competitor, preventing entry, or deterring or preventing a person from engaging in competitive conduct.

32. CCH, Australian Trade Practices News, Report 421, 25 March 1996, p.2.

33. (1996) ATPR 41-466, at p.41,678.

34. [1978] 1 CMLR 429.

35. (1996) ATPR 41-466, at p.41,672, referring to *Re Tooth & Co Ltd; Re Tooheys Ltd* (1979) ATPR 40-113.

36. (1953) 346 US 356 at 358.

37. (1984) 468 US 85.

38. (1982) 670 F 2d 1, 249.

39. (1996) ATPR 41-466, at p.41,679, referring to *Arnott's Limited v Trade Practices Commission* (1990) 24 FCR 313, at 334.

40. CCH, *op cit*, p.3.

41. Pengilley, *op cit*, at p.118.

42. *Ibid*.

43. *Ibid*, p.123.

Appendix

Introduction

Only a few weeks before this Roundtable was scheduled to commence, the Full Court of the Federal Court of Australia handed down a decision that will have great implications for rugby league, if not sport in general, in Australia. On 4 October 1996, the Full Court overturned on appeal the decision of Burchett J in *News Limited v Australian Rugby League Limited* ("the Superleague case")[1].

The above Note for the Roundtable Discussion on Sports and Competition Policy discusses the trial Judge's decision in some detail. This *addendum* discusses the Appeal judgement, to the extent that it contributes to the discussion of sports and competition law in Australia.

The Superleague Appeal

In a judgement spanning over 200 pages, Lockhart, Von Doussa, and Sackville JJ allowed the appeal and ordered that all orders made by the trial Judge be set aside. The judgement is lengthy, partly because the Court considered it necessary to set out the course of events in considerable detail (which it did for over 100 pages). It did so because on many issues the Court differed from the trial Judge in the inferences drawn from the primary facts.

Background to the Litigation

The Court outlined in detail the background to the litigation. The litigation arose out of an attempt by News Ltd to establish a new rugby league competition, known as "Superleague" (or "Super League"), to operate in competition with the established national rugby competition which has been conducted for many years under the auspices of the New South Wales Rugby League Ltd or the Australian Rugby Football League Ltd (hereafter referred to collectively as "the League").

During 1995, News Ltd or its associated Superleague companies entered into contracts with over 300 players and coaches to participate in the Superleague competition. The signing of the players and coaches took place after the League had executed Commitment and Loyalty Agreements with the 20 clubs that comprised the national competition. These Agreements precluded the clubs from participating for five years (until the end of the 1999 season) in any competition not conducted or approved by the League. In return, each of the clubs was admitted to the national competition for five years. Previously the clubs were required to apply annually for admission to the competition.

News Ltd claimed, amongst other things, that the Commitment and Loyalty Agreements were void on the basis they contravened the *Trade Practices Act 1974*, as they contained "exclusionary provisions" (resulting in a breach of s.45(2)(a)(i) or s.45(2)(b)(i) of the Act), and that they had the purpose or effect of substantially lessening competition in various markets (in contravention of s.45(2)(a)(ii) or s.45(2)(b)(ii) of the Act). News also claimed the League had abused its significant market power by preventing the entry of the proposed Superleague (in breach of s.46 of the Act).

The League filed cross-claims including that the "rebel clubs" (those clubs prepared to release players and coaches from their existing contracts to participate in the Superleague) had breached contractual obligations to the League; that the rebel clubs had breached fiduciary duties arising from a "joint venture" between the clubs and the League; that News Ltd and the Superleague companies had induced the rebel clubs to breach their contractual and fiduciary duties; and that News Ltd and the Superleague companies had engaged in misleading and deceptive conduct, passing off and had infringed the League's trade marks.

The Trial Judge's Decision

The League and loyal clubs succeeded before the trial Judge, who rejected News Ltd's claims that the Commitment and Loyalty Agreements contravened the *Trade Practices Act*. Burchett J rejected the claim that there was a contract, arrangement or understanding that had the purpose or effect of substantially lessening competition in breach of s.45(2)(a)(ii) or s.45(2)(b)(ii) of the Act. News Ltd's claim that the League had breached s.46 of the Act was also rejected. Burchett J found that none of the markets pleaded by News Ltd had been established, and rejected the contention that the relevant market should be confined to rugby league; rather the market included at least some other sports, such as rugby union, Australian rules football, soccer and basketball.

The trial Judge also rejected the claim that the parties to the Commitment and Loyalty Agreements made or gave effect to "exclusionary provisions" in breach of s.45(2)(a)(i) or s.45(2)(b)(i) of the Act. It was this aspect of the appeal judgement on which the legality of the Agreements turned. In fact, the Full Court did not find it necessary to consider the other competition issues raised by Burchett J, including his broad interpretation of the market definition.

The trial Judge added that, even if News Ltd had established contraventions of s.45 and s.46 of the Act, he would have refused relief on discretionary grounds, because of the role played by News Ltd in inducing breach of contract and his view that News Ltd had engaged in conduct outside the norms of proper and commercial behaviour.

Regarding other claims, Burchett J found that the rebel clubs had breached their contractual and fiduciary obligations to the League, and found that News Ltd and the Superleague companies had induced the clubs to breach their obligations. Burchett J made a number of orders which, in substance, prevented News Ltd and the Superleague companies from organising or participating in a rugby league competition, other than one authorised by the League, until the year 2000. Previously the clubs were required to apply annually for admission to the competition.

The Full Court's Judgement

The judgement is divided into several parts. Following a comprehensive examination of the major events leading to the litigation, the Court looks at a number of issues in turn. This paper will concentrate primarily on the competition issues that the Court discusses, although for the sake of completeness, the Court's other major findings will be briefly mentioned.

The Court addressed claims by the League that the rebel clubs had breached contractual obligations. The Court rejected some of the claims, but found that the clubs breached an implied obligation arising under the contract constituted by their admission to the 1995 competition. The

obligation required them to do everything reasonably necessary to enable the 1995 competition to be carried on in a manner that allowed the League to receive the benefit of that competition. The Court said that the remedies available to the League should be confined to an award for damages, and referred the matter back to the trial Judge for assessment.

With regard to certain other claims of relief, the Court referred back to the trial Judge for further examination some unresolved claims, including those based on misleading or deceptive conduct, passing off and infringement of intellectual property rights.

The Court then dealt with the contention that some of the trial Judge's orders would directly affect the rights and obligations of Superleague players and coaches who had not been joined by the League as parties to the litigation. The Court held that these orders, whether supportable or not, had to be set aside.

The Court then looked at the contention that the rebel clubs owed fiduciary duties to the League and other clubs. These obligations were said to arise out of a "League Joint Venture", which was defined as a joint venture for the carrying out of the respective objects of the League and the clubs. The Court found that there was not that degree of "mutual trust and confidence" that is found among partners in a commercial venture. The League and clubs each had conflicting commercial interests. Furthermore, the right of clubs to withdraw from the competition (which could be exercised by choosing not to apply for admission) was inconsistent with a fiduciary obligation to use the club's assets for the benefit of the national competition. Since no fiduciary duties were owed, the rebel clubs could not have been in breach of them, nor could they have been induced to breach them.

Competition Issues

Despite the attention given by the trial Judge to the issue of market definition, the Court found it unnecessary to discuss the issue. The Court did not find it necessary to consider the argument put forward by News Ltd that the League had misused market power in contravention of s.46 of the *Trade Practices Act*, nor did it find it necessary to consider whether the Commitment and Loyalty Agreements constituted contracts, arrangements or understandings which contained provisions having the purpose or effect, or likely effect, of substantially lessening competition in a market, thereby contravening s.45(2)(a)(ii) or s.45(2)(b)(ii) of the Act.

Instead, the competition issues discussed by the Court centred on the prohibition in s.45(2)(a)(i) or s.45(2)(b)(i) of the *Trade Practices Act 1974* against making or giving effect to agreements containing exclusionary provisions. The Court found that the appellants had established that the Commitment and Loyalty Agreements contained exclusionary provisions as defined in s.4D of the Act and were therefore void.

Agreements containing exclusionary provisions are *per se* contraventions of the *Trade Practices Act*. Exclusionary provisions are defined in s.4D as provisions of a contract, arrangement or understanding having the purpose of preventing, restricting or limiting the supply or acquisition of goods or services by persons in competition with each other in relation to those goods or services.

Before examining the Full Court's decision in this respect, it is useful to recap the trial Judge's thinking on this issue. First, Burchett J found that the clubs were not in competition with each other, either in relation to the supply of rugby league teams or in relation to the acquisition of the services of a competition organiser. Secondly, while the clubs were in fact in competition with each other to secure the

services of players, this kind of competition was expressly excluded from the scope of the Act by the definition of "services" in s.4(1) of the *Trade Practices Act*. Thirdly, given that the principal purpose of the Commitment and Loyalty Agreements was to preserve the quality of the rugby league competition through the joint participation of the clubs, there was no proscribed purpose of preventing, restricting or limiting the supply or services to, or the acquisition of services from, particular persons. Fourthly, there was no contract, arrangement or understanding within the meaning of the Act since it had not been shown that the parties had the necessary "meeting of minds"; rather the trial Judge found that the clubs had no more than a hope or expectation that others would execute the Commitment or Loyalty Agreements.

The Full Court did not accept that the clubs and the League were engaged in joint activities and disagreed with the trial Judge's contention that the clubs were not set up to compete, as commercial entities, to supply their teams or to acquire the services of a competition organiser. The Court placed weight on the fact that each year the clubs have to apply to the League to enter the league competition for that year and in support of this application each club was required to meet financial requirements the satisfaction of which required clubs to attract spectators, sponsorship and television viewers. These were clearly matters in respect of which the clubs competed with each other.

The Court held that at least some of the clubs which had executed the Commitment and Loyalty Agreements were in competition or likely to be in competition with each other to retain their position within the national competition. The Court gave some weight to the fact that admission to the league competition was for one year only, that some of the clubs had long requested the League to change its policy on admissions, and that over several years the question of rationalising and reducing the number of clubs had been raised.

The Court held that the clubs were in competition with each other for the acquisition of the services of News Ltd as an alternative competition organiser. It viewed the Commitment and Loyalty Agreements as being designed, in large measure, to prevent any of the clubs from choosing to participate in the rival competition, which the Court considered was very much at the forefront of the minds of the representatives of the League.

The Court also held that in the competition between clubs for premier players there was a real chance or possibility that there could be competition to engage players other than under a contract of service. Although the League adopted a standard form of contract of service between players and clubs (as did Superleague), there was nothing that required the contracts to take that form. It was open to a club to engage the services of a player otherwise than under a contract of service. The clubs were therefore likely to be in competition with each other for the "services" of premier players (as defined in the Act), at the time the Commitment and Loyalty Agreements were executed.

The Court rejected the trial Judge's finding that there was no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements, and held that the Agreements entered into by each club with the League collectively constituted an arrangement or understanding between each of the clubs and the League. The Court noted that the trial Judge's view was heavily influenced by the characterisation of the objectives of the League and the clubs as essentially non-commercial. The Court rejected this characterisation of the relationship between the clubs and the League, and found that the evidence pointed to a common understanding of the clubs to take concerted action to adopt the provisions of the Agreements.

In effect, the Commitment and Loyalty Agreements provided that the clubs would be bound to the League for the next five years and would not have any dealing with any competition organised by any

other person. The Court held that the facts established that the clubs and the League entered the Agreements for the purposes of preventing, for five years:

-- the supply by the clubs of rugby league teams to any competition organiser other than one approved by the League; and

-- the acquisition by the clubs of the services of a competition organiser other than one approved by the League.

The Court held that, while the clubs and the League may have had other objectives in entering the agreements, these were substantial purposes on any view open of the word "substantial" for the purposes of s.45(2). Accordingly, the Court held that the arrangement contained an exclusionary provision and therefore contravened the Act.

There was some discussion that the relationship between the League and the clubs existed outside the sphere of business activity, and that they were therefore not caught by the Act because they did not engage in trade or commerce. The Court held that both the League and the clubs were engaged in trade or commerce - they derived money from sponsorships, merchandising rights, television rights, game entry fees, they hired grounds and organised competitions.

The Court having found that the Commitment and Loyalty Agreements were void as containing exclusionary provisions, set aside the orders of Burchett J preventing participation in a Superleague competition. The Court noted that the trial Judge had regarded the conduct of News Ltd as "well outside the norms of proper and commercial conduct", and that he would have exercised his discretion under s.87 of the *Trade Practices Act* not to grant relief by setting aside the Agreements *ab initio*, if he had found that contraventions of the Act were established by News Ltd. The Court disagreed with this interpretation of the discretionary nature of the remedies provided by this section: "the powers in s.87 do not alter the ordinary rule, that where a statutory provision such as s.45 provides that a contract is contrary to law, the contract is void."

The Full Court's judgement may not be the end of the Superleague litigation. Immediately following the handing down of the judgement, the League announced that it would seek leave to appeal the decision to the High Court of Australia.

NOTE

1. (1996) ATRP 41-466.

DENMARK

BROADCASTING OF DANISH FOOTBALL MATCHES

The Framework Agreement (FA)

A recent case treated by the Council involved the Danish Football Association (DBU), the main cable-owner Tele Denmark and the two main free-TV broadcasters in Denmark.

The rules and regulations of the DBU prevent member clubs from selling their television rights to broadcasters on an individual basis. Consequently DBU controls all broadcasting rights to Danish football matches (including the All-Denmark Team, the national league and cup-matches).

According to the Framework Agreement (FA) DBU has sold all television broadcasting rights exclusively (and transferable) for a period of eight years to the two main (public service) free-TV broadcasters. The FA contains an on option for prolongation of the agreement. At the same time the parties have agreed to start a new (Danish) Pay-TV Sports channel. The Sports channel is based on a joint-venture between the parties from the FA and Tele Denmark. It acquires rights for the broadcasting of three matches each week from the national league on exclusive terms.

The question of market definition is crucial. The Council has concluded that a distinct market exists for supply of radio and television broadcasting rights to Danish football matches and a distinct market for transmission of TV sportsprogrammes to Danish homes. About 60 per cent of the transmission of TV programmes to households is transmitted by cable, 10 per cent is based on DTH and the remaining 30 per cent on terrestrial transmission.

The Council also concluded that the parties in the FA have a dominant influence on both markets. The decision is based upon the fact that

- -- DBU, due to it's rules and regulations controls (almost) all broadcastings of football matches including Danish teams;

- -- the two main TV-broadcasters hold a share of more than 2/3 of TV-viewers (measured by time);

- -- Tele Denmark owns the main cable-network in Denmark. More than a third of all households are connected to this cable-network;

- -- The two main TV-broadcasters have bought the rights exclusively for a period of eight years.

As a result of it's dominant influence the FA is subject to notification to the Council (Section 5).

Although the agreement was found to have a dominant influence on the market, the Council did not consider it - except for the option for prolongation - to entail harmful effects on competition. In support of this the Council attached importance to the fact that the TV rights are transferable to third party,

and the Council didn't find any fundamental problem with the exclusivity *per se*. Therefore only the option for prolongation is to be removed.

The Council has emphasised however, that this decision may be reconsidered, and has also declared that it will follow the market conditions closely. As a part of this the agreement will be made available to the public.

Background material about the Danish Competition Act

The purpose of the Danish Competition Act is to promote competition and thus strengthen the efficiency of production and distribution of goods and services through the greatest possible transparency of competitive conditions and through measures against restraints of the freedom of trade and other harmful effects of anti-competitive practices.

Decisions and agreements which may result in a dominant influence being exerted on the market concerned are subject to notification to the Competition Council (Section 5 of the Danish Competition act). According to the Danish Competition Act a notification isn't an approval of the agreement. If necessary the Council can take action against the agreement.

Action can be taken against such decisions if they entail or may entail harmful effects on competition and therefore on the efficiency of production and revenue (Section 11 & 12).

There are no special rules on dominant positions, but as mentioned above the Council may take action against restrictive practices arising from dominant positions.

FRANCE

Les grands événements sportifs sont devenus le vecteur d'activités économiques nouvelles associées à la cession des droits de propriété (retransmission télévisée des rencontres, vente sous licence de produits dérivés) et à la promotion des marques d'entreprises (parrainage des compétiteurs, des clubs et des manifestations).

En France, les problèmes de concurrence suscités par cette évolution sont souvent liés au comportement des fédérations sportives qui manifestent la volonté de s'assurer la maîtrise des ressources financières dégagées par l'exploitation des compétitions officielles en usant de leurs pouvoirs normatifs.

La question de l'application du droit de la concurrence aux actes des fédérations sportives se pose alors en considération du contexte juridique, de la jurisprudence et des perspectives d'évolution de la législation.

Trois remarques à cet égard, semblent s'imposer :

(a) la singularité du contexte français provient du statut particulier dont bénéficient ces organismes, et de la coexistence de deux ordres de juridiction, dont l'une est spécialisée dans le contrôle des actes administratifs ;

(b) la jurisprudence des autorités de concurrence a dégagé certains principes quant à la soumission des comportements d'entreprise des fédérations sportives au respect du droit de la concurrence, mais des interrogations subsistent ;

(c) la recrudescence des litiges de concurrence dans le secteur sportif et la nécessité de solutions préventives ont convaincu les pouvoirs publics d'engager une réflexion sur la clarification du rôle économique des fédérations sportives.

Le contexte

L'organisation de chaque discipline sportive est confiée à une fédération nationale agréée par l'Etat

Ces organismes associatifs participent à l'exercice d'une mission de service public qui emporte la jouissance de prérogatives de puissance publique (le pouvoir d'adopter des décisions individuelles et des règlements disciplinaires). Dans le cadre de l'accomplissement de cette mission, il leur revient notamment d'organiser les compétitions à l'issue desquelles sont délivrés des titres officiels.

Le contrôle de la validité des actes de ces fédérations est tributaire de l'existence de deux ordres de juridiction et donc soumis au respect des compétences respectives du juge administratif et du juge judiciaire

En vertu de la séparation des autorités administratives et judiciaires, le contentieux des actes organisant le service public du sport ou des mesures adoptées en application d'une prérogative de puissance publique échappe aux autorités de concurrence au profit du juge administratif.

En principe, la répartition des compéten ces contentieuses est clairement établie et ne devrait pas faire obstacle à l'application du droit de la concurrence par les deux ordres de juridiction aux actes et pratiques dont ils ont respectivement à connaître.

En vérité, cette question fait régulièrement l'objet d'un débat contentieux et constitue un préalable à l'application du droit de la concurrence, dès lors que le juge administratif, saisi de la validité d'un règlement sportif édicté par une fédération, n'a pas souhaité jusqu'à présent se référer aux règles de concurrence posées par l'ordonnance de 1986, pour apprécier si cet acte était ou non entaché de détournement de pouvoir.

La jurisprudence

Quelques exemples illustrent le fait que les autorités de concurrence se sont employées à qualifier la nature des actes des fédération et à soumettre au droit de la concurrence ceux qui avaient un caractère économique .

Certains comportements litigieux portent sur des activités strictement commerciales, exercées par les fédérations sportives indépendamment de leur mission de service public. Ces activités sont soumises au respect des règles de concurrence, qu'elles se situent ou non dans le cadre de l'exploitation d'un monopole légal

La distribution de produits d'assurance liée à la pratique du ski

Dans l'exercice de sa mission de service public, la fédération française de ski subordonne l'accès aux compétitions à la présentation d'une licence dont la délivrance est soumise à la détention d'une assurance personnelle. La licence fédérale comportant elle-même une assurance assistance, la fédération avait introduit dans ses statuts une disposition exigeant l'adhésion au régime d'assurance souscrit par elle, sous peine pour le candidat, même convenablement assuré, d'être exclu des compétitions.

Le Conseil de la concurrence a condamné cette disposition statutaire en 1988 en constatant qu'elle entravait la liberté pour le compétiteur de choisir le prestataire d'assurance de son choix.

La fédération a bénéficié jusqu'en 1986 d'un monopole de fait sur l'offre d'assurances ski vendues en station. L'apparition de produits concurrents l'a conduit à menacer de ne plus organiser de compétitions dans les stations qui ne feraient pas obstacle à la diffusion de ces produits.

Le Conseil a établi que ces menaces de boycottage constituaient une pratique d'entente illicite. A la faveur d'une seconde décision, le Conseil a également considéré qu'elles participaient d'une exploitation abusive de la position dominante détenue par la fédération sur le marché de la vente d'assurances ski en station.

La Cour d'appel de Paris a confirmé la décision du Conseil en rappelant que les pratiques incriminées n'avaient pas trait à l'organisation des compétitions mais aux moyens utilisés par la fédération afin de conserver son monopole sur l'assurance ski vendue en station, et ne s'inscrivaient donc pas dans le cadre de sa mission de service public.

La cession des droits de retransmission audiovisuelle des compétitions de football professionnel

En 1991, la fédération française de football décidait de ne plus autoriser la société La Cinq à diffuser les rencontres de football disputées en Europe, alors même que cette fédération avait conclu un contrat d'exclusivité avec les sociétés TF1 et Canal Plus pour la retransmission des rencontres se déroulant en France.

La Cour de cassation a établi que les contrats de droits privés passées par la fédération avec les chaînes de télévision, en vue de céder à titre onéreux des droits de retransmission de rencontres de football, ne participaient pas à l'exécution d'une mission de service public, et relevaient du champ d'application de l'ordonnance de 1986. Elle a confirmé que les conditions dans lesquelles une fédération use de sa faculté d'interdire la retransmission audiovisuelle d'événements sportifs pouvaient être examinées sous l'angle de l'exploitation abusive d'une position dominante.

D'autres comportements contestables des fédérations sportives ne sont pas sans relation avec la réalisation de leur mission d'intérêt général, mais revêtent en fait le caractère d'une activité de distribution ou de services au sens de l'ordonnance de 1986

Le Conseil de la concurrence et le juge judiciaire ont retenu leur compétence dès lors qu'ils étaient invités à apprécier des actes de nature économique, détachables de l'exercice des prérogatives de puissance publique reconnues aux fédérations.

L'homologation des produits et l'agrément des entreprises intervenant sur le marché de la construction d'équipements sportifs.

La fédération française de squash a mis en place en 1995 un système d'homologation des courts délivrée aux réalisations des constructeurs qu'elle agrée moyennant une contrepartie financière. L'agrément des entreprises repose sur l'utilisation exclusive de produits et matériaux commercialisés par des fabricants accrédités par la fédération mondiale.

Le Conseil a considéré que l'instauration d'une procédure d'agrément reposant sur l'utilisation de produits de marque et sur le versement d'une redevance, qui se traduisait par la préconisation de certaines entreprises auprès des collectivités territoriales, constituait une activité de services, détachable de l'exercice de toutes prérogatives de puissance publique.

Le parrainage sportif des clubs de football professionnels

Aux termes d'un protocole conclu en 1995 avec la société Adidas, la ligue nationale de football s'est engagée à lui concéder l'exclusivité de la fourniture des équipements de football aux clubs participant aux championnats de France professionnels.

Le Conseil a suspendu cette convention, après avoir constaté que son entrée en vigueur aurait des conséquences graves pour certaines entreprises évincées du parrainage sportif des clubs professionnels.

La Cour d'appel de Paris a confirmé cette suspension en précisant que l'accord litigieux avait le caractère d'un contrat de droit privé dont l'objet était étranger à l'usage des prérogatives conférées à la Ligue pour exercer ses compétences en matière de réglementation de la publicité sur les équipements sportifs et dans les stades.

Enfin, certains comportements imputables aux fédérations sportives, dont la finalité commerciale n'est pas sérieusement contestable, peuvent comporter l'usage de prérogatives de puissance publique

L'équipement des joueurs de clubs de football professionnel en articles de sport

Dans l'affaire concernant le parrainage des clubs de football, la ligue a également adopté une modification du règlement des championnats de France imposant aux clubs de faire porter à leurs joueurs les seuls équipements fournis par ses soins.

Le Conseil avait enjoint à la ligue de suspendre l'application de cette disposition.

La Cour d'appel a annulé cette injonction, sur un motif d'incompétence, estimant que cette décision découlait de l'usage de prérogatives de puissance publique et revêtait le caractère d'un acte administratif.

Selon la Cour, le pouvoir d'imposer aux clubs de faire porter à leurs joueurs les équipements fournis par la ligue relevait du pouvoir général d'organisation des compétitions confiée par délégation ministérielle et l'exercice de ce pouvoir n'était pas constitutif d'une activité économique au sens de l'ordonnance de 1986.

Considérant qu'il ne lui appartenait pas de connaître de la validité de cet acte ni de suspendre les effets dudit texte, "une telle suspension impliquant une appréciation implicite mais nécessaire de sa validité", la Cour a infirmé sur ce point la décision du Conseil.

L'équipement des clubs de football professionnel en logiciels de billetterie

La ligue a décidé en 1993 d'imposer aux clubs disputant les compétitions qu'elle organise d'informatiser leur système de billetterie en recourant au logiciel dont elle a acquis les droits d'exploitation auprès d'une société de service informatique.

Le Conseil a considéré que cette mesure était susceptible de restreindre le jeu de la concurrence entre fournisseurs sur le marché des logiciels de billetterie destinés aux clubs de football et pourrait être visée par les dispositions de l'ordonnance de 1986. La Cour d'appel a confirmé la compétence du Conseil, en observant que la fourniture d'un logiciel de billetterie aux clubs constitue une activité de distribution ou de services, détachable de l'exercice des prérogatives de puissance publique de la ligue, et rendue en concurrence avec d'autres prestataires

Le Tribunal des Conflits est saisi d'un litige de compétence dans cette affaire. S'il venait à affirmer que la ligue n'est pas intervenue en qualité d'opérateur économique mais conformément à ses pouvoirs réglementaires, qui portent sur le contrôle du fonctionnement de la billetterie des clubs, il reviendrait au juge administratif de statuer sur le fond.

Ces deux affaires laissent en suspend une interrogation : s'il est nécessaire de caractériser l'activité marchande d'une fédération sportive pour soumettre son comportement au respect du droit de la concurrence et si on constate que ce comportement affecte les conditions de la concurrence sur un marché, doit-il faire l'objet d'un contrôle de légalité sur le fondement de ce droit ? Ou bien, les autorités de concurence pourraient-elles juger de la validité d'une norme au regard de l'ordonnance de 1986 en considération de ses effets économiques ?

Les perspectives de réforme de la législation

La législation reconnaît aux instances fédérales un droit de propriété sur les compétitions qu'elles organisent, mais elle n'en fixe ni l'étendue ni les modalités. Elle ne sépare pas l'intervention des fédérations au titre de leur mission de service public de celle relevant de leurs activités purement économiques.

Afin d'éviter les distorsions de concurrence découlant de cette situation, trois axes de réforme sont a priori envisageables.

(a) Proscrire l'exercice de toutes activités marchandes aux fédérations sportives afin de les réserver aux opérateurs qui ont un statut professionnel et qui pourraient ainsi vendre leurs prestations sportives et leur image auprès des partenaires de leur choix ;

(b) Attribuer aux fédérations sportives des monopoles légaux sur l'exploitation commerciale des compétitions qu'elles organisent ;

(c) Distinguer clairement les missions de service public auxquelles participent les fédérations de leurs activités commerciales, et encadrer la mise en oeuvre de ces dernières.

GERMANY

Matters central to the exploitation of television broadcasting rights to sports events are currently being discussed in an ongoing proceeding of the Bundeskartellamt against the German Football Association (Deutscher Fußball-Bund - hereinafter referred to as "DFB"). This is considered to be a pilot proceeding, which when concluded will have an effect on the entire sector involved in the central marketing of broadcasting rights to sports events in Germany.

Case Study

The Bundeskartellamt prohibited the DFB from centrally marketing television broadcasting rights to certain European Cup home matches of German football clubs as a violation of the ban on cartels (Section 1 of the Act against Restraints of Competition (ARC)).

DFB

The DFB is a registered, non-profit-making society whose members are the German regional and Länder (state) football associations. The full members are five regional and 21 Länder associations and the extraordinary members are the clubs belonging to the two top divisions of the National Football League (professional leagues: "Bundesliga" and "2. Bundesliga"). The DFB´s responsibilities include issuing regulations relating to German professional football. The details are laid down in the Lizenzspielerstatut (LSpSt), which is drafted and amended by the DFB Advisory Committee. In 1989, a provision was added to these Regulations giving the DFB the sole right to conclude contracts concerning TV and radio broadcasting transmissions of domestic and international championship games with professional league teams[1].

The provisions relating to UEFA competitions

Along with more than 40 other national associations the DFB is a member of the Union of European Football Associations (hereinafter referred to as "UEFA"). UEFA has been handling three different tournaments (European Champions´ Cup, Cup Winners´ Cup and the UEFA Cup[2]) for over 30 years. Apart from the administrative handling of the tournaments, UEFA is also responsible for "Matters relating to Refereeing" and "Control and Discipline".

Pursuant to the regulations, the home clubs concerned are responsible for organising the European Cup game. Although on the one hand the home club bears the entire organisation expenses e.g. the hiring of the stadium and the salaries of the players, trainers, coaches and managers, it can on the other hand keep the revenue from such a game. If a game does not take place owing to force majeure, the clubs involved share the organisation and travel expenses. Furthermore, the home club must take out third-party liability insurance and renounce claiming damages from UEFA. Although the visiting club receives no remuneration for participating in the match, its economic interests are protected by the fact that it is the

organiser of the return game. UEFA receives certain amounts for its services via the national member associations.

Marketing of TV broadcasting rights

Until the end of the 1986/87 season, German football clubs individually marketed their own TV broadcasting rights to those European Cup home games which were the subject-matter of the proceeding. Until 1986/87 the home clubs transferred 10 per cent each of their revenue to UEFA.

Since the 1989/90 season the DFB has centrally marketed the TV broadcasting rights to European Cup home games of German football clubs. Initially (until 1991/92), the rights were granted either individually or as a package to sports agencies or TV stations. Thereafter the rights to most European Cup home games of German clubs were granted as a package for the whole season. Until 1997/98 Ufa Film- und Fernseh-GmbH (Ufa[3]) and ISPR were granted rights in annual rotation, viz. exclusive world-wide TV broadcasting rights (with the exception of Italy and Monaco) for the whole season. The package did not include rights to the final match of the European Cup Winners and the games of the Champions League in the European Champions' Cup.

The DFB shared the revenue as follows: 10 per cent of the total amount continued to be transferred to UEFA. Of the balance, 20 per cent went into the so-called "live pool", which is shared between the clubs of the Bundesliga and 2. Bundesliga on a 70:30 basis. The remainder was shared in part in a way that reflects the success achieved and for the rest in equal amounts by the German clubs that had qualified for the European Cup competitions. If a German club is eliminated early, the amount going to the live pool increases.

Violation of the ban on cartels

In the Bundeskartellamt's view, the DFB's central marketing of TV broadcasting rights to European Cup home games of German football clubs constitutes a violation of the ban on cartels (Section 1 of the ARC). The Bundeskartellamt decision prohibited the DFB from continuing to implement the rules[4] which formed the basis of the DFB's marketing activity.

The market for TV broadcasts of sports events, in which organisers of sports events act as suppliers and sports agencies and TV stations act as buyers, was deemed to be the relevant product market. Of special importance to sports agencies and TV stations as buyers is a sports event's attractiveness to spectators, because the expected amount of advertising revenue depends on the ratings. In that respect, TV rights to football events in Germany are clearly more important than those to other sports events.

In the Bundeskartellamt's view, the DFB acts as an association of enterprises to the extent that it takes decisions that influence the economic activities of the professional league clubs. All German clubs having qualified for one of the three European Cup competitions are actual competitors for the supply of TV broadcasting rights to their European Cup home games. However, the challenged LSpSt rules exclude competition on price and conditions between the German clubs participating in the European competitions. The individual club is deprived of the opportunity to sell the broadcasting rights to its European Cup home games individually or as a package. Nor is it free to shape its rights and to exploit them accordingly[5].

The crucial point for deciding the question of whether a restraint of competition is present is who is the organiser in the legal sense of the game and thus the original owner of the rights to exploit the game (tickets, broadcasting rights etc.). The Bundeskartellamt holds that the German home clubs in their capacity as organisers in the legal sense are the original owners of the television broadcasting rights to their European Cup home games. In this context it resorted to the civil law organiser concept developed by the Federal Supreme Court. The organisers in the legal sense thus are those who bear the organisational and financial responsibility and the economic risk. The organisers of the European Cup games are the home clubs concerned because they provide the essential organisational conditions for the matches and above all bear the economic risk. The organisational tasks of UEFA and the DFB[6] do not involve the assumption of economic risks.

The parties alleged that the European Club competitions had created a special, new product whose organiser in the legal sense was the DFB or UEFA. The individual match had no importance of its own. The DFB therefore argued that the service to which the television broadcasts related was the competition concerned rather than the individual match.

However; the fact that the broadcasting rights were marketed individually by the individual clubs until 1987 did not support this line of reasoning. For the DFB as well as for the clubs and the buyers of the rights the individual cup match obviously was a product that could be exploited independently. The individual marketing by clubs abroad of broadcasting rights to European Cup home games also implies that in fact the exploitable product is the individual game rather than a "cup competition" package.

It is easy to understand that the clubs participating in a European Cup competition have to agree on the number, the place and the date of the games to be played for such a tournament to take place at all. However, in the Bundeskartellamt's view, the right to market the broadcasting rights centrally cannot be inferred from the admissibility under competition law of a certain kind of co-operation in the organisation of European Cup competitions.

Nor is the central granting of rights by the DFB indispensable, in the Bundeskartellamt's opinion, for securing the European Cup competitions and the existence of the professional leagues. There is no indication either that the individual marketing of the rights until 1987 would have jeopardised the economic existence of any club or the survival of the professional leagues.

Appeal filed with the Berlin Court of Appeals

The parties concerned filed appeals against this prohibitory Bundeskartellamt decision with the Berlin Court of Appeals, which dismissed them as unfounded, however.

As regards the controversial question of who is the organiser in the legal sense of the game, the appellate court - the same as the Bundeskartellamt - assumed that the German football clubs were the sole organisers in the legal sense of their home matches and as such the original owners of the broadcasting rights. The Berlin Court of Appeals held that the case did not involve the stability of the professional league operations but exclusively the cup competitions. The Court admitted that participation in the UEFA Cup competition depended on the end-of-season standings of the first national league, but it denied that a further connection between the competitions was discernible.

Appeals on points of law to the Federal Supreme Court

The DFB as well as the sports agencies ISPR and Ufa filed appeals on points of law against the Berlin Court of Appeals' ruling with the Federal Supreme Court, the highest German court for civil cases. It is unlikely that it will decide on the case before mid-1997.

NOTES

1. Section 3 No. 2 and No. 6 of the Lizenzspielerstatut reads as follows:
"2. The DFB owns the right to conclude contracts concerning TV and radio broadcasting transmissions of domestic and international championship games with professional league teams. (...)
6. If only professional league clubs may take part in the competition, the negotiations are conducted by the League Committee, otherwise by the DFB Executive Board, in the case of games of the DFB cup final round, with the participation of representatives of the League Committee."
Section 54 of the DFB Implementing Regulations for national games states:
"The DFB owns the exclusive right to conduct negotiations of TV and radio broadcasts on behalf of the clubs, to conclude contracts and to distribute the payments from such contracts. ..."

2. The national champions of the UEFA member associations take part in the European Champions´ Cup matches and the respective national Cup winners take part in the Cup Winners´ Cup matches. In the UEFA Cup the no. 2 to no. 5 ranked national league clubs have taken part for Germany for several years. Apart from the finals of the Champions´ Cup and the Cup Winners´ Cup, all rounds of the three Cup tournaments are played both as home and away matches.

3. Ufa is owned by Bertelsmann AG; ISPR is a joint venture owned on a 50:50 basis by Axel Springer Verlag and Leo Kirch group.

4. Section 3 Nos. 2 and 6 of the LSpSt (see Fn.1).

5. Broadcasting rights can be sold for live transmissions, deferred transmissions, excerpts and highlights. These transmissions can be authorised for terrestrial, cable and /or satellite television. Moreover, broadcasting rights may be sold for sports' transmissions in free TV and pay-TV.

6. The organisational tasks of the DFB include the following: draw up the fixture list, plan the dates of cup matches, change the dates of matches and fix new dates, co-ordinate dates, confirm dates of international games, examine and grant the right to play, handle the transfer of players, grant licences and monitor the conditions imposed upon a club during the licensing procedure.

IRELAND

Overview

The Authority has to date dealt with a small number of cases which involve the application of competition law in respect of sports. Issues that have been of major interest in other jurisdictions such as exclusive television rights have not been involved. At present there is only one State television broadcaster, RTE. The demand for coverage of sports events is largely limited to a small number of big games e.g. soccer or rugby internationals. In practice, while RTE broadcasts such events live, they are also broadcast live on regional UK channels based in Northern Ireland, but generally widely available within the Republic of Ireland. Similarly Gaelic football and hurling matches tend to be broadcast on both RTE and UK regional channels.

The cases which the Authority has dealt with have involved sponsorship arrangements and exclusive supply agreements. These involved an exclusive supply agreement between an equipment manufacturer and the national soccer association. The Authority found that the arrangement was not anti-competitive since there was competition for the exclusive right at regular intervals and the agreement did not create an entry barrier. A second agreement involved sponsorship of a professional snooker tournament. This agreement included a restriction on participating players playing within a 50 mile radius during the week of the tournament. The Authority again found that such an agreement was not anti-competitive since other firms could sponsor tournaments at any other time of the year while the number of players involved was relatively small. Summaries of these cases along with certain other sports cases dealt with by the Authority is attached.

Other potential competition issues have arisen in the sports area although these have not been considered by the Authority, in part because, until quite recently, it was limited to considering only requests for exemption or negative clearance where an agreement was notified by a party involved. In the past the domestic national soccer league has, reportedly sought compensation from UK broadcasters for the adverse effect on attendances of the broadcasting of UK soccer matches, where the timing of such broadcasts would clash with domestic league matches. According to media reports the domestic league had threatened to try and block such broadcasts with the aid of other football associations.

More recently there have been media reports of an attempt by an Irish consortium to purchase a British Premier division soccer club and relocate the franchise to Dublin. The Football Association of Ireland has threatened to block such a move in order to protect clubs competing in the domestic national league. It is the sole body entitled by the international soccer associations to authorise anyone to organise official games within the country. It is not clear how viable the proposition is. For example, it is not clear what is the view of other English soccer clubs. This case may nevertheless be of hypothetical interest. Essentially were such a proposal to proceed it would mean having a fully professional team based in Dublin playing regular matches against the top English professional clubs whereas the domestic national league consists of part-time professionals and amateurs. The parties behind the proposal would appear to be of the view that such a club would represent a viable commercial proposition. They appear to have no interest in making a similar investment in a domestic league club. Given the widespread interest throughout the country in English soccer, it is likely that a team playing against English based clubs would attract supporters and commercial sponsorship, possibly to the detriment of the domestic league. In

competition terms arguably it can be reduced to a simple issue of whether or not consumers should have a choice between going to see games between such a club and English based teams as an alternative to watching domestic games or indeed watching live television broadcasts of English league games. Similarly there is an issue as to whether investors should be allowed to supply an alternative product i.e. live English Premiership matches where it may be detrimental to the domestic national league clubs.

Gallaher/Snooker Players (Decision No. 423 of 12/9/95)

This decision concerned a sponsorship agreement between Gallaher (Dublin) Ltd (Gallaher) and the World Professional Billiards and Snooker Association (WPBSA). Gallaher is incorporated in Ireland and is engaged in the production and distribution of cigarettes and other tobacco products. The WPBSA is a UK registered company which controls and governs professional snooker tournaments. The agreement was one whereby Gallaher, trading as Benson & Hedges, sponsored a snooker tournament at Goffs, Naas, Co. Kildare, Ireland on an annual basis from 1991-1995. In return Gallaher had the right to advertise its products at the tournament. The agreement specified that the WPBSA should ensure that none of the players participating in the tournament at Goffs would play or participate in any snooker exhibition, match or promotional event within a radius of 50 miles of Goffs while the tournament was in progress without first obtaining the written consent of Benson & Hedges and the WPBSA. Gallaher promised to pay certain prize money and all other costs of the tournament. They also undertook to ensure that any television company or other filming company broadcasting or recording the tournament should only televise, broadcast or show it within the State.

The Authority's assessment was that the agreement did not prevent any firm from sponsoring a snooker tournament at any time other than during the week of the Goffs tournament Players were only prevented from participating in rival events during the Goffs tournament. Even without the agreement players could not play elsewhere as they were committed to the Goffs tournament. A rival competition could be organised using other players or a competition involving the same players could be organised at any other time of the year. The Authority concluded that the restriction in the agreement on players playing in other tournaments was not anti-competitive. The Authority found that the requirement that the tournament be only televised or broadcast within the State did not prevent, restrict or distort competition within the State since it did not restrict who might film it but only specified that it only be broadcast or shown within the State. The restriction applied outside the State and did not prevent, restrict or distort competition within the State. The Authority found that none of the other conditions in the agreement were anti-competitive and issued a certificate to the effect that the agreement was not anti-competitive.

Adidas/FAI (Decision No. 421 of 12/9/95)

This decision concerned an agreement between Adidas (Ireland) Ltd (Adidas) and the Football Association of Ireland (FAI). Adidas is engaged in the production and marketing of sports goods including equipment, clothing and footwear and the FAI is the governing body for all soccer in the State whose activities include the organisation and control of the National League and of international games at various age levels. Under the agreement the FAI granted to Adidas the exclusive right to supply it with sportswear for all of its international teams and to market replicas of this sportswear and other sportswear using the official FAI crest for a period of four years. In return Adidas agreed to pay the FAI a minimum amount and to pay additional royalties in the event of sales exceeding a certain amount. If the team qualified for the final stages of the European Championship or the World Cup additional payments were to be made. The FAI agreed to ensure that all team members and officials of the FAI would wear the sportswear at all fixtures and in training sessions and secure the use of Adidas footballs for home fixtures.

The Authority considered that the exclusive right of Adidas to supply sportswear to the FAI for use by its team precluded the FAI, for the duration of the agreement, from entering into a similar arrangement with an alternative sportswear supplier. It also prevented other suppliers from supplying sportswear to the FAI as a means of promoting their products. The Authority pointed out that there were many other teams and individuals that other sportswear manufacturers could enter into similar agreements with. As the agreement had a limited duration of four years, other sportswear firms could bid at the appropriate time for the right to supply. Indeed the FAI subsequently entered into a similar agreement with a competing supplier. The Authority, therefore, found that the right of Adidas to supply the FAI did not prevent, restrict or distort competition.

The Authority found that Adidas's right to market replicas of the sportswear it provided to the FAI did not prevent it from producing and marketing other sportswear including other replica soccer kits. Other suppliers were not prevented from entering the sportswear market by virtue of the agreement. They were not prevented from producing soccer shirts, for example, only a soccer shirt carrying the FAI crest. Although the agreement gave Adidas a competitive edge this was fundamental to the competitive process. The Authority concluded, therefore, that Adidas's exclusive right under the agreement to market sportswear using the FAI crest did not prevent, restrict or distort competition since it did not create a barrier to entry in the relevant market. The Authority issued a certificate certifying that the agreement was not anti-competitive.

Adidas/Sports Stars (Decision No. 422 of 12/9/95)

This decision concerned a standard sponsorship agreement between Adidas (Ireland) Ltd (Adidas) and individual sports personalities. Under the agreements, which were for one to five years in duration, Adidas agreed to pay the individual in quarterly instalments for the duration of the agreements and to supply him/her with footwear and clothing. In return Adidas required photographs of the individual for advertising in Irish magazines and photographs of the individual wearing Adidas kit for circulation to the Irish Sports trade. Appearances by the individual at major Irish stores for a minimum guaranteed fee was also required.

The parties argued that the individual sports persons were not undertakings and that the Act therefore did not apply. Under the agreement the individual received payment from Adidas in return for the promotion of its products. The Authority considered such activity as the provision of a service for gain and that, therefore, the individuals were undertakings. The Authority went on to find that the agreement did not prevent any other firm from selling sportswear in Ireland nor from marketing its sportswear and certified that the agreement was not anti-competitive. The Authority did not consider that the arrangement constituted a barrier to entry since rival suppliers could conclude agreements with other sports personalities.

Professional Golfers Association Limited

The notified agreement is the Constitution and Regulations of the Professional Golfers Association (PGA) which form a contract between the PGA and its members, who are professional golfers in Ireland. The PGA organises and represents professional golfers in Ireland, the UK and abroad, organises and promotes golf tournaments and ensures the participation of professional golfers in such tournaments. The PGA has 280 members in Ireland and a further 5 000 in the UK and elsewhere. The main restriction in

the Regulations is one whereby a PGA member may not play in another event or tournament which conflicts with a PGA organised tournament in which he is eligible to play.

MEXICO

In Mexico's competition law experience since 1993 there have been two cases related to sports. Both involved football (soccer), one of the nation's most popular sports, if not the most popular. The first case concerned contracting between the major national television broadcaster and national league football teams on exclusive transmission rights of football matches. The other case is about the draft system created by those same football teams in order to regulate the transfers of professional players[1]. The two cases so far have been in the stage of preliminary analysis by officials of the Federal Competition Commission (FCC), and have not led to formal investigations by this body.

Exclusive broadcasting rights to football matches

In 1996, officials of the FCC informally evaluated the possible anti-competitive effects of the exclusive contracts between television broadcasters on the one hand and artists and professional football teams on the other. The concern for potential harm on competition was due to the fact that the largest Mexican broadcasting company, Televisa, has a large share in the television broadcast market. In particular, the analysis focused on evaluating whether the vertical restraint could foreclose Televisa's only major rival, TV Azteca, from hiring actors or from transmitting football matches. On the other hand, in the football case the distribution of the rents created by exclusive contracts as such was not a competitive concern because both contracting parties (broadcaster and football team) are expected to benefit from exclusivity[2].

The television broadcast market in Mexico[3]

TV broadcasting in Mexico is clearly dominated by two large private broadcasters, Televisa and TV Azteca. According to the number of TV stations owned throughout the country (603 in total), Televisa has a market share of 49.8 percent and TV Azteca of 29.5 percent. I.e. these two companies concentrate 80 percent of total TV broadcasting capacity[4]. The remaining stations are operated by smaller, mainly publicly owned broadcasters.

In 1994, Televisa was ranked 15th among Mexico's biggest companies according to annual sales, and its market value was US$ 1 112 millions. Apart from television broadcasting, Televisa participates in a broad range of activities such as cable-TV, radio broadcasting, music recording, newspaper publishing, telecommunications and ownership of professional football teams. In TV-broadcasting, it reaches 97 percent of the 15.6 million TV homes in the country and its programs have a rating of approximately 70 or 80 percentage points[5].

TV Azteca became a private broadcaster only in 1993, when the government privatised a huge communications package with a total value of US$ million 644.3, in which the television broadcasting capacity was included[6]. TV Azteca and Televisa are both vertically integrated television companies, that is, they are active in each of the three stages of broadcasting, as distinguished by the OECD report: *(i)* program production; *(ii)* program packaging; and *(iii)* program delivery[7].

In a normal week, TV coverage of sporting events totals 63 hours, of which 18.5 hours concern the transmission of first division professional football matches. Televisa transmits eight hours of football, TV Azteca 10.5 hours. The other 44.5 hours show international football events and other, also mainly foreign, sports[8]. Although, there is no information on ratings available, it is probable that domestic football matches are far more popular than other sporting events, so that their transmission cannot be substituted easily by other sports programs. This is important in defining the relevant market for the present case, as shown below.

Contracts for broadcasting rights

The exclusive broadcasting rights on first division football matches are subject to contracts which are negotiated directly between the TV broadcasters and each individual football team. The exclusive rights only apply to matches played in the home stadium of the contracted team. Today, there are 18 teams in the first division, five of which are related to one of the TV companies, either through direct ownership or through common shareholders. Televisa owns the actual two-times champion Necaxa and is related to the America and Atlanta teams through common shareholders. TV Azteca owns the Veracruz team and one of its major shareholders is also the owner of Morelia. Thus, in the market for broadcasting rights only the rights of the remaining 13 teams are freely negotiated. Table 1 shows that for the championship that started in August of this year, both companies obtained exclusive transmission rights for nine first division teams. In previous seasons Televisa had more teams under contract than TV Azteca.

It is widely accepted that the existence of exclusive contracts is not sufficient to harm competition and that these contracts can be justified by economic efficiency arguments. Two factors could make the contracts potentially harmful to competition, first, the dominant position of Televisa in TV broadcasting, and, second, the limited amount of transmission rights freely negotiable (only for 13 teams). Thus, Televisa might foreclose TV Azteca from broadcasting first division football matches.

The relevant market

The relevant market has to be defined in order to make a competitive analysis of the exclusive contracts. The main question is whether the market should be narrowly defined as the transmission of first division football matches, or more broadly including other sporting events on TV (most importantly, international football matches and basketball, baseball and American football matches from the US). An even more ample definition of the market would include other types of TV programs as well.

If the market is defined such as to include more than just the transmission of national football matches then the exclusive broadcasting rights on football matches would present little concern for competition. Even in the theoretical case that one broadcaster contracts all 18 first division teams, the other broadcaster could still compete by transmitting other types of events.

Intuitively, however, there is something to say for defining the relevant market as just the transmission of first division football matches. Given the popularity of national football, viewers would not easily switch to other channels showing different types of programs. Off course, in TV broadcasting it is not the viewers themselves but advertisers who pay for the programs. But the advertisers' decisions as to around what programs they buy air time depend directly on the viewers' preferences. Thus, a hypothetical monopolist who is the only present and future broadcaster of first division football matches would likely

impose a small but significant (five percent) and non-transitory increase in the price of advertising air time around those matches. Advertisers would not switch to other programs because viewers are captive to watching first division football matches, whether or not transmitted by a monopolist.

Anti-competitive foreclosure

However, even with this narrow definition of the relevant market there seems to be little danger of monopolisation by one broadcaster through exclusive contracting with all of the football teams. In the first place, it would be difficult to establish that one firm actually has substantial market power in the relevant market, which is one of the requirements of the Federal Law of Economic Competition (FLEC) for prohibiting a vertical restraint[9]. This can be seen in table 1. The bottom row of the table shows that for the present season both Televisa and TV Azteca have signed contracts with nine teams. From 1993 to 1995, the situation was imbalanced, with Televisa transmitting matches for far more teams than TV Azteca. But as of the 1995-1996 season, the latter firm also started to contract more teams.

With respect to the average performance record of the contracted teams (as expressed in points earned divided by games played during the last three seasons), competition between the two broadcasters also seems quite balanced, as can be observed from the second row from below of table 1. At the start of the present season, the average performances of Televisa's and TV Azteca's teams were more or less equal (1.033 vs.1.024).

Of course, the popularity of a team (and thus the rating of its transmitted matches) does not only depend on its performance in recent seasons but also on tradition. The two traditionally most popular teams, America and Guadalajara, are both under contract with Televisa. However, this hardly changes the conclusion that neither broadcaster has substantial market power and that competition between the two in the relevant market is actually quite balanced (TV Azteca has the exclusive rights for two other traditionally popular teams, Cruz Azul and UNAM).

In the second place, anti-competitive foreclosure is difficult to establish because the exclusive broadcasting rights have a limited term (probably of only one or two seasons)[10]. As a consequence, teams can easily switch between broadcasters every time a contract expires, depending on which one offers more. This is illustrated, for example, by the fact that Guadalajara and UANL (both in 1994) switched from TV Azteca to Televisa, and that Veracruz, Santos (both in 1995), Cruz Azul and León (both in 1996) switched in the opposite direction.

One of the main reasons for this limited duration of exclusive contracts is the risk the broadcasters face regarding the performance of the teams in the league, because the rating of a match transmission depends to a large extent on that performance, as noted before. Contrary to the case of the artists (which the FCC simultaneously analysed), the broadcaster can hardly influence the performance of football teams through promotional efforts[11]. Moreover, a good performance in previous years (as reflected in a high average performance indicator) is no guaranty for success in the current season[12]. On top of this, there is also the risk that a team under contract for more than one season will be relegated to the second division at the end of the present season, strongly reducing the value of the broadcaster's exclusive transmission right.

Possibilities of anti-competitive foreclosure in theory

But even if Televisa had monopoly power and if the exclusive contracts had a longer duration, total foreclosure of TV Azteca would still be quite difficult. First, in its attempt to monopolise the market, Televisa would have to sign individual contracts with all 18 first division teams, outbidding TV Azteca in every single case (assuming for the moment that the two teams related to TV Azteca could also be contracted by Televisa), which would obviously be a very costly strategy[13]. It should be noted that the mere fact that one TV broadcaster owns all transmission rights in itself would not be anti-competitive, as long as these rights are obtained through a competitive bidding process. Competition policy in Mexico, as in many other countries, does not impose restrictions on the existence of dominant firms as such, but only if these firms incur in anti-competitive practices.

An anti-competitive practice could be established if the prices paid for the contracts constitute a sort of predatory or raising-rival's-cost strategy to exclude competing buyers from the market[14]. In this case, Televisa must have some possibility of recouping the high prices paid for the exclusive contracts through charging monopolistic prices to advertisers. However, such a strategy seems unlikely to be beneficial as the price charged to advertisers to cover the costs of contracts would probably be inhibitively high (far exceeding the five percent price increase level used to define the relevant market). At such a high price, advertisers likely would switch to other programs.

In the 1994-1995 season Televisa had what could be called a dominant position in the market: it had exclusive transmission rights for 13 teams, two of which had been with TV Azteca in the previous season. Furthermore, Televisa transmitted a number of individual matches for three other teams (UAT, Querétaro and Morelia). However, during the season Televisa sold the rights for a number of matches to pay-TV broadcaster Multivisión and even some to competitor TV Azteca, which makes the hypothesis of monopolization less credible. Furthermore, the dominant position did not last long, as in the following season Televisa reduced and TV Azteca expanded the number of contracted teams (from 13 to 11 and from two to seven respectively).

Finally, it can be argued that a predatory strategy as described above would only keep TV Azteca out of the relevant market of football matches, but not out of other TV markets. Therefore, TV Azteca would be a permanent potential entrant in the market of football matches, making the recoupment of the predatory strategy even more unlikely.

Thus, even in a hypothetical case it seems impossible that exclusive broadcasting rights for football matches can have significant anti-competitive effects. This is confirmed by the fact that in practice there exits actual competition in the relevant market, as shown in the previous section.

Exclusivity and collusion between football teams in player transfers

In 1991 the Mexican Football Federation (FMF) established a mechanism which regulates the exchange of professional football players between football teams, a mechanism commonly known as the "draft". The new mechanism received ample attention in the news media and was heavily criticised by some players for hurting their interests, giving rise to an informal investigation of the draft by the FCC.

The functioning of the professional football system

The relevant market in this case could be defined as the market for the services offered by professional football players and demanded by the teams. Professional football is a commercial business in which the teams try to maximise profits through revenues obtained from stadium audience, advertising and TV transmissions. The services offered by players constitute one of the main inputs for clubs. It is important to note that the football teams pay a kind of two-part price for a player's services: *(i)* a fixed transfer sum for the property rights on a player's services, paid to the previous owner of that right; and *(ii)* a salary paid to the player himself.

The entertainment services offered by the different football teams in the league are complementary, that is, one team by itself could not provide such entertainment. However, in the relevant market for players' services the teams operate independently as buyers, so that they can be considered as competing agents in this relevant market. This observation is important with respect to a possible determination of a horizontal agreement between these competing agents.

The FMF is the official body representing football in Mexico and comprises all the professional and amateur leagues and teams as well as all football players and referees. The first division of the professional sector is the most important source of revenue for the Federation, and therefore it also has the largest influence in the body's decisions. The first division consists of 18 teams with in total approximately 450 professional players under contract. In the other three professional divisions there are about 60 teams (some of them owned by first division teams) which count with both semi-professional and professional players.

New, talented players can be registered as amateurs at the FMF by one of the professional teams. An amateur turns professional if that same team chooses to register him as such, or if he is included in the list for the draft and subsequently sold. Once a football team registers a player as professional it obtains a so-called "letter of property", which gives the team the exclusive property right on the football services provided by that player. These rights are valid during the entire professional life of the player.

It is the team which decides whether or not to sell a player, i.e. a player wishing to leave his team is not free to do so unless his owner puts him on the draft list. Foreign clubs interested in buying a Mexican player are also obligated to buy that player's letter of property from his current team. A player can only obtain his own letter of property, thus becoming a free agent, if the team decides to hand it over to him (which happens sometimes to players who have no more market value), or if he stays nonactive for at least 30 months. As a result, free agents in Mexican professional football are rare.

Property rights to a player's services

It is evident that this property rights system established by the FMF gives the teams enormous bargaining power over players. But the new draft mechanism only makes the players' position worse, as will be described in the following sections. First we would like to make some comments on the exclusive letters of property. In principle, some exclusivity on the rights to a player's services seems to be justified because a club has to make certain investments in that player, such as: *(i)* the costs of searching for and winning over new talents; *(ii)* the training of the player before he even starts to play in the first selection; and *(iii)* letting him play in the first selection to gain experience. If a player could walk freely after his training, the club would have less incentives in the first place to train him.

Therefore, the problem lies not so much in the exclusivity as such but rather in the fact that the letters of property are valid during the entire professional life of the player. As a result, the property rights system also applies to experienced professional players who do not need anymore of such investment by the team. Therefore this life-long exclusivity seems to be unjustified from an efficiency point-of-view.

There are more efficient mechanisms of property rights than the one established in Mexico. For example, the Argentinean equivalent of the letter of property has a duration of three or four years, after which a player can be freely contracted by other teams. Apparently, this has not led to any lack of investment in new players in Argentina. Another interesting case is Europe, where the European Commission recently put an end to the practice of teams charging transfer sums even for players whose contract had expired. The former transfer practice in Europe was to a large extent similar to the property system in Mexican football. The EC decision will lead to a situation where the relationship between a club and a player resembles any normal employer-employee relationship, instead of one where players are treated as assets. In order to keep a player for the team, the latter now has to come up with higher salaries for longer periods in order to outbid other interested teams.

Eventually, European football clubs will have less incentives to invest in new talents, as they cannot sell them anymore for large sums and because they can now more easily buy them from elsewhere.[15] On the other hand, a new equilibrium could be reached where the talents themselves are willing to pay to enter the training program of a famous club (for example, by accepting to sign exclusive contracts for long periods at low salaries), with the prospect of later recovering that investment by obtaining high salaries. Such a situation is similar, for example, to that of ambitious students willing to pay for entering a high reputation business school with the prospect of earning high salaries in the future. There is also some similarity with the artists case briefly described in the previous section: new artists have an incentive to pay the TV broadcaster (by accepting less favourable contract terms) in order to be promoted by the latter.

The rules of the draft

Let us now return to the draft system in Mexican football, which thrives on the exclusive property system and which, as noted before, does not improve the situation for the professional football players. The draft is the mechanism through which the professional football teams at the end of each season interchange the letters of property of the players who have been put on transfer. It should be noted that under this mechanism both amateur and experienced professional players are exchanged. This is in contrast with, for example, the drafts organised by most North American sports, where only new, amateur players are put "on sale". Thus, the draft in Mexico practically constitutes the market where all demand and supply of professional football players' services meet.

The teams fix the player's transfer value which, once registered in the draft list of the Federation, can be altered only by a Valuation Commission according to the draft rules. These rules establish maximum transfer values per category of player, except for the highest, so-called free category. For example, for players who have participated in more than 60 per cent of the matches during the last two seasons the maximum price in the 1996 draft was US$ 164 000. For players who have been active in more than 50 per cent it was US$ 99 000 etc. A selling team only has to accept an offer if it exceeds 75 per cent of the maximum price, so that this maximum price at the same time sets a minimum. The free category, where prices are higher than US$ 164 000, is applicable to players whose performance has been "outstanding". In this category only offers equal to or higher than the transfer value fixed by the team must be accepted.

The above mentioned maximum levels are actually not very high, so that a many transferable players fall into the free category, where no maximum is established. This reduces the influence of the price ranges established by the draft rules on actual transfer prices.

Anti-competitive effects

The draft mechanism and the exclusive property rights system have a number of negative effects on competition and efficiency. First, life-long duration makes the exclusive letter of property of a player more valuable, so that the prices of these letters tend to be higher than in situations with shorter-term exclusivity. This makes Mexican players especially expensive for clubs from countries where allowed exclusivity terms are shorter. These clubs must pay the Mexican team a premium for life-long exclusivity, but cannot claim the same exclusive right in their own country. The inflation of prices is further stimulated, paradoxically, by the maximum transfer values fixed by the draft, which, as shown above, in effect work as minimum values.

High prices evidently reduce the amount of players traded during the draft. The fact that in the 1994 draft only 103 out of 500 transferable players were actually traded indicates that prices for players are too high. Another indication is the fact that very few Mexican players are active in foreign, especially European, leagues, as compared with players from other Latin American countries[16]. Although difficult to prove, less mobility of players caused by excessive transfer prices might result in a suboptimal allocation of resources over teams and thus in an overall lower level of performance (and quality) in Mexican football as compared to other countries.

In table 2 an attempt is made to compare transfer prices in Mexico and abroad. The findings do not confirm the hypothesis that prices in Mexico are too high, although it should be noted that such a comparison is difficult because the players' services are not homogenous goods and because of lack of information. In the 1996 draft the highest-priced player was sold for US$ 1.54 million, and the average price for players of the free category was US$ 840 000. Higher price levels were set for ten players of the national team right after the 1994 World Championships, the highest transfer value being US$ five million and the average 2.3 million. These prices do not seem to be very high when compared to some player transfers in England between 1994 and 1996, which had an average value of approximately US$ four million (not considering transfers exceeding US$ six million). However, future comparisons with Europe probably will show relatively high prices for Mexico as it is expected that European transfer prices will reduce significantly due to the "Bosman ruling". Off course, a more extended comparative analysis is needed in order to reach more thorough conclusions. But it seems reasonable to assume that prices are higher in Mexico than they would be in the absence of the exclusive property rights system.

Second, the draft and property rights systems significantly increase the bargaining power of clubs over the players. The higher the transfer value a team sets for its player, the lower will be the demand for that player by other teams, so that the player is almost forced to accept the terms of contract imposed by his present club. I.e. higher transfer values lead to lower salaries, as the only remaining incentive of clubs for paying a high salary is to motivate a player to perform well, whereas the other main incentive, that of inducing a player to stay with the team, is minimised. The Federal Law of Labour establishes that a player is entitled to at least 25 percent of the value of his letter of property, but in practice this requirement is not respected. Furthermore, the draft rules state explicitly that in case a player refuses to sign with a team that wants to buy him and that complies with all the draft requirements, this player cannot be recontracted by his former team. Of course this rule diminishes a player's bargaining power in negotiating contract terms with the new team.

Possible action under the Federal Law of Economic Competition

The above described practices can be translated into the terms of Mexico's competition law. The exclusive letters of property of football players constitute a form of exclusive dealing, where the buyer (the team) forces the seller (the player) to provide his service exclusively to the former during his entire professional life. In this case the particular exclusive dealing rights can be traded, but without any say in it by the subject of that right, the player.

As described in the section on the broadcasting case, in Mexico exclusive dealing is considered a relative monopolistic practice under article 10(IV) of the FLEC, and has to be analysed under a rule of reason. The main criterion for this rule of reason is the existence of substantial market power. In the present case, the individual football teams do not have market power in the market for players' services. Although difficult to prove, one might establish that jointly the teams do have such power through the FMF. The Federation is responsible for creating the exclusive property rights system and, as noted before, it is precisely the first division teams who have influence in the body's policies.

The draft system might be interpreted as horizontal price fixing, prohibited per se under article 9 of the FLEC as an absolute monopolistic practice. However, in this case the FMF established the draft rules, and not the individual football teams. Therefore, if a case is made against the draft then it must be proven that the teams are in some way responsible for the Federation's policy. Under this interpretation, the teams, through the FMF, collude to fix maximum prices for players' letters of property which have the effect of minimum prices. By so raising the transfer prices of letters of property, the teams increase their monopsony power over the players, thus being able to impose lower salaries on the latter. However, as shown above, the effect of the maximum prices established by the draft rules is actually limited because they are relatively low, so that many players fall in the free category for which there are no maximum prices.

Table 1. **TV broadcasting rights and performance of first division teams of the Mexican Football League**
(average points) (1)

Location/Teams	1993-1994		1994-1995 (2)		1995-1996		1996-1997	
	Televisa	TV Azteca	Televisa	TV Azteca	Televisa	TV Azteca	Televisa	TV Azteca
Mexico City								
Necaxa	1.219	--	1.241	--	1.178	--	1.229	--
America	1.140	--	1.232	--	1.256	--	1.243	--
Cruz Azul	1.193	--	1.250	--	1.278	--	--	1.286
UNAM	--	1.105	--	1.098	--	1.078	--	1.114
Neza	--	--	--	--	--	0.878	--	0.986
Atlanta	1.167	--	1.036	--	0.967	--	0.843	--
Guadalajara City								
UAG (4)	--	--	1.232	--	1.211	--	1.086	--
Atlas	1.009	--	1.000	--	1.033	--	1.014	--
UdeG	0.754	--	CL	--	--	--	--	--
Guadalajara	--	1.061	1.143	--	1.244	--	1.200	--
Monterrey City								
Monterrey	--	1.035	--	1.018	--	0.933	1.014	--
UANL	--	0.991	0.875	--	0.811	--	R	--
Other cities								
Hidalgo	0.816	--	CL	--	--	--	--	--
UAT (5)	--	--	--	--	--	R	--	--
Querétaro (5)	--	--	R	--	--	--	--	--
Puebla	1.035	--	1.045	--	0.900	--	0.886	--
Toluca	1.018	--	0.946	--	0.967	--	0.786	--
Veracruz (4)	--	--	0.966	--	--	0.944	--	1.000
Santos	0.939	--	0.964	--	--	1.056	--	0.900
Morelia (5)	--	--	--	--	--	0.878	--	0.814
León	1.140	--	1.036	--	0.967	--	--	0.971
Tampico-Madero	--	--	--	--	--	R	--	--
Celaya	--	--	--	--	--	0.938	--	1.118
Pachuca	--	--	--	--	--	--	--	A
Average performance	**1.039**	**1.048**	**1.074**	**1.058**	**1.074**	**0.958**	**1.033**	**1.024**
Number of teams	**11**	**4**	**13**	**2**	**11**	**7**	**9**	**9**

(1) Average points = points earned/games played during the last three seasons.
(2) During the season 1994-1995, Televisa sold the broadcasting rights of some matches to pay-TV broadcaster Multivisión and TV Azteca.
(3) Points at the beginning of the season.
(4) In the season 1993-1994, these teams had contracts with pay-TV broadcaster Multivisión.
(5) In the seasons 1993-1994 and 1994-1995, some matches of these teams were transmitted by Televisa.
CL : Change of location.
R : Relegated to second division.
A : Ascended to first division.

Table 2. **Transfer prices of players in Mexico**

	Number of players	Average transfer value	Lowest value	Highest value
		(millions of dollars)		
National team players (1)	10	2.34	1.02	5.00
1995 draft (2)	7	0.61	0.53	0.64
1996 draft (2)	15	0.84	0.53	1.54
English football league (3)	14	4.02	1.84	5.75

(1) Prices charged for players right after the 1994 World Championships.
(2) Prices paid for a number of players of the free category.
(3) Transfer prices between 1994 and 1996, excluding transfers with a value exceeding US$ 6 million.

NOTES

1. It could be interesting to compare the first case with one in Spain of 1985 involving the Spanish Football Federation and two broadcasters. The players transfer case might have some interesting similarities with the recent "Bosman-ruling" of the European Commission.

2. In reference to contracts between program producers and broadcasters, an OECD report stated that "the way in which quasi-rents are divided between producer and network is unlikely, in and of itself, to have a substantial effect on economic efficiency or on upstream consumer surplus." (OECD, 1993, *Competition Policy and a Changing Broadcast Industry*, p. 136). Some football teams' presidents have stated to the press that the revenues of broadcasting rights represented a fixed income for them of around 25 to 40 percent of their total income (*El Financiero*, July 14th, 1996).

3. For the purpose of this paper, broadcasting does not include any type of pay-TV services.

4. *Televisa on line*, Home page, Internet.

5. See "Las empresas más importantes de México", *Expansión*, august 16th, 1995; and the intervention of Joaquín Vargas, owner of pay-TV company Multivisión, before Congress, described in *Proceso*, July 14th, 1996.

6. FCE, SHCP and SECOGEF, 1994, *Desincorporación de empresas estatales*, Mexico.

7. OECD, op. cit. 2, P. 67

8. For example, last June both Televisa (81 hours) and TV Azteca (70 hours) transmitted 1996 European Football Championship matches (*El Financiero*, June 23th, 1996).

9. Article 10(IV) of the FLEC defines exclusive dealing as a relative monopolistic practice. Article 11 states that for a relative monopolistic practice to be in violation of the Law, the presumed responsible party must have substantial market power in the relevant market.

10. It should be noted that until the 1994-1995 season not all teams signed exclusive contracts for a whole season, but rather sold transmission rights for single matches. Only as of the 1995-1996 season each of the 18 teams was contracted by one of the two broadcasters, as shown in table 1.

11. In other words, the role of the TV broadcaster as promotor of audience for football matches is limited. To attract audience, a team has to be either well performing or traditionally popular. Both characteristics are beyond the influence of broadcasters. The difficulty of promoting the popularity of a team is shown by the case of Necaxa. Owner Televisa put a lot of money in the team and in its promotion, resulting in two consecutive championships (1995 and 1996), but not in a significantly increased support.

12. For example, at the beginning of the 1995-1996 season, Televisa had 11 teams under contract and TV Azteca only seven, the latter being teams with a worse average performance (0.958 vs. 1.074, see table 1). Still, at the end of the season both broadcasters had four teams qualifying for the play offs quarter finals. Also in the subsequent semifinals and final, both broadcasters were equally represented.

13. An interesting difference between this case and the one in Spain of 1985 is that in the latter the national broadcaster signed a collective contract with the Spanish Football Federation which covered all the teams of the first division, making anticompetitive foreclosure more easy.

14. The OECD report (*op. cit*.. 2, p. 145) mentions this possibility of raising a rival's costs: "...a firm acquires exclusive use of the entire supply of low-cost or high-quality inputs, leaving rivals to rely on substitute inputs that are higher-cost or less productive."

15. This will especially affect teams such as Ajax from the Netherlands, who's football school is famous for producing many talents later sold to richer teams.

16. We believe that this difference cannot be wholly attributed to quality differences between Mexican and foreign players, but rather to excessive transfer sums asked for the former.

THE NETHERLANDS

At the beginning of this year, the Dutch football association Koninklijke Nederlansche Voetbal Bond (KNVB) sold the exclusive and collective television rights for the transmission of league matches and home games played by the Dutch national football team to a newly established sports channel for a seven-year period. This sports channel is a joint venture between a number of large Dutch concerns, in which the KNVB holds a 10 per cent participating interest. The rights agreement was notified by the parties involved to the European Commission in accordance with Article 85 of the EC Treaty.

One of the affiliated football clubs is objecting to the sale of these rights and has submitted a complaint to the Dutch cartel authorities. The club maintains that the sale of collective exclusive rights constitutes an illegal pricing agreement under Dutch competition law. Its reasons are as follows. The freedom to sell TV transmission rights belongs in principle to the club in whose stadium a match is being played (arena rights of the home club). As such, the clubs are entitled to set their own prices for these rights. By selling the collective TV transmission rights, the KNVB alone is fixing this price. This restricts the freedom of the clubs to set their own prices, in addition to depriving them of the freedom to sell their own rights. This constitutes an illegal price cartel.

The KNVB is challenging this view. It maintains that as the organiser of league matches, it has sole authority to sell the television broadcasting rights for league matches. The KNVB argues that it is the league as a whole that is the product being sold rather than the individual matches. The KNVB also maintains that without the league, club football matches would be of little value, and that the collective sale therefore serves a general interest. Moreover, since the profits of the sale of rights would be distributed equally between the clubs, this would allow the less wealthy clubs to hire good (and therefore expensive) players, which is vital for exciting and attractive league matches.

The civil law question of who precisely owns the TV transmission rights (the KNVB or the clubs) is currently being considered by a Dutch civil court. The answer to this question is likely to determine the outcome of the cartel investigation. If the KNVB is found to be the owner of the television broadcasting rights, it cannot be deemed to be restricting the freedom of the clubs to determine their own marketing behaviour. Consequently, there will be no question of a cartel. If, however, the rights are found to belong to the clubs, this would suggest the existence of an illegal price cartel with the KNVB operating as a central sales office. If this is the conclusion drawn, it will be necessary to decide whether it would be appropriate to grant the KNVB an exemption from the ban on cartels. It will also need to be determined whether the KNVB has abused its position of economic dominance, since the price which will be paid for the rights over the next few years is many times higher than the price paid in the period just ended. This can provisionally be explained by an increase in the number of TV channels wanting to broadcast football and a rise in demand for football on television.

A final question which must be addressed is whether the cartel investigation should distinguish between national league games and European Cup matches.

PORTUGAL

Introduction

Du point de vue de la Direction Générale de la Concurrence et des Prix (ci-après "la DGCep"), il semble n'exister aucune raison justifiant au regard de l'application des règles nationales de concurrence, un traitement exceptionnel des activités sportives, dans la mesure où d'une part, le régime général de protection de la concurrence établi par le décret-loi n° 371/93 du 29 octobre, est en principe applicable à toute activité économique et, d'autre part, seules les exceptions y prévues ou celles prévues dans des lois spéciales sont admises. Or tel n'est pas le cas en ce qui concerne les activités sportives.

Tant la pratique administrative de la Commission européenne -- qui a examiné plusieurs à plusieurs reprises des comportements d'entreprises et d'associations sportives à l'égard des articles 85 et 86 du traité CE et qui a établi un accord informel avec l'UEFA en 1992, -- que la jurisprudence de la Cour de Justice dans les arrêts *Walrave***,** du 1 décembre 1974 (affaire 36/74), et *Dona*, du 14 juillet 1976 (affaire 3/76) ont clairement considéré que le sport professionnel doit être qualifié d'activité économique au sens de l'article 2 du traité CE.

Plus récemment l'arrêt *Bosman*, du 15 décembre 1995, a confirmé que l'article 48 du traité de la CE, relatif à la libre circulation des travailleurs salariés, est aussi applicable aux règlements pris par des organisation sportives privées, l'interdiction de discrimination s'imposant dans l'ensemble des conditions de travail salarié et de prestations de service.

Les cas qui sont actuellement à l'étude au Portugal, de même que l'expérience des institutions communautaires en la matière, ne font que souligner le besoin de traiter le sport comme les autres activités économiques au regard de l'application des règles de la concurrence et d'intervenir de façon à empêcher les conduites restrictives.

Droits exclusifs de transmission télévisée

Au Portugal, cette question se pose surtout dans le domaine du football, qui constitue le sport le plus populaire entre tous. Les principaux intervenants dans ce secteur sont:

-- la Ligue portugaise du football professionnel (ci-après "la Ligue") qui vise à rassembler tous les clubs de football professionnel, et dont l'objectif est de promouvoir leurs intérêts communs et d'organiser et gérer les événements publics du football professionnel au niveau national (tels que le championnat national) ; et

-- la Fédération portugaise de football (ci-après "la Fédération") dont un des membres ordinaires est la Ligue qui a pour but de promouvoir, diriger et réglementer la pratique du football national, représenter ses membres auprès de l'administration publique, établir et maintenir des contacts avec ses membres et avec les associations similaires d'autres papys regroupées à la FIFA, assurer leur affiliation dans celles-ci et dans l'UEFA, représenter le football portugais

dans les enceintes nationales et internationales, organiser et appuyer la réalisation d'événements internationaux, et contrôler toutes les compétitions nationales.

Les contrats portant sur les droits de transmission télévisée des matches de football sont actuellement passés, dans leur quasi-totalité, entre la Ligue (qui représente ses membres) ou la Fédération, d'autres entités intermédiaires et les chaînes de télévision.

La Ligue détient depuis 1989, l'exclusivité de la commercialisation des droits de transmission des clubs-membres, en ce qui concerne l'enregistrement des matches de football qui doivent être télédiffusés ultérieurement, en totalité ou en partie cette exclusivité lui conférant dans la pratique un monopole de fait, vu que les clubs les plus importants sont membres de la Ligue.

Dans la mesure où les contrats ont une durée moyenne de trois à quatre ans et sont renouvelables pour des périodes identiques, la concession de droits exclusifs de transmission des matches de football a créé d'importantes carrières à l'entrée des nouveaux opérateurs de télévision dans ce marché.

L'interdiction de la transmission télévisée de quelques événements sportifs, demandée par certains au Portugal, en vue de la protection des recettes de stade, semble, à première vue, être peu importante, l'absence du public dans les stades n'étant pas nécessairement liée à la diffusion des matches à la télévision. Ceci est confirmé, d'ailleurs, par l'expérience récente dans d'autres pays -- comme l'Espagne, la France et l'Italie -- où les transmissions sportives sont plus fréquentes qu'au Portugal, sans que cela ait empêché la présence massive de public dans les stades. En tout état de cause, il apparaît que la diminution des "recettes de stade" pourrait être compensée par le paiement des droits de transmission aux clubs, aussi bien que par une réduction des frais d'organisation des matches.

Pratiques restrictives de la concurrence dans le football

En 1995, la DGCeP a ouvert une procédure contre la Ligue, *Olidesportos* -- une entreprise privée de publicité -- et *RTP* -- l'entreprise publique qui gère les deux chaînes de télévision publique au Portugal -- dont l'objet concerne les droits exclusifs de transmission télévisée des résumés des matches de football, à la suite d'une plainte déposée par une des deux chaînes privées de télévision, qui contestait l'exclusivité des contrats de commercialisation des droits d'enregistrement et de diffusion des images, signées entre les trois parties.

L'analyse développée par DGCeP l'a amenée à considérer que l'exclusivité accordée était de nature à empêcher l'accès d'autres opérateurs portugais de télévision au marché concerné, à savoir celui des droits d'enregistrement et de diffusion des images des matches de football.

La conduite des trois entités en cause a également été qualifiée par la DGCeP d'exploitation abusive d'une position dominante collective, de la part de la Ligue, de l'entreprise de publicité et de la RTP, en raison de l'imposition de conditions de commercialisation des droits de transmission des matches de football, du contrôle de la distribution dans le domaine de la diffusion télévisée de résumés des matches de football et du refus de cession de ces droits.

L'affaire dont l'instruction a été terminée en janvier 1996, attend encore une décision du Conseil de la concurrence.

Les contrats relatifs à la transmission directe et intégrale de matches de football disputés par les clubs de 1ère Division pour le championnat national, ainsi que des matches des clubs portugais dans le

cadre de la Coupe UEFA et de la Coupe des Coupes font actuellement l'objet d'un examen approfondi par les services de la DGCeP. Par ces contrats, les clubs cèdent leurs droits originels d'enregistrement et de transmission des matches joués sur leurs stades, soit directement à une chaîne de télévision (la RTP ou une des deux chaînes privées SIC et TVI), soit à des entreprises intermédiaires qui les cèdent par après à une chaîne de télévision.

Récemment, en juin 1996, la DGCeP a été saisie d'une plainte déposée par l'Union des associations de commerçants contre les clubs de football, concernant l'exclusivité accordée par certains clubs à des entreprises en vue de la fabrication et commercialisation de drapeaux et flammes, ce qui serait de nature, selon le plaignant, à entraver l'accès à ce marché. Ce cas est actuellement à l'étude.

SPAIN

Introduction

The increasing professionalisation of sports, together with the ever growing number of new TV channels, has produced an enormous increase in the price paid for the TV broadcasting rights of sport events, especially of those of football matches of the National League.

The Royal Spanish Federation of Football, on behalf of the clubs used to negotiate the sale of the broadcasting rights with the only existing channel, TVE. Nevertheless, the Spanish Administration, taking into account the changes that were taking place in the area of professional football, invited the football clubs to found an association which could take care of their common interests. It was in 1983 that the National League of Professional Football (LNFP) was established.

The Sports Law of 15 September 1990 supported the role played by this association which organised and grouped together the different professional clubs into various competitions and football leagues. In its transitory provision 3, the law establishes that the LNFP will receive and negotiate the economic revenues obtained from the broadcasting rights of the competitions organised by the LNFP or in collaboration with other club associations.

The Spanish Competition Authorities have dealt with several cases regarding exclusive TV broadcasting rights. The most complex case gathered together several dossiers and gave rise to the Resolution of 10 June 1993 of the Spanish Tribunal for the Protection of Competition (TDC) described below.

Description of the Case 319/92: Negotiation of the TV broadcasting rights of live football matches and summaries for news programmes.

In 1989 the LNFP decided to put out to tender the acquisition of the exclusive TV broadcasting rights of the matches of the 1st Division of the National Football League and the Cup of his Majesty the King. The contracts were granted for a period of time of five years to the company Promoción del Deporte which sold all the rights to the Regional Public Televisions of Cataluña, Valencia, Galicia, Madrid and the Basque Country.

These agreements took place only few days before the government authorised three new private television channels: Antena 3, Telecinco and the only existing coded television in Spain, Canal Plus. In July 1990 Canal Plus and the Regional Public televisions carried out a series of agreements to share out the broadcasting rights of the football matches for a period of eight years. These agreements prevented the access to the broadcasting rights to other private televisions, and established as well, a preferent right for the Regional Televisions and Canal Plus to acquire the broadcasting rights in the future.

The private channels which had been excluded from the agreements lodged each a complaint before the Service for the Protection of Competition (SDC).

Antena 3 considered the agreements to be against art. 1 of law 16/1989 for the Protection of Competition and art. 85 of the ECT. At the same time Antena 3 accused the LNFP and Promoción del Deporte of abuse of dominant position under art. 6 of Law 16/1989 and art. 6 of the ECT.

Telecinco accused the football clubs of 1st and 2nd Division, the LNFP, the Association of Regional Public Televisions (FORTA) and Canal Plus of prohibited conducts under art. 1.6 and 7 of Law 16/1989. In addition, Telecinco lodged its complaint before the Commission of the European Union for violation of art. 85 and 86 of the ECT. The Commission, applying the principle of subsidiarity, decided to file out the complaint due to the fact that the agreements affected primarily the Spanish market.

The Commission took into consideration as well, that the Spanish Competition Authorities had started proceedings in this case. In its reply the Commission stated that the agreements could violate art. 85 and that a single exemption did not seem to be possible because the contracts did not fulfil the conditions established under art. 85.3.

The SDC, after gathering together the various dossiers drew up the following objections, which were submitted to the TDC:

i) The LNFP had abused its dominant position under art. 6 of Law 16/1989. The renewal of the contract which took place in July 1990 extended the number of seasons for the broadcasting rights and increased the number of football matches to be broadcasted each season. This conduct prevented the existing and future private channels from broadcasting live matches and informative summaries until 1998.

ii) The contracts established between the LNFP, the Regional Public Televisions, Canal Plus and TVE (which also had subscribed a later agreement in 1991 with the Regional Televisions) violated art. 1.1 of Law 16/1989, due to the characteristics of these agreements:

-- World-wide exclusivity

-- Long-lasting validity

-- Comprehensive nature (excessive number of matches per season)

-- Restrictive clauses, such as the prohibition to grant rights to 3rd parties.

The TDC, in its Resolution of 10 June 1993 deemed that:

i) The LNFP had abused its dominant position in the market, under art. 6.2b) and 6.2c) of Law 16/1989, distorting competition in the television market by blocking the access to the football TV broadcasting rights for the new operators.

ii) The contracts signed by LNFP, the Regional Public Televisions, Canal Plus and TVE violated art. 1.1 of Law 16/1989 for being agreements of exclusive transfer of rights for a very long period of time and for a large number of football matches.

iii) The prohibited conducts should be abandoned at the end of the season 1993/94.

iv) The Regional Televisions had to allow access to the images of the summaries of the football matches to all the operators by means of payment.

v) To impose a fine amounting to pts. 147 500 000.

From the TDC's Resolution it is important to highlight the following points:

Relevant market

It was considered that the relevant market was that of the football television broadcasting rights for competitions of national interest, as well as for international competitions which attracted similar interest (matches played by the National Team, European Cup, Super Cup, etc.) in their different varieties: live broadcasts, recorded matches, summaries, football programmes, etc. It was also considered that the coded broadcast of football images did not constitute a separate market. The Spanish market was determined as geographic market, regardless a certain Community dimension, because of the limits established in the contracts for the overseas broadcasting of matches.

Abuse of dominant position

To determine whether the Football League had a dominant position in the market, the TDC studied the impact of the television broadcast of football images upon the audiences. The average audience was calculated as the number of television viewers (in thousands) who had watched the programme, multiplied by the number of minutes the programme had lasted. The study allowed to conclude, that the images corresponding to the Football League matches represented more than half the total impact of the football programmes. Since the market was not contestable due to the long-lasting exclusive contracts, which were, besides, reinforced with preferential rights of purchase and redemption for the Regional Public Televisions, the TDC found that the LNFP enjoyed a position of dominance which allowed to fix high prices and arbitrarily establish market conditions.

The League had abused its position by closing the term to present tenders for the broadcasting rights, before the Government had authorised private televisions. Furthermore, it was unnecessary at the time to do so, as the contracts had been extended for another season. The renewal of the contracts established an excessive length of time, and rights of purchase and redemption for the awardees, which prevented private televisions from having access to images of football matches of national interest.

Prohibited conducts under art. 1 of Law 16/1989

Although the TDC did not condemn the establishment of exclusive contracts *per se*, the agreements between the National League, the Regional Public Television, Canal Plus and TVE were found to be restrictive of competition due to their comprehensive nature (included all forms of broadcasting of the images), long duration and the privileged rights of purchase and redemption for the future contracts granted to the parties.

Other cases regarding TV broadcasting rights

The first case that took place in Spain was the agreement signed in 1983 by the TVE and the Royal Federation of Football by which TVE acquired the exclusive broadcasting rights of the football competitions.

The recently founded Basque Television lodged a complaint before the Service for the Protection of Competition. The TDC resolved that the agreement was a restrictive practice under Law 110/1963, in force at the time, because it prevented the regional TV from obtaining sports information to which it was entitled. The TDC also took into consideration that the agreement also hindered the participation of the Basque TV in the market of TV advertising.

Finally, in 1991 Telecinco lodged a complaint against the Royal Spanish Federation of Football for its refusal to authorise the broadcast of the finals of the Super Cup of 1990 between two Italian teams.

The TDC deemed that the Royal Federation of Football had abused its dominant position under article 6 of Law 16/1989. This case coincided with the inquiry carried out by the Commission of the European Union to study UEFA's statutes under art. 85 of the ECT. This circumstance influenced the TDC's resolution, which only considered the conduct of the Royal Federation of Football as contrary to art. 6 of Law 16 June 1989, without judging the conduct of the Federation within the frame of the UEFA's statutes.

Current situation

The TDC's Resolution of 10 June 1993 was never implemented, as it was appealed before the National Court, which suspended the resolution until a final decision by the Supreme Court is reached. In the meantime, a number of football clubs have decided to negotiate independently with the private TV channel, Antena 3[1]. This private television is also trying to reach an agreement with the Regional Televisions to broadcast the matches of the Spanish Football League. The new situation puts an end to the position of the National Football League to negotiate the broadcasting rights on behalf of all the clubs exclusively. At the same time, it would mean to break the exclusive contracts that had been signed in 1990 for a period of eight years.

Canal Plus has lodged a complaint against Antena 3 for unfair competition.

The conflict is open, as there is not unanimity among the Regional Televisions regarding the granting of TV broadcasting rights to the private channels.

The high level of audiences reached by the broadcast of football matches in Spain, the important revenues from advertising, and the high prices that the TV channels are prepared to pay to the football clubs, have provoked an open war among clubs, National Football League and the television channels.

Football and TV: Competition considerations

Defining the relevant market

The definition of the relevant market is undoubtedly one of the main difficulties we encounter, when trying to apply competition legislation to sports and TV exclusive broadcasting rights.

It is necessary to take into account the characteristics of the product: the existence of comparable substitutes, differentiation, price or quality. Equally important in defining a concrete market, it is the degree of indispensability of the product, the strategy of the companies involved, the perishable nature of the services, and the importance of its availability within a short period of time.

However, objective criteria are substituted for others much more subjective, when dealing with consumer goods. Thus, consumer's tastes play a key role in determining the demand of sports events.

When we analyse the existence of easily comparable substitutes, we could agree that we find a degree of eventual substitution between the broadcasting of a national football match and other forms of entertainment. Nevertheless, as the Tribunal for the Protection of Competition states in its Resolution of 10 June 1993, this can not lead us to consider all kinds of entertainment as an only market, because we are talking of very dissimilar products with different qualities, prices, etc.

In the same way, it is important to study to which extent different sports can be interchanged, and whether live broadcasting of sports competition produce similar responses in the public. Media studies show that this is not the case. In Spain, according to studies carried out by the Instituto de Medios y Audiencia, the percentage of the audiences watching sport events is distributed as follows: football matches 41 per cent, cycling 33.5 per cent, basketball 31.5 per cent, athletics 31.5 per cent, gymnastics 23.5 per cent and tennis 22.5 per cent. In all cases but for gymnastics, there is a much higher percentage of men interested in sports in TV than of women. The National Football League and UEFA international competitions obtain huge audiences, which follow the matches with a high degree of fidelity. Other sports do not arouse the same interest and we can conclude, therefore, that different sports do not compete with each other for the audiences.

Sports viewers do not behave in the same way and they are not the same segment of the public for every sport. The prices for broadcasting sports events vary accordingly and we can not, consequently, talk about homogenous products.

Looking at the problem of the relevant market from a different perspective, one could discuss whether the demand of TV sports events is, in fact, made up of the TV channels and not of the spectators.

In this last case, the relevant market, or at least one of them, would be that of advertising in TV, as the TDC declared in its Resolution of 1985. Inside the advertising market, one could find smaller submarkets, according to the type of viewers that follow an specific sport.

Collective bargaining and exclusive contracts

The National Professional Football League is entrusted by the Spanish Sports Law 10/1990 of 15 October 1990 with the task of negotiating, on behalf of the professional football clubs, the broadcasting rights of the matches of the National Football League. This collective bargaining of the TV broadcasting rights prevents competition among the football clubs. However, it is usually considered that professional football clubs, although functioning as economic operators, compete with each other in sports and not in an economic or commercial way.

The collective bargaining of the broadcasting rights has originated the proliferation of exclusive contracts with the different TV channels.

The TDC in its Resolution of 10 June 1993 states that the contracts granting exclusive TV broadcasting rights of the football matches are favourable for the consumer, for the TV industry and also for the development of competition. However, the TDC considers that these contracts should fulfil a number of requisites in order to prevent restrictions or distortion in the market:

i) It should exists the possibility of fair competition conditions for all the actual or eventual operators, when competing for the granting of the broadcasting rights.

ii) Distribution of the rights in different groups (video rights, informative summaries, live matches broadcasting, etc.).

iii) The contracts should be valid for a reasonable length of time, in relation to the programming needs and the repayment of non-recoverable investments.

iv) the contracts should not contain preferential contracting rights for the future, or for different rights than those stipulated in the contracts.

v) It should be granted the access to a minimum of images for all the operators, through reasonable payment if necessary.

Generally speaking, the TDC takes into consideration that the restrictions imposed should be indispensable for the well functioning of the system and that there should not be barriers of access to the market for the new operators.

Public versus private TV channels

Competition in the market of the TV broadcasting rights is greatly influenced by the different legal regulations affecting public television, regional television and private TV channels. The programming needs, the advertising conditions, and the different costs and financing systems produce unequal conditions for the development of free competition.

TVE, the public national TV, enjoys the advantages of preferential rights acquired through the collective negotiations carried out by the Eurovision group. The very system of Eurovision is under discussion, as the First Instance Tribunal of the European Union has just overruled the Decision of the Commission authorising the rules of admission into the Eurovision system by Court decision of 11 July 1996. The Tribunal consider that the rules for admission of new members into the European system are vague and discriminatory.

The Spanish Tribunal for the Protection of competition recognises the importance of the aims of public interest of the national and regional channels: the protection of the different languages of the country, the broadcasting of cultural events or the programmes addressed to minority audiences. The national and regional TV channels are financed by the state, by advertising and by bank loans obtained with the state guarantee.

This double financing system affects seriously competition among television channels, and it has been considered by the private TV channels as unfair competition.

The TDC in its Resolution of 10 June 1993 expressed its intention to submit to the government a proposal of revision of the regulations of the public television, in order to improve competition and prevent the distortion caused in the market by the double financing system.

The right to information

The right to information established by art. 20 of the Spanish Constitution has been invoked frequently to defend the right of TV channels to obtain images of sports events and to deny the validity of exclusive broadcasting contracts.

The Tribunal for the Protection of Competition, already in its Resolution of 30 December 1985, expressed its concern about the limitations to the right of information imposed by the exclusive broadcasting agreements.

However, two later sentences of the ordinary tribunals of 1992 and 1993 stated that the images of football matches were not part of the right to information. The right to information should only include the possibility to inform about what has happened in the matches and the final result. The images of the event would be, therefore, considered as part of the entertainment show.

The TDC in its Resolution of 10 June 1993 took into consideration, however, the economic importance of the football images and obliged the holders of exclusive broadcasting rights to permit access to the images to other TV channels, by means of a reasonable payment in order to offer summaries in their sports news programmes.

Nevertheless, the debate continues. The National Court, by Judicial Decree of 23rd of September 1996 has authorised the private TV channel Tele 5 to enter the football stadia to record matches of the Football League of 1st and 2nd division, as well as the matches of the National Team. This decree will be in force until the final decision of the Supreme Court takes place. The Judges argue that the images are indispensable part of the TV nature and that access to football stadia should be granted in order to fulfil the duties of information.

NOTE

1. This new situation is due to the fact that the football clubs have already completed a financial restructuring, becoming Public Limited Sport Companies. Therefore, the transitory provision 3 of the Sports Law of 15.10.1990 is no longer in force and the clibs can negotiate individuallythe broadcasting rights.

SUISSE

Droits de retransmission TV exclusifs

En Suisse, le droit de diffuser des émissions télévisées fait l'objet d'une concession accordée par le Conseil fédéral à la Société suisse de radiodiffusion et télévision (SSR) qui dispose ainsi d'un monopole étatique.

De par cette situation de monopole, la Suisse ne connaît pas le phénomène de la "guerre des chaînes" qui sévit dans certains pays pour l'attribution des droits de retransmission TV des événements sportifs. Le monopole étatique dont dispose la SSR ne la met toutefois pas à l'abri de la surenchère qui règne dans le commerce des droits TV en matière sportive. En tant que télévision publique, la SSR est en réalité durement touchée et a de plus en plus de peine à soutenir la concurrence avec les géants des télévisions privées. Si les négociations internationales sont toujours plus ardues, la situation se dégrade également sur le plan national. En effet, de plus en plus fréquemment, les clubs sportifs suisses de haut niveau cèdent leurs droits TV à des sociétés intermédiaires, qui elles-mêmes tentent ensuite de les revendre à la SSR. Le but de telle sociétés étant naturellement de rentabiliser leur investissement, les conditions qu'elles fixent à la SSR sont très restrictives, notamment sur le plan financier. Faute de disposer des moyens nécessaires, bien qu'elle ait ces dernières années doublé son budget sportif, la SSR se voit actuellement contrainte de renoncer à retransmettre certaines manifestations sportives d'envergure. L'exemple le plus récent est celui des Coupes d'Europe de football: alors que quatre clubs suisses étaient engagés, seuls les matchs disputés par deux d'entre eux ont pu être retransmis. Plus préoccupant encore, l'appât financier offert par les magnats étrangers de l'audiovisuel tente maintenant les fédérations et associations sportives suisses. Ainsi, toujours en matière de football, la Ligue nationale suisse envisagerait éventuellement de ne pas reconduire le contrat par lequel elle a cédé ses droits TV à la SSR et de vendre ceux-ci à une firme étrangère plus offrante qui lui proposerait ses droits TV à la SSR et de vendre ceux-ci à une firme étrangère plus offrante qui lui proposerait en effet plus du double que ce que la SSR lui verse actuellement. Cela pourrait avoir pour conséquence que les téléspectateurs suisses seraient contraints de suivre le championnat suisse de football sur une chaîne étrangère...

Outre le problème politique qu'implique ce genre de situation, il faut également se poser la question de la position dominante des sociétés intermédiaires concurrentes de la SSR. Les parts de marché qu'elles détiennent (ainsi, bon nombre de clubs de football suisses de ligue nationale A ont cédé leurs droits TV à la même société étrangère), leur puissance financière, leur position à l'égard de la SSR lors de la signature des contrats de production (prix très élevés et exponentiels, négociation des droits TV en bloc, etc...) semblent autant d'indices de domination du marché, voire de pratiques abusives.

Bien que ces questions soient préoccupantes, elles n'ont à ce jour fait l'objet d'aucune plainte auprès de la Commission fédérale des cartels ou de la Commission fédérale de la concurrence qui lui a officiellement succédé le 1er juillet 1996. Aucune procédure n'a par ailleurs été ouverte d'office. Ceci peut s'expliquer par le caractère relativement nouveau du phénomène à l'échelon suisse et également par le fait que la plupart des sociétés intermédiaires concurrentes de la SSR sont domiciliées à l'étranger.

Sport et publicité

Une enquête a été ouverte en 1992 par l'ancienne Commission des cartels au sujet du cas suivant:

Le seul magazine suisse de tennis de dimension nationale boycottait depuis de nombreuses années les annonces publicitaires provenant de discounters et de grands distributeurs. Cette attitude trouvait sa raison dans la menace du représentant général en Suisse de certaines marques d'articles de tennis de retirer sa publicité et d'inciter d'autres fabricants et importateurs à faire de même si le magazine en question acceptait de publier les annonces d'entreprises pratiquant une politique de bas prix.

Un des magasins de sport exclus a déposé une plainte auprès du Secrétariat de la Commission.

La Commission a estimé que le magazine pouvait être assimilé à une "organisation analogue à un cartel" (cf. article 4 de l'ancienne loi sur les cartels), vu sa position d'entreprise unique dominant l'offre sur le marché suisse des espaces publicitaires dans la presse spécialisée du tennis. Considérant cette position dominante et le fait que, dans la presse spécialisée du tennis. Considérant cette position dominante et le fait que, dans le cas d'espèce, le plaignant ne disposait d'aucun autre moyen publicitaire aussi percutant que la réclame par voie d'annonces, la Commission a jugé que le boycott qui lui avait été soumis portait une atteinte notable à la concurrence. Dans son examen des conséquences économiques et sociales de cette restriction, la Commission a conclu qu'elle n'avait pas de justification suffisante et était globalement nuisible. La Commission n'ayant à l'époque aucun pouvoir de décision, elle s'est bornée à recommander au magazine d'accepter les annonces de toutes les entreprises de la branche du tennis, y compris celles pratiquant des prix bas, dont le plaignant (cf. Publications de la Commission suisse des cartels et du préposé à la surveillance des prix (Publ. CCSPr, vol. 4/1993, p. 153ss).

Matériel sportif officiel : contrats d'exclusivité et marques imposées

Les contrats d'exclusivité passés avec des producteurs ou des importateurs de matériel sportif par certaines associations sportives et les pratiques de celles-ci tendant à imposer une ou plusieurs marques lors de compétitions officielles ont donné lieu à un certain nombre d'enquêtes de la Commission des cartels. Le problème étant loin d'être résolu et resurgissant périodiquement, la Commission de la concurrence a décidé de lui donner une solution globale en établissant une communication définissant les règles de comportement à adopter par les associations sportives suisses dans leurs accords et règlements sur le matériel sportif officiel. Cette communication est en cours d'élaboration et constitue pour la Commission le thème de priorité dans le domaine du sport.

Les cas qui ont été soumis à la Commission des cartels présentent de nombreuses similitudes, le présent rapport n'exposera que deux d'entre eux, soit celui du hockey sur glace et celui du volley-ball.

Le hockey sur glace

La Ligue suisse de hockey sur glace (LSHG) a conclu en 1985 un contrat de fourniture de cannes avec une association regroupant des entreprises actives dans le domaine de l'importation d'équipements de hockey sur glace (ci-après "le pool").

Par ce contrat, la LSHG s'engageait à ce que, durant le championnat suisse, les joueurs licenciés utiliseraient exclusivement des cannes fournies par un des membres du pool. Afin d'assurer le respect de

cet engagement, la LSHG édictait au début de chaque saison à l'attention des clubs un règlement qui indiquait quelles marques provenant de quels importateurs étaient autorisées lors des matchs officiels. En contrepartie de cette garantie d'exclusivité, le pool s'obligeait à verser chaque année une somme substantielle à la LSHG.

-- Le pool était régi par les règles suivantes :

-- chaque nouveau membre devait s'acquitter d'une finance d'admission ;

-- la redevance versée à la LSHG était répartie entre les membres au prorata des cannes vendues ;

-- les nouveaux venus n'étaient pas autorités à importer des marques de cannes déjà représentées par un membre, ce qui signifiait donc une interdiction d'importations parallèles ;

-- il était imposé aux nouveaux venus un délai d'attente de trois ans pour pouvoir fournir en cannes les clubs des deux ligues supérieures.

Suite à la plainte d'un importateur non-membre du pool, une enquête préalable puis une enquête ont été ouvertes en 1992-1993 par la Commission des cartels. Durant l'instruction de l'enquête, la LSHG a décidé de mettre fin avec effet immédiat au contrat qu'elle avait passé avec le pool. L'enquête étant devenue sans objet, elle a été close. Les principales constatations auxquelles elle avait mené la Commission étaient les suivantes :

-- du fait du contrat d'exclusivité passé par la LSGH, l'accès au marché concerné était pratiquement fermé aux non-membres du pool. La seule solution pour ceux-ci était d'entrer dans le pool et d'en accepter les conditions d'admission restrictives ;

-- l'interdiction des importations parallèles avait pour effet de limiter de façon notable la concurrence à l'intérieur du pool et de créer un partage du marché.

Vu la suppression du contrat de pool, la Commission a renoncé à mettre en balance ses effets utiles et nuisibles. Elle s'est bornée à relever que, si le soutien financier qu'il procurait à la LSHG aurait sans doute été considéré comme un élément positif, le délai d'attente qu'il imposait aux nouveaux membres et l'interdiction des importations parallèles suffisaient à le rendre inadmissible du point de vue de la loi sur les cartels. Le contrat de pool n'aurait donc pu subsister que moyennant la suppression de ces deux conditions (cg. Publ. CCSPr4/1993, p. 127ss).

Le Volley-ball

L'Association suisse de volley-ball (SVBV) avait passé avec un importateur un accord selon lequel, durant les saisons 1992/1993 à 1996/1997, il serait le fournisseur exclusif de la seule marque de balle autorisée durant le championnat suisse et les matchs joués en Suisse par l'équipe nationale. En contrepartie de cette garantie d'exclusivité, l'importer en question s'engageait à verser chaque année à la SVBV une certaine somme et à fournir des prestations en nature, dont des balles gratuites à l'équipe nationale.

Saisi d'une plainte déposée par un importateur évincé, le Secrétariat de la Commission des cartels a ouvert en 1995 une enquête préalable tendant à déterminer l'admissibilité du point de vue cartellaire du contrat d'exclusivité conclu par la SVBV.

Cette enquête préalable a notamment conduit le Secrétariat aux constatations suivantes:

-- le marché déterminant en l'espèce était celui des compétitions officielles,. Il comporte les segments suivants: matchs officiels; matchs amicaux; tournois non officiels; entraînement en équipe, entraînement et usage privés ;

-- du fait du contrat d'exclusivité passé par la SVBV, le segment "matchs officiels" du marché des compétitions officielles était totalement fermé aux autres importateurs de balles ;

-- le volley-ball est un sport où la texture et la conception de la balle jouent un rôle déterminant. Il est donc indispensable pour la qualité du jeu et d'un point de vue psychologique que les balles utilisées lors de compétitions présentante les mêmes caractéristiques que celles avec lesquelles les joueurs se sont entraînés. Pour cette raison, les équipes de volley-ball achètent en principe uniquement la marque de balle avec laquelle elles joueront lors des matches officiels. Par exemple, cette marque est également celle utilisée durant les tournois non officiels et les matchs amicaux. Cette même marque, familière aux joueurs, est enfin celle qu'achètent ceux-ci pour leu usage et leur entraînement privés.

Dès lors qu'en l'espèce, une seule marque était autorisée lors des matchs officiels, la concurrence était limitée de façon très importante dans les autres segments du marché des compétitions officielles.

Le Secrétariat en a tiré la conclusion que l'importateur exclusif de cette balle unique occupait une position dominante sur le marché des compétitions officielles et qu'il devait donc être considéré comme une "organisation analogue à un cartel" (cf. article 4 alinea 1 de l'ancienne loi sur les cartels). Pour le Secrétariat, cette position dominante trouvait manifestement son origine dans le monopole de fait exercé par la SVBVC, qui est en effet seule chargée d'organiser le championnat suisse et les matchs joués en Suisse par l'équipe nationale. De ce fait, elle a tous les pouvoirs pour reconnaître une seule marque de balle comme officielle et pour choisir un fournisseur exclusif.

Quant à l'argument de la promotion financière qui était invoqué par la SVBV, il a été réfuté par le Secrétariat. De l'avis de celui-ci, la limitation de la concurrence qui résultait du contrat d'exclusivité était disproportionnée par rapport au but recherché. En effet, la SVBV aurait aussi bien pu parvenir au même résultat financier en concluant plusieurs contrats de sponsoring ou en augmentant les cotisations versées par ses membres.

Bien que le Secrétariat soit arrivé à la conclusion que le contrat d'exclusivité conclu par le SVBV laissait entrevoir de sérieux indices d'une restriction illicite à la concurrence, il a renoncé à faire suivre son enquête préalable d'une enquête, préférant régler ce cas par le biais des règles de comportement générales qui trouveront leur place dans la communication qu'il est en train d'établir.
(cf. Publ. CCSPr 1a/1996, p. 124-125)

Pour conclure ce thème sur une note typiquement suisse, il convient de citer un cas de contrat d'exclusivité dont la nouvelle Commission de la concurrence vient de prendre connaissance. Ce cas concerner le "hormuss", sport folklorique helvétique apparenté au base-ball qui, en résumé, consiste pour une équipe à frapper une petite balle de la forme d'une noix "Nouss" et pour l'autre équipe à réceptionner le plus rapidement possible avec de grands panneaux de bois. Alors qu'une entreprise aurait mis au point

un modèle de “Nouss” révolutionnaire par sa stabilité et sa solidité (et donc plus économique), enthousiasmant apparemment les joueurs et les clubs, l’accès au marché des matchs officiels lui est totalement fermé pour le motif que l’Association suisse de hormuss a conclu depuis de nombreuses années un contrat d’exclusivité avec un fabricant.

Restrictions à la liberté de circulation des joueurs

La nouvelle loi fédérale sur les cartels et autres restrictions à la concurrence (Lcart) s’applique aux entreprises, à savoir à tout acteur qui produit des biens ou des services et participe ainsi de manière indépendante au processus économique, que ce soit du côté de l’offre ou de la demande (cf. Message du Conseil fédéral suisse concernant la Lcart, p. 63, n° 222.1). vu son acceptation économique, le terme entreprise implique que la Lcart n’est pas applicable aux accords qui concernent exclusivement des rapports de travail. Cela signifie que le statut des joueurs professionnels et semi-professionnels dont les revenus sont supérieurs aux frais n’est pas soumis à la Lcart et que la Commission de la concurrence ne peut être saisie des restrictions qui peuvent l’affecter pour mener une enquête préalable puis éventuellement une enquête. Les engagements des joueurs professionnels et semi-professionnels sont donc exclusivement régis par les règles du droit privé et les litiges auxquels ils peuvent donner lieu seront soumis au juge civil.

Dans la mesure où ils sont soumis aux règles ordinaires, les contrats de travail des joueurs professionnels et semi-professionnels ne sont valables que s’ils respectent les principes généraux du droit suisse. La limitation la plus importante est déduite de l’article 19, alinea 2 du Code des obligations (CO) et de l’article 27 alinea 2 du Code civil (CC), en vertu desquels les engagements qui portent une atteinte excessive à la liberté personnelle et reviennent à livrer une partie à l’arbitraire illimité de l’autre sont nuls, car contraires aux bonnes moeurs.

Selon la jurisprudence du Tribunal fédéral suisse, la liberté personnelle protégée par l’article 27, alinea 2CC comprend la liberté économique, savoir celle d’exercer une activité permettant de gagner sa vie. Un aspect de cette liberté est le droit des joueurs de pratiquer un sport et de participer à des compétitions afin d’en tirer des revenus. Dans un arrêt fameux, le Tribunal fédéral a jugé que restreignait de manière inadmissible le droit d’un joueur de football d’exercer librement son activité le fait de lui refuser la “lettre de sortie” lui permettant d’obtenir son transfert dans un autre club que celui auquel il appartient. Les dispositions réglementaires de la Ligue nationale suisse de football relatives à l’exigence de la “lettre de sortie” on donc été déclarées inopposables au joueur en question et les clauses de son contrat de travail les contenant absolument nulles car immorales. Selon le Tribunal fédéral, cette conclusion s’imposait également si l’on considérait que le fait d’évincer ainsi un joueur de la compétition au niveau national correspondait à un *boycott d’assujettissement* dont les conditions de licéité n’étaient ne l’espèce pas remplies (affaire Perroud, publiée dans AFT 102 II 21ss.). Il est intéressant de relever que, suite à cette jurisprudence, la Ligue nationale a revu son Règlement de qualification et a supprimé le système de la “lettre de sortie”, laquelle ne peut désormais être exigée que pour les joueurs venant d’une fédération étrangère.

UNITED KINGDOM

Introduction and background

This paper provides a synopsis of the Office of Fair Trading's approach under the Restrictive Trade Practices Act 1976 (RTPA) to agreements between sports bodies and broadcasters, for the televising of sporting events.

This is a complex, but interesting, field. Also interesting is that our perceptions of sports broadcasting agreements have changed radically in the past 2-3 years. Following the revision of the RTPA in 1976, when services agreements were brought within its scope, we regarded the effects of such agreements as insignificant. Sports broadcasts were merely another form of TV entertainment substitutable with any other programme. One or other of the terrestrial broadcasters - the BBC or independent television - would purchase the rights for apparently reasonable sums of money. Indeed, in one particular year, when the UK Football Association raised the contract price, both broadcasters boycotted football: such was the importance of football to broadcasters at that time.

However, our perceptions changed with the advent and expansion of satellite pay TV, with dedicated sports channels. These developments created:

-- outlets with the capacity for a greater concentration of sport;
-- a greater demand from broadcasters for sports programmes;
-- increasingly marketable sporting events; and
-- the potential for a monopolistic sports broadcaster.

In parallel with this broadcasting revolution came the realisation by sports bodies and event organisers that they now had a very marketable product for which there was substantial demand and which could command substantial sums. In short, they now had market power. They had observed developments in Australia and elsewhere and recognised the possibility of realising their commercial potential. In the case of football in England, the Football Association Premier League Ltd was founded principally to "cash in" on this potential.

In the light of these developments and on the receipt of new agreements which reflected these innovative developments, we had to reconsider our assessment of such agreements under the RTPA. Clearly, sports programming was no longer just another form of entertainment. A distinct market for sport had emerged - and indeed, even niche markets within it. On reflection, the situation seemed obvious - multi-channel technology now meant television was not just a medium for general entertainment, but dedicated channels representing individual markets - for sports, movies, children's programmes, home shopping, etc.

Criteria for assessing significance

Having identified that certain sports may constitute a separate and distinct market given the facilities afforded by broadcasters, it therefore had to be decided which of these wielded market power and whether the registrable agreements to which they were a party could be regarded as significant in competition terms. The agreements requiring consideration covered football (both Premier League and other divisions of the Football League), rugby (both Rugby Union and Rugby League), horse racing, cricket and athletics.

As an aid to deciding which broadcasting agreements for particular sports or events could be regarded as significant, we formulated a set of criteria (shown at Annex A), against which each agreement could be judged on significance. If the restrictions in any agreement are considered to be insignificant, the agreement can be dealt with administratively; otherwise the Director General of Fair Trading must refer it to the Restrictive Practices Court.

In many ways, the test lies in the degree of popularity which a particular sport commands and whether there are other sports which viewers regard as acceptable substitutes. Also, a live transmission is of greater value than recorded highlights (where the result can be known). At one extreme is horse racing: although popular and with few, if any substitutes, there is a substantial choice of events for prospective broadcaster - 59 UK racecourses, 22 of which regularly host top class meetings. At the other extreme is Premier League football. It is the most popular and sought-after sport, featuring top grade English football which is unique and for which there is no substitute and which viewers wish to see live. In between are rugby (Union and League), cricket and athletics. Although we have no current agreements, we will also consider the position of golf.

It is these "intermediate" sports (rugby, cricket etc.) which cause the problem. There are as many assessments of relative popularity as there are opinions. We are therefore in the process of establishing a method by which we can identify the level of popularity of a sport and then decide if broadcasting agreements associated with it, or the selling arrangements for its rights, represent a level of significance to warrant a referral to the Restrictive Practices Court. We have identified certain indicators of popularity. At Annex B is an analysis of the percentage space dedicated to particular sports in the main UK national newspapers during one week in 1994. While we make no claims for their statistical reliability, the results are interesting and we intend to repeat this exercise over a longer period. Other analyses indicating the popularity of various sports are attached at Annexes C to F for information. Although we are continuing our consideration, we have firmly concluded that top quality English football, as represented by the Premier League, is unique and constitutes a materially important and specific niche market in which the Premier League is the dominant (and really only) supplier of this product.

Premier League/BSkyB/BBC arrangement

We concluded that this agreement satisfied all our criteria in respect of a significant agreement which required examination by the Restrictive Practices Court. It would then be for the Court to decide whether the restrictions operated against the public interest, in which case a court order would be likely to be made against the parties to the agreement.

An arrangement was concluded in 1992 for five years allowing BSkyB to televise, live, 60 (from a choice of 380) Premier League Championship football matches and to show highlights from the remainder, while the BBC could show recorded highlights from any of the 380 games. The contract was worth £214 million. This compares with previous contracts for £72m and £22m. We identified two

restrictions which we considered to be significant; firstly, not to supply any games to other broadcasters and secondly, on renewal of the contract, BSkyB and the BBC would be allowed to match any competing bid for the new rights. We were also unhappy that the agreement was for as long a period as five years.

This arrangement had been furnished to DGIV of the Commission who took the view that the renewal clause was contrary to Article 85(1) in frustrating entry into the market.

But we felt the broadcasting arrangement could not be considered in isolation, since the core to the exclusivity lay in the role of the Premier League. The rules of the League enable it to sell the broadcasting rights of its constituent clubs collectively, which represents a further restrictive provision. We concluded therefore that the rules of the Premier League required to be considered by the Court together with the broadcasting arrangement.

The current position of the Office of Fair Trading is that the Court should strike down the restrictions because:

a) in selling the rights collectively the Premier League is acting as a cartel;
b) striking down the restrictions will force clubs to conclude separate agreements with broadcasters;
c) this will create competition in the supply of programme material;
d) charges to broadcasters will fall;
e) subscriptions for pay TV will fall (subscriptions have risen 50 per cent in two years);
f) pay TV will be more readily available to consumers; and
g) innovation by clubs and broadcasters will be facilitated.

The parties argued that:

a) the broadcasting of football is not a separate market;
b) any change will create logistical problems - fixtures, dates, etc.;
c) broadcasting on different channels would cause confusion - the fans want the whole championship on one channel;
d) more broadcasting will adversely affect attendances; and
e) the revenue raised by the sale of the rights is put to various good uses, including assistance to the poorer clubs, improvements to stadia, and support for the game at grass roots level. This is a controversial case.

Many opinions, for and against, have been expressed:

a) 170 unsolicited letters were received in support of our action:
b) during the House of Lords debate on the Broadcasting Bill, much concern was expressed on the subject of the broadcasting of sport, and particularly on the dominant position being built up by BSkyB;
c) During the House of Commons debate on the Bill, one MP moved a motion to disapply sports broadcasting agreements from the RTPA - but later withdrew it;
d) the press has been very interested, but overall has not taken sides.

The case is now before the Restrictive Practices Court; there has been one hearing to settle legal points and there is another in October. When the parties concluded, in June, a further agreement for the seasons 1997/98 to 2000/01 for £743m, we considered seeking interim relief (a more difficult procedure)

and decided against. The parties are required to produce their statement of case by 1 December, and a full hearing is likely to be held in the autumn of 1997.

Conclusion

There is a long way to go before the Premier League case is decided or before it is decided which other sports agreements should be considered by the Court. This is an important case which has ramifications for other sports and broadcasting companies - and they are very aware of this.

A similar case is being pursued by the BKA in Germany and we have received enquiries on the case from Italy, Spain, the Netherlands and Denmark. DGIV is also considering a similar case in the Netherlands.

Some of the larger Premier League clubs are showing signs that they may wish to sell their broadcasting rights separately. If there is a "break-away" the future of collective selling is in question.

UNITED STATES

In the United States, the treatment of sports league practices in antitrust cases can best be understood by focusing on two key questions: the court's view of the nature of the league (e.g., group of competitors, joint venture, single entity); and whether the league's conduct at issue is in some manner exempt from or beyond the scope of the antitrust laws.

When the conduct of a sports league is challenged -- assuming no antitrust exemption applies -- the court must determine what antitrust standard to apply. Generally, courts have recognised that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival" (*Brown v. Pro Football, Inc.*, 116 S.Ct. 2116, 2126 (1996)[1], *quoting National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 US 85, 101-102 (1984), and have rejected *per se* treatment of league practices. Most courts have evaluated sports league conduct under section 1 of the Sherman Act, using the rule of reason to evaluate the impact of the conduct on competition. In essence, these courts have viewed a league as a joint venture. Alternatively, some have suggested that a sports league should be viewed as a partnership or single entity that competes as a unit against other forms of entertainment. *See generally, Chicago Professional Sports Limited Partnership v. National Basketball Association*, 95 F.3d 593 (7th Cir. 1996)[2] ("Chicago Bulls case"). Because Section 1 of the Sherman Act requires concerted action, viewing a league as a single entity would effectively remove league conduct from Section 1 scrutiny, leaving such conduct subject only to Section 2 prohibitions on monopolisation and attempts to monopolise.

As the law has developed, some sports league conduct has been exempted from the antitrust laws for a variety of reasons. The Sports Broadcasting Act of 1961 (15 U.S.C. sec. 1291) exempts certain agreements by which leagues sell the rights to the sponsored telecasting of league games. There has been some litigation, such as the Chicago Bulls case, involving the scope of that exemption. League television agreements that are not exempted by the Sports Broadcasting Act are not necessarily antitrust violations, but are merely subject to antitrust challenge. Another instance in which Congress legislated an antitrust exemption is the 1966 legislation that exempted the merger of the two competing professional football leagues that existed at the time.

Beyond these statutory exemptions, the Supreme Court has generally (not just in the sports context) found in the labour laws an implicit, nonstatutory antitrust exemption that applies where needed to make the collective bargaining process work. The effect of the "nonstatutory labour exemption" is that a collective bargaining relationship between a league and its players' union protects the league from players' antitrust challenge. The scope of this exemption in the context of a labor dispute was at issue in the Supreme Court's recent *Brown* decision. Finally, baseball is alone among professional sports in enjoying a special exemption from the antitrust law that was created by a 1922 Supreme Court decision that baseball was not "trade or commerce." While the Supreme Court has since recognised that professional baseball is a business engaged in interstate commerce and the exemption has become "an aberration", the Court has refused to strip away the exemption on the grounds that Congress has allowed the exemption to stand.

One issue that has come up in the United States that is not noted in the Secretariat's August 30 "Preliminary list of issues" involves whether league restrictions on franchise relocation (the owner of a

team wants to move the team from city A to city B) may violate the antitrust laws. While there are only a handful of cases on point, leagues have in some instances stated that they did not act to block reallocations because of fear of antitrust litigation.

NOTES

1. See annexes I, II, III. The text of the relevant decision is downloaded from Internet (http://supct.law.Cornell.edu/supct/)

2. See annex IV. The text of the relevant decision is downloaded from Internet (www.law.emory.edu/FEDCTS).

Annexe I

Syllabus

BROWN, ET AL. *v.* PRO FOOTBALL, INC., DBA WASHINGTON REDSKINS, ET AL.

Certiorari to the United States court of Appeals for the District of Columbia Circuit

No. 95–388. Argued March 27, 1996—Decided June 20, 1996

After their collective-bargaining agreement expired, the National Football League (NFL), a group of football clubs, and the NFL Players Association, a labor union, began to negotiate a new contract. The NFL presented a plan that would permit each club to establish a "developmental squad" of substitute players, each of whom would be paid the same $1,000 weekly salary. The union disagreed, insisting that individual squad members should be free to negotiate their own salaries. When negotiations reached an impasse, the NFL unilaterally implemented the plan. A number of squad players brought this antitrust suit, claiming that the employers' agreement to pay them $1,000 per week restrained trade in violation of the Sherman Act. The District Court entered judgment for the players on a jury treble-damages award, but the Court of Appeals reversed, holding that the owners were immune from antitrust liability under the federal labor laws. *Held:* Federal labor laws shield from antitrust attack an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer. Pp. 3–18.

(a) This Court has previously found in the labor laws an implicit, "nonstatutory" antitrust exemption that applies where needed to make the collective-bargaining process work. See, *e.g., Connell Constr. Co.* v. *Plumbers,* 421 U. S. 616, 622. The practice here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining—is unobjectionable as a matter of labor law and policy, and, indeed, plays a significant role in the multiemployer collective-bargaining process that itself comprises an important part of the Nation's industrial relations system. Subjecting it to antitrust law would threaten to introduce instability and uncertainty into the collective-bargaining process, for antitrust often forbids or discourages the kinds of joint discussions and behavior that collective bargaining invites or requires. Moreover, if antitrust courts tried to evaluate particular kinds of employer understandings, there would be created a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert body, the National Labor Relations Board, to which the labor laws give primary responsibility for policing collective bargaining. Thus, the implicit exemption applies in this case. Pp. 3–10.

(b) Petitioners' claim that the exemption applies only to labor-management *agreements* is rejected, since it is based on inapposite authority, and an exemption limited by petitioners' labor-management-consent principle could not work. Pp. 10–12.

(c) Also rejected is the Solicitor General's argument that the exemption should terminate at the point of impasse. His rationale, that employers are thereafter free as a matter of labor law to

negotiate individual arrangements on an interim basis with the union, is not completely accurate. More importantly, the simple "impasse" line would not solve the basic problem that labor law permits employers, after impasse, to engage in considerable joint behavior, while uniform employer conduct—at least when accompanied by discussion—invites antitrust attack. Pp. 12–15.

(d) Petitioners' alternative rule, which would exempt from antitrust's reach postimpasse agreements about bargaining "tactics," but not those about substantive "terms," is unsatisfactory because it would require antitrust courts, insulated from the bargaining process, to delve into the amorphous subject of employers' subjective motives in order to determine whether the exemption applied. Pp. 15–16.

(e) Petitioners' arguments relating to general ``backdrop'' statutes and the ``special'' nature of professional sports are also rejected. Pp. 16–18.

(f) The antitrust exemption applies to the employer conduct at issue here, which took place during and immediately after a collective-bargaining negotiation; grew out of, and was a directly related to, the lawful operation of the bargaining process; involved a matter that the parties were required to negotiate collectively; and concerned only the parties to the collective-bargaining relationship. The Court's holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an employer agreement could be sufficiently distant in time and in circumstances from the bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. The Court need not decide in this case whether, or where, to draw the line, particularly since it does not have the detailed views of the Board on the matter. Pp. 18–19. 50 F. 3d 1041, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion.

Annexe II

ANTONY BROWN, ET AL., PETITIONERS *v.* PRO FOOTBALL, INC., DBA WASHINGTON RED-SKINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 20, 1996]

JUSTICE BREYER delivered the opinion of the Court.

The question in this case arises at the intersection of the Nation's labor and antitrust laws. A group of professional football players brought this antitrust suit against football club owners. The club owners had bargained with the players' union over a wage issue until they reached impasse. The owners then had agreed among themselves (but not with the union) to implement the terms of their own last best bargaining offer. The question before us is whether federal labor laws shield such an agreement from antitrust attack. We believe that they do. This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collectivebargaining process work. Like the Court of Appeals, we conclude that this need makes the exemption applicable in this case.

I.

We can state the relevant facts briefly. In 1987, a collective-bargaining agreement between the National Football League (NFL), a group of football clubs, and the NFL Players Association, a labor union, expired. The NFL and the Players Association began to negotiate a new contract. In March 1989, during the negotiations, the NFL adopted Resolution G-2, a plan that would permit each club to establish a "developmental squad" of up to six rookie or "first-year" players who, as free agents, had failed to secure a position on a regular player roster. See App. 42. Squad members would play in practice games and sometimes in regular games as substitutes for injured players. Resolution G-2 provided that the club owners would pay all squad members the same weekly salary.

The next month, April, the NFL presented the developmental squad plan to the Players Association. The NFL proposed a squad player salary of $1,000 per week. The Players Association disagreed. It insisted that the club owners give developmental squad players benefits and protections similar to those provided regular players, and that they leave individual squad members free to negotiate their own salaries.

Two months later, in June, negotiations on the issue of developmental squad salaries reached an impasse. The NFL then unilaterally implemented the developmental squad program by distributing to the clubs a uniform contract that embodied the terms of Resolution G-2 and the $1,000 proposed weekly salary. The League advised club owners that paying developmental squad players more or less than $1,000 per week would result in disciplinary action, including the loss of draft choices.

In May 1990, 235 developmental squad players brought this antitrust suit against the League and its member clubs. The players claimed that their employers' agreement to pay them a $1,000 weekly salary violated the Sherman Act. See 15 U. S. C. §1 (forbidding agreements in restraint of trade). The Federal District Court denied the employers' claim of exemption from the antitrust laws; it permitted the case to reach the jury; and it subsequently entered judgment on a jury treble-damage award that exceeded $30 million. The NFL and its member clubs appealed.

The Court of Appeals (by a split 2-to-1 vote) reversed. The majority interpreted the labor laws as "waiv[ing] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." 50 F. 3d 1041, 1056 (CADC 1995). The Court held, consequently, that the club owners were immune from antitrust liability. We granted certiorari to review that determination. Although we do not interpret the exemption as broadly as did the Appeals Court, we nonetheless find the exemption applicable, and we affirm that Court's immunity conclusion.

II.

The immunity before us rests upon what this Court has called the "nonstatutory" labor exemption from the antitrust laws. *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 622 (1975); see also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965); *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, see 29 U. S. C. §151; *Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959); which require good-faith bargaining over wages, hours and working conditions, see 29 U. S. C. §§158(a)(5), 158(d); *NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342, 348–349 (1958); and which delegate related rulemaking and interpretive authority to the National Labor Relations Board, see 29 U. S. C. §153; *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242–245 (1959).

This implicit exemption reflects both history and logic. As a matter of history, Congress intended the labor statutes (from which the Court has implied the exemption) in part to adopt the views of dissenting justices in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), which justices had urged the Court to interpret broadly a different *explicit* "statutory" labor exemption that Congress earlier (in 1914) had written directly into the antitrust laws. *Id.*, at 483–488 (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting) (interpreting §20 of the Clayton Act, 38 Stat. 738, 29 U. S. C. §52); see also *United States* v. *Hutcheson*, 312 U. S. 219, 230–236 (1941) (discussing congressional reaction to *Duplex*). In the 1930's, when it subsequently enacted the labor statutes, Congress, as in 1914, hoped to prevent judicial use of antitrust law to resolve labor disputes—a kind of dispute normally inappropriate for antitrust law resolution. See *Jewel Tea, supra*, at 700–709 (opinion of Goldberg, J.); *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365, 370, n. 7 (1960); A. Cox, Law and the National Labor Policy 3–8 (1960); cf. *Duplex, supra*, at 485 (Brandeis, J., dissenting) (explicit "statutory" labor exemption reflected view that "Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands"). The implicit ("nonstatutory") exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict. See *Jewel Tea, supra*, at 709–710.

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with

each other *any* of the competition restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. See *Connell, supra,* at 622 (federal labor law's "goals" could "never" be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws); *Jewel Tea, supra,* at 711 (national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining); *Pennington, supra,* at 665 (implicit exemption necessary to harmonize Sherman Act with "national policy . . . of promoting `the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation' ") (quoting *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U. S. 203, 211 (1964)).

The petitioners and their supporters concede, as they must, the legal existence of the exemption we have described. They also concede that, where its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees. Accord *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n,* 390 U. S. 261, 287, n. 5 (1968) (Harlan, J., concurring); *Jewel Tea, supra,* at 729–732, 735 (opinion of Goldberg, J.); Brief for AFL-CIO as *Amicus Curiae* in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters,* O. T. 1981, No. 81–334, pp. 16–17; see also P. Areeda & H. Hovenkamp, Antitrust Law ¶229'd (1995 Supp.) (collecting recent circuit court cases); cf. *H. A. Artists & Associates, Inc.* v. *Actors' Equity Assn.,* 451 U. S. 704, 717, n. 20 (1981) (explicit "statutory" exemption applies only to "bona fide labor organization[s]"). Nor does the dissent take issue with these basic principles. See *post,* at 3–4. Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

Labor law itself regulates directly, and considerably, the kind of behavior here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in preexisting conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. *Storer Communications, Inc.,* 294 N. L. R. B. 1056, 1090 (1989); *Taft Broadcasting Co.,* 163 N. L. R. B. 475, 478 (1967), enf'd, 395 F. 2d 622 (CADC 1968); see also *NLRB* v. *Katz,* 369 U. S. 736, 745, and n. 12 (1962). The collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith. See *Akron Novelty Mfg. Co.,* 224 N. L. R. B. 998, 1002 (1976) (where employer has not bargained in good faith, it may not implement a term of employment); 1 P. Hardin, The Developing Labor Law 697 (3d ed. 1992) (same). These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process. See *Bonanno Linen Serv., Inc.,* 243 N. L. R. B. 1093, 1094 (1979) (describing use of impasse as a bargaining tactic), enf'd, 630 F. 2d 25 (CA1 1980), aff'd, 454 U. S. 404 (1982); *Colorado-Ute Elec. Assn.,* 295 N. L. R. B. 607, 609 (1989), enf. denied on other grounds, 939 F. 2d 1392 (CA10 1991), cert. denied, 504 U. S. 955 (1992).

Although the caselaw we have cited focuses upon bargaining by a single employer, no one here has argued that labor law does, or should, treat multiemployer bargaining differently in this respect. Indeed, Board and court decisions suggest that the joint implementation of proposed terms after impasse is

a familiar practice in the context of multiemployer bargaining. See, *e.g., El Cerrito Mill & Lumber Co.,* 316 N. L. R. B. 1005 (1995); *Paramount Liquor Co.,* 307 N. L. R. B. 676, 686 (1992); *NKS Distributors, Inc.,* 304 N. L. R. B. 338, 340–341 (1991), rev'd, 50 F. 3d 18 (CA9 1995); *Sage Development Co.,* 301 N. L. R. B. 1173, 1175 (1991); *Walker Constr. Co.,* 297 N. L. R. B. 746, 748 (1990), enf'd, 928 F. 2d 695 (CA5 1991); *Food Employers Council, Inc.,* 293 N. L. R. B. 333, 334, 345–346 (1989); *Tile, Terazzo & Marble Contractors Assn.,* 287 N. L. R. B. 769, 772 (1987), enf'd, 935 F. 2d 1249 (CA11 1991), cert. denied, 502 U. S. 1031 (1992); *Salinas Valley Ford Sales, Inc.,* 279 N. L. R. B. 679, 686, 690 (1986); *Carlsen Porsche Audi, Inc.,* 266 N. L. R. B. 141, 152–153 (1983); *Typographic Service Co.,* 238 N. L. R. B. 1565 (1978); *United Fire Proof Warehouse Co.* v. *NLRB,* 356 F. 2d 494, 498–499 (CA7 1966); *Cuyamaca Meats, Inc.* v. *Butchers' and Food Employers' Pension Trust Fund,* 638 F. Supp. 885, 887 (SD Cal. 1986), aff'd, 827 F. 2d 491 (CA9 1987), cert. denied, 485 U. S. 1008 (1988). We proceed on that assumption.

Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. See Appendix (multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements, and is used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports); *NLRB* v. *Truck Drivers,* 353 U. S. 87, 95 (1957) *(Buffalo Linen)* (Congress saw multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining"); *Charles D. Bonanno Linen Service, Inc.* v. *NLRB,* 454 U. S. 404, 409, n. 3 (1982) *(Bonanno Linen)* (multiemployer bargaining benefits both management and labor, by saving bargaining resources, by encouraging development of industry-wide worker benefits programs that smaller employers could not otherwise afford, and by inhibiting employer competition at the workers' expense); Brief for Respondent NLRB in *Bonanno Linen,* O. T. 1981, No. 80–931, p. 10, n. 7 (same); General Subcommittee on Labor, House Committee on Education and Labor, Multiemployer Association Bargaining and its Impact on the Collective Bargaining Process, 88th Cong., 2d Sess. 10–19, 32–33 (Comm. Print 1964) (same); see also C. Bonnett, Employers' Associations in the United States: A Study of Typical Associations (1922) (history). The upshot is that the practice at issue here plays a significant role in a collective-bargaining process that itself comprises an important part of the Nation's industrial relations system.

In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever. See, *e.g., Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30 (1930) (agreement to insert arbitration provisions in motion picture licensing contracts). Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, see, *e.g., United States* v. *General Motors Corp.,* 384 U. S. 127, 142–143 (1966); *United States* v. *Foley,* 598 F. 2d 1323, 1331– 1332 (CA4 1979), cert. denied, 444 U. S. 1043 (1980), or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision, see, *e.g., American Tobacco Co.* v. *United States,* 328 U. S. 781, 809–810 (1946); *United States* v. *Masonite Corp.,* 316 U. S. 265, 275 (1942); *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 226–227 (1939). See generally 6 P. Areeda, Antitrust Law ¶¶1416–1427 (1986); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal, invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. The same is true of postimpasse discussions aimed at renewed negotiations with the union. Nor would adherence to the terms of an expired collective-bargaining agreement eliminate a potentially plausible antitrust claim charging that they had "conspired" or tacitly "agreed" to do so, particularly if maintaining the status quo were not in the immediate economic self interest of some. Cf. *Interstate Circuit, supra,* at 222–223; 6 Areeda, *supra,* at ¶1425. All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.

We do not see any obvious answer to this problem. We recognize, as the Government suggests, that, in principle, antitrust courts might themselves try to evaluate particular kinds of employer understandings, finding them "reasonable" (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy. See *supra,* at 3–4; see also *Jewel Tea*, 381 U. S., at 716–719 (opinion of Goldberg, J.).

III.

Both petitioners and their supporters advance several suggestions for drawing the exemption boundary line short of this case. We shall explain why we find them unsatisfactory.

A.

Petitioners claim that the implicit exemption applies only to labor-management *agreements*—a limitation that they deduce from caselaw language, see, *e.g., Connell,* 421 U. S., at 622 (exemption for "some union-employer *agreements*") (emphasis added), and from a proposed principle—that the exemption must rest upon labor-management consent. The language, however, reflects only the fact that the cases previously before the Court involved collective-bargaining agreements, see *Connell, supra,* at 619–620; *Pennington,* 381 U. S., at 660; *Jewel Tea, supra,* at 679–680; the language does not reflect the exemption's rationale. See 50 F. 3d, at 1050.

Nor do we see how an exemption limited by petitioners' principle of labor-management consent could work. One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired. Yet a multiemployer bargaining

process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union. Petitioners cannot rescue their principle by claiming that the exemption applies only insofar as *both* labor and management consent to those understandings. Often labor will not (and should not) consent to certain common bargaining positions that employers intend to maintain. Cf. Areeda & Hovenkamp, Antitrust Law, at ¶229'd, p. 277 (Supp. 1995) ("[J]oint employer preparation and bargaining in the context of a formal multi-employer bargaining unit is clearly exempt"). Similarly, labor need not consent to certain tactics that this Court has approved as part of the multiemployer bargaining process, such as unit-wide lockouts and the use of temporary replacements. See *NLRB* v. *Brown*, 380 U. S. 278, 284 (1965); *Buffalo Linen*, 353 U. S., at 97.

Petitioners cannot save their consent principle by weakening it, as by requiring union consent only to the multiemployer bargaining process itself. This general consent is automatically present whenever multiemployer bargaining takes place. See *Hi-Way Billboards, Inc.*, 206 N. L. R. B. 22 (1973) (multiemployer unit "based on consent" and "established by an unequivocal agreement by the parties"), enf. denied on other grounds, 500 F. 2d 181 (CA5 1974); *Weyerhaeuser Co.*, 166 N. L. R. B. 299, 299–300 (1967). As so weakened, the principle cannot help decide *which* related practices are, or are not, subject to antitrust immunity.

B.

The Solicitor General argues that the exemption should terminate at the point of impasse. After impasse, he says, "employers no longer have a duty under the labor laws to maintain the status quo," and "are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union." Brief for United States et al. as *Amici Curiae* 17.

Employers, however, are not completely free at impasse to act independently. The multiemployer bargaining unit ordinarily remains intact; individual employers cannot withdraw. *Bonanno Linen*, 454 U. S., at 410–413. The duty to bargain survives; employers must stand ready to resume collective bargaining. See, *e.g.*, *Worldwide Detective Bureau*, 296 N. L. R. B. 148, 155 (1989); *Hi-Way Billboards, Inc.*, 206 N. L. R. B., at 23. And individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with "the duty to abide by the results of group bargaining." *Bonanno Linen*, *supra*, at 416. Regardless, the absence of a legal "duty" to act jointly is not determinative. This Court has implied antitrust immunities that extend beyond statutorily *required* joint action to joint action that a statute "expressly or impliedly allows or assumes must also be immune." 1 P. Areeda & D. Turner, Antitrust Law ¶224, p. 145 (1978); see, *e.g.*, *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 682–691 (1975) (immunizing application of joint rule that securities law permitted, but did not require); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 720–730 (1975) (same).

More importantly, the simple "impasse" line would not solve the basic problem we have described above. *Supra*, at 9–10. Labor law permits employers, after impasse, to engage in considerable joint behavior, including joint lockouts and replacement hiring. See, *e.g.*, *Brown*, *supra*, at 289 (hiring of temporary replacement workers after lockout was "reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multiemployer bargaining unit"). Indeed, as a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union. See generally 1 Hardin, The Developing Labor Law, at 516–520, 696–699. What is to happen if the parties cannot reach an interim agreement? The other alternatives

are limited. Uniform employer conduct is likely. Uniformity—at least when accompanied by discussion of the matter—invites antitrust attack. And such attack would ask antitrust courts to decide the lawfulness of activities intimately related to the bargaining process.

The problem is aggravated by the fact that "impasse" is often temporary, see *Bonanno Linen, supra,* at 412 (approving Board's view of impasse as "a recurring feature in the bargaining process . . . a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force") (internal quotation marks omitted); W. Simkin & N. Fidandis, Mediation and the Dynamics of Collective Bargaining 139–140 (2d ed. 1986); it may differ from bargaining only in degree, see 1 Hardin, *supra,* at 691–696; *Taft Broadcasting Co.,* 163 N. L. R. B., at 478; it may be manipulated by the parties for bargaining purposes, see *Bonanno Linen, supra,* at 413, n. 8 (parties might, for strategic purposes, "precipitate an impasse"); and it may occur several times during the course of a single labor dispute, since the bargaining process is not over when the first impasse is reached, cf. J. Bartlett, Familiar Quotations 754:8 (16th ed. 1992). How are employers to discuss future bargaining positions during a temporary impasse? Consider, too, the adverse consequences that flow from failing to guess how an *antitrust* court would later draw the impasse line. Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.

The Solicitor General responds with suggestions for softening an "impasse" rule by extending the exemption after impasse "for such time as would be reasonable in the circumstances" for employers to consult with counsel, confirm that impasse has occurred, and adjust their business operations, Brief for United States et al. as *Amici Curiae* 24; by reestablishing the exemption once there is a "resumption of good-faith bargaining," *id.,* at 18, n. 5; and by looking to antitrust law's "rule of reason" to shield—"in some circumstances"—such joint actions as the unit-wide lockout or the concerted maintenance of previously-established joint benefit or retirement plans, *ibid.* But even as so modified, the impasse related rule creates an exemption that can evaporate in the middle of the bargaining process, leaving later antitrust courts free to second guess the parties' bargaining decisions and consequently forcing them to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide. Cf. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745* v. *NLRB,* 355 F. 2d 842, 844–845 (CADC 1966) ("The problem of deciding when further bargaining . . . is futile is often difficult for the bargainers and is necessarily so for the Board. But in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal . . . or better suited to the expert experience of a board which deals constantly with such problems").

C.

Petitioners and their supporters argue in the alternative for a rule that would exempt postimpasse agreement about bargaining "tactics," but not postimpasse agreement about substantive "terms," from the reach of antitrust. See 50 F. 3d, at 1066–1069 (Wald, J., dissenting). They recognize, however, that both the Board and the courts have said that employers can, and often do, employ the imposition of "terms" as a bargaining "tactic." See, *e.g., American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 316 (1965); *Colorado-Ute Elec. Assn., Inc.* v. *NLRB,* 939 F. 2d 1392, 1404 (CA10 1991), cert. denied, 504 U. S. 955 (1992); *Circuit-Wise, Inc.,* 309 N. L. R. B. 905, 921 (1992); *Hi-Way Billboards,* 206 N. L. R. B., at 23; *Bonanno Linen,* 243 N. L. R. B., at 1094. This concession as to joint "tactical" implementation would turn the presence of an antitrust exemption upon a determination of the employers' primary purpose or motive. See, *e.g.,* 50 F. 3d, at 1069 (Wald, J., dissenting). But to ask antitrust courts, insulated from the

bargaining process, to investigate an employer group's subjective motive is to ask them to conduct an inquiry often more amorphous than those we have previously discussed. And, in our view, a labor/antitrust line drawn on such a basis would too often raise the same related (previously discussed) problems. See *supra,* at 4–5, 9–10; *Jewel Tea,* 381 U. S., at 716 (opinion of Goldberg, J.) (expressing concern about antitrust judges "roaming at large" through the bargaining process).

D.

The petitioners make several other arguments. They point, for example, to cases holding applicable, in collective-bargaining contexts, general "backdrop" statutes, such as a state statute requiring a plant-closing employer to make employee severance payments, *Fort Halifax Packing Co.* v. *Coyne,* 482 U. S. 1 (1987), and a state statute mandating certain minimum health benefits, *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724 (1985). Those statutes, however, "`neither encourage[d] nor discourage[d] the collective-bargaining processes that are the subject of the [federal labor laws].'" *Fort Halifax, supra,* at 21 (quoting *Metropolitan Life, supra,* at 755). Neither did those statutes come accompanied with antitrust's labor-related history. Cf. *Oliver,* 358 U. S., at 295–297 (state antitrust law interferes with collective bargaining and is not applicable to labor-management agreement).

Petitioners also say that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is "special." We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption. We concede that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 101–102 (1984); App. 110–115 (declaration of NFL Commissioner). In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us.

We also concede that football players often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers. See *post*, at 5 (STEVENS, J., dissenting). But this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table. We do not see how it could make a critical legal difference in determining the underlying framework in which bargaining is to take place. See generally Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971). Indeed, it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy.

The dissent points to other "unique features" of the parties' collective bargaining relationship, which, in the dissent's view, make the case "atypical." *Post*, at 5. It says, for example, that the employers imposed the restraint simply to enforce compliance with league-wide rules, and that the bargaining consisted of nothing more than the sending of a "notice," and therefore amounted only to "so-called" bargaining. *Post,* at 6–7. Insofar as these features underlie an argument for looking to the employers' true purpose, we have already discussed them. See *supra,* at 15–16. Insofar as they suggest that there was not a genuine impasse, they fight the basic assumption upon which the District Court, the Court of Appeals, the petitioners, and this Court, rest the case. See 782 F. Supp. 125, 134 (DC 1991); 50 F. 3d, at 1056–

1057; Pet. for Cert. i. Ultimately, we cannot find a satisfactory basis for distinguishing football players from other organized workers. We therefore conclude that all must abide by the same legal rules.

* * *

For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. See, *e.g.*, 50 F. 3d, at 1057 (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co.*, 316 N. L. R. B., at 1006–1007 (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Buffalo Linen*, 353 U. S., at 96 (internal quotation marks omitted); see also *Jewel Tea*, 381 U. S., at 710, n. 18.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX TO OPINION OF BREYER, J.

Table A

Major Bargaining Units and Employment in Private Industry, by Type of Bargaining Unit, 1994.
(Covers bargaining units of 1,000 or more workers.)

(*Number Percent)*

Type Unit	*Employment*		*Units*	*Employmen*
I	522	2 305 478	44	43
M&S	664	3 040 159	56	57
Total	1 186	5 345 637	100	100

I = Multiemployer.
M = One company, more than one location.
S = One company, single location.
Source: U. S. Dept. of Labor, Bureau of Labor Statistics, unpublished data (Feb. 14, 1996) (available in Clerk of Court's case file).

Table B

Major Multiemployer Collective Bargaining Units and Employment in Private Industry, by Industry, 1994.
(Covers bargaining units of 1,000 or more workers.)

(Number Percent)

Type Units	*Employment*		*Units*	*Employment*
All industries	522	2 305 478	100	100
Manufacturing	45	210 050	9	9
Food	13	50 750	2	2
Apparel	23	141 600	4	6
Other	9	17 700	2	1
Nonmanufacturing	477	2 095 428	91	91
Mining	2	67 500	(1)	3
Construction	337	995 443	65	43
Railroads	12	189 183	2	8
Other transportation	20	156 662	4	7
Wholesale trade	6	8 500	1	(1
Retail trade	37	314 100	7	14
Real estate	11	85 800	2	4
Hotels and motels	11	79 200	2	3
Business services	13	63 200	2	3
Health services	8	65 100	2	3
Other	20	70 740		3

(1) = More than 0 and less than 0;05 percent.
Source: US Dept. of Labor, Bureau of Labor Statistics, unpublished data (Apr. 17, 1996) (available in Clerk of Court's case file).

Annexe III

SUPREME COURT OF THE UNITED STATES

ANTONY BROWN,
et al., PETITIONERS *v.* PRO FOOTBALL, INC., dba WASHINGTON REDSKINS, ET AL

on writ of certiorari to the United States court of Appeals for the District of Columbia Circuit

[June 20, 1996]

JUSTICE STEVENS, dissenting.

In his classic dissent in *Lochner* v. *New York,* 198 U. S. 45, 75 (1905), Justice Holmes reminded us that our disagreement with the economic theory embodied in legislation should not affect our judgment about its constitutionality. It is equally important, of course, to be faithful to the economic theory underlying broad statutory mandates when we are construing their impact on areas of the economy not specifically addressed by their texts. The unique features of this case lead me to conclude that the Court has reached a decision that conflicts with the basic purpose of both the antitrust laws and the national labor policy expressed in a series of congressional enactments.

I.

The basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels. *National Soc. of Professional Engineers* v. *United States,* 435 U. S. 679, 695 (1978). Collusion among competitors, it is believed, may produce prices that harm consumers. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, n. 59 (1940). Similarly, the Court has held, a market-wide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act. *Anderson* v. *Shipowners Assn. of Pacific Coast,* 272 U. S. 359 (1926).

The jury's verdict in this case has determined that the market-wide agreement among these employers fixed the salaries of the replacement players at a dramatically lower level than would obtain in a free market. While the special characteristics of this industry may provide a justification for the agreement under the rule of reason, see *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.,* 468 U. S. 85, 100–104 (1984), at this stage of the proceeding our analysis of the exemption issue must accept the premise that the agreement is unlawful unless it is exempt.

The basic premise underlying our national labor policy is that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be.[†]

[†] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working

Whether or not the premise is true in fact, it is surely the basis for the statutes that encourage and protect the collective-bargaining process, including the express statutory exemptions from the antitrust laws that Congress enacted in order to protect union activities.[‡] Those statutes were enacted to enable collective action by union members to achieve wage levels that are higher than would be available in a free market. See *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 40 (1957).

The statutory labor exemption protects the right of workers to act collectively to seek better wages, but does not "exempt concerted action or agreements between unions and nonlabor parties." *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 621–622 (1975). It is the judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions. *Ibid.*

The limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees' wages may enjoy the benefits of the resulting agreements. The purpose of the labor laws would be frustrated if it were illegal for employers to enter into industry-wide agreements providing supracompetitive wages for employees. For that reason, we have explained that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*, at 622.

Consistent with basic labor law policies, I agree with the Court that the judicially crafted labor exemption must also cover some collective action that employers take in response to a collective bargaining agent's demands for higher wages. Immunizing such action from antitrust scrutiny may facilitate collective bargaining over labor demands. So, too, may immunizing concerted employer action designed to maintain the integrity of the multi-employer bargaining unit, such as lockouts that are imposed in response to "a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 93 (1957).

In my view, however, neither the policies underlying the two separate statutory schemes, nor the narrower focus on the purpose of the nonstatutory exemption, provides a justification for exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level that would be produced in a free market. Nor do those policies support a rule that would allow employers to suppress wages by implementing noncompetitive agreements among themselves on matters that have not previously

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conditions within and between industries." 29 US . C. §151; R. Posner & F. Easterbrook, Antitrust 31 (2d ed. 1981) ("The main purpose of labor unions is to raise wages by suppressing competition among workers . . ."); see also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 723 (1965) (opinion of Goldberg, J.) ("The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment").

‡ "The basic sources of organized labor's exemption from federal antitrust laws are §§6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. §17 and 29 U. S. C. §52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. §§104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U. S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers* v. *Pennington*, 381 U. S. 657, 662 (1965)." *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 621–622 (1975).

been the subject of either an agreement with labor or even a demand by labor for inclusion in the bargaining process. That, however, is what is at stake in this litigation.

II.

In light of the accommodation that has been struck between antitrust and labor law policy, it would be most ironic to extend an exemption crafted to protect collec- tive action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market. Perhaps aware of the irony, the Court chooses to analyze this case as though it represented a typical impasse in an unexceptional multiemployer bargaining process. In so doing, it glosses over three unique features of the case that are critical to the inquiry into whether the policies of the labor laws require extension of the nonstatutory labor exemption to this atypical case.

First, in this market, unlike any other area of labor law implicated in the cases cited by the Court, player salaries are individually negotiated. The practice of individually negotiating player salaries prevailed even prior to collective bargaining.[§] The players did not challenge the prevailing practice because, unlike employees in most industries, they want their compensation to be determined by the forces of the free market rather than by the process of collective bargaining. Thus, although the majority professes an inability to understand anything special about professional sports that should affect the framework of labor negotiations, *ante* at 16–17, in this business it is the employers, not the employees, who seek to impose a noncompetitive uniform wage on a segment of the market and to put an end to competitive wage negotiations.

Second, respondents concede that the employers imposed the wage restraint to force owners to comply with league-wide rules that limit the number of players that may serve on a team, not to facilitate a stalled bargaining process, or to revisit any issue previously subjected to bargaining. Brief for Respondents 4. The employers could have confronted the culprits directly by stepping up enforcement of roster limits. They instead chose to address the problem by unilaterally forbidding players from individually competing in the labor market.

Third, although the majority asserts that the "club owners had bargained with the players' union over a wage issue until they reached impasse," *ante* at 1, that hardly constitutes a complete description of what transpired. When the employers' representative advised the union that they proposed to pay the players a uni- form wage determined by the owners, the union promptly and unequivocally responded that their proposal was inconsistent with the "principle" of individual salary negotiation that had been accepted in the past and that predated collective bargaining.[**] The so-called "bargaining" that followed amounted to

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[§] As the District Court explained, "[t]he present case does not involve any change in preexisting wage terms of either an active or expired collective bargaining agreement. In fact, creation of the develop- mental squads added a novel category of players to each NFL club. These players were not treated under the salary terms applicable to regular NFL players. Under the 1982 Collective Bargaining Agreement, the NFL players were expressly given the right to negotiate the salary terms of their contracts. 1982 Collective Bargaining Agreement at Article XXII, Plaintiffs' Exhibits at 1. By contrast, the developmental squad contracts indicates that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non- negotiable salary of $1,000 per week. Plaintiffs' Exhibits at 8, 9, 15 & 28." 782 F. Supp. 125, 138 (D.C. 1991).

[**] In a memorandum summarizing his meeting with the union representative, the owners representative stated, in part:

nothing more than the employers' notice to the union that they had decided to implement a decision to replace individual salary negotiations with a uniform wage level for a specific group of players.[††]

Given these features of the case, I do not see why the employers should be entitled to a judicially crafted exemption from antitrust liability. We have explained that the "[t]he nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Constr. Co.*, 421 U. S., at 622. I know of no similarly strong labor policy that favors the association of employers to eliminate a competitive method of negotiating wages that predates collective bargaining and that labor would prefer to preserve.

Even if some collective action by employers may justify an exemption because it is necessary to maintain the "integrity of the multiemployer bargaining unit," *NLRB* v. *Brown*, 380 U. S. 278, 289 (1965), no such justification exists here. The employers imposed a fixed wage even though there was no dispute over the pre-existing principle that player salaries should be individually negotiated. They sought only to prevent certain owners from evading roster limits and thereby gaining an unfair advantage. Because "the employer's interest is a competitive interest rather than an interest in regulating its own labor relations," *Mine Workers* v. *Pennington*, 381 U. S. 657, 667 (1965), there would seem to be no more reason to exempt this concerted, anticompetitive employer action from the antitrust laws than the action held unlawful in *Radovich* v. *National Football League*, 352 U. S. 445 (1957).

The point of identifying the unique features of this case is not, as the Court suggests, to make the case that professional football players, alone among workers, should be entitled to enforce the antitrust laws against anticompetitive collective employer action. *Ante*, at 17. Other employees, no less than well-paid athletes, are entitled to the protections of the antitrust laws when their employers unite to undertake anticompetitive action that causes them direct harm and alters the state of employer-employee relations that existed prior to unionization. Here that alteration occurred because the wage terms that the employers unilaterally imposed directly conflict with a pre-existing principle of agreement between the bargaining parties. In other contexts, the alteration may take other similarly anticompetitive and unjustifiable forms.

III.

Although exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still, the Court provides a sweeping justification for the exemption that it creates today. The consequence is a newly-minted exemption that, as I shall explain, the Court crafts only by ignoring the reasoning of one of our prior decisions in favor of the views of the dissenting Justice in that case. Of course, the Court actually holds only that this new exemption applies in cases such as the present in which the parties to the bargaining process are affected by the challenged anticompetitive conduct. *Ante*, at 18. But that welcome limitation on its opinion fails to make the Court's explanation of its result in this case any more persuasive.

"Gene [Upshaw] indicated he fully understood the developmental squad but could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary. Upshaw said that no matter what salary level we proposed to pay developmental players, whether it was our $1,000 weekly or a higher number, the union would not `in principle' permit two classes of players to exist, one with individual bargaining rights and one without." App. 19–20.

[††] The unique features of this case presumably explain why the National Labor Relations Board can endorse the position of the players in this case without fearing the adverse impact on the bargaining process in the hypothetical cases that concern the Court. Brief for United States 27, n. 10.

The Court explains that the nonstatutory labor exemption serves to ensure that "antitrust courts" will not end up substituting their views of labor policy for those of either the Labor Board or the bargaining parties. *Ante*, at 4. The Court concludes, therefore, that almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the Nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place. It notes that a contrary conclusion would require "antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive," a task that it believes too "amorphous" to be permissible. *Ante,* at 15.

The argument that "antitrust courts" should be kept out of the collective-bargaining process has a venerable lineage. See *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 483–488 (1921) (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). Our prior precedents subscribing to its basic point, however, do not justify the conclusion that employees have no recourse other than the Labor Board when employers collectively undertake anticompetitive action. In fact, they contradict it.

We have previously considered the scope of the nonstatutory labor exemption only in cases involving challenges to anticompetitive *agreements* between unions and employers brought by other employers not parties to those agreements. *Ante,* at 11. Even then, we have concluded that the exemption does not always apply. See *Mine Workers* v. *Pennington,* 381 U. S., at 663.

As *Pennington* explained, the mere fact that an antitrust challenge touches on an issue, such as wages, that is subject to mandatory bargaining does not suffice to trigger the judicially fashioned exemption. *Id.,* at 664. Moreover, we concluded that the exemption should not obtain in *Pennington* itself only after we examined the motives of one of the parties to the bargaining process. *Id.,* at 667.

The Court's only attempt to square its decision with *Pennington* occurs at the close of its opinion. It concludes that the exemption applies because the employers' action "grew out of, and was directly related to, the lawful operation of the bargaining process," "[i]t involved a matter that the parties were required to negotiate collectively," and that "concerned only the parties to the collective-bargaining relationship." *Ante*, at 18.

As to the first two qualifiers, the same could be said of *Pennington*. Indeed, the same was said *and rejected* in *Pennington*. "This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement." 381 U. S., at 664–665.

The final qualifier does distinguish *Pennington,* but only partially so. To determine whether the exemption applied in *Pennington*, we undertook a detailed examination into whether the policies of labor law so strongly supported the agreement struck by the bargaining parties that it should be immune from antitrust scrutiny. We concluded that because the agreement affected employers not parties to the bargaining process, labor law policies could not be understood to require the exemption.

Here, however, the Court does not undertake a review of labor law policy to determine whether it would support an exemption for the unilateral imposition of anticompetitive wage terms by employers on a union. The Court appears to conclude instead that the exemption should apply merely because the employers' action was implemented during a lawful negotiating process concerning a mandatory subject of bargaining. Thus, the Court's analysis would seem to constitute both an unprecedented expansion of a heretofore limited exemption, and an unexplained repudiation of the reasoning in a prior, nonconstitutional decision that Congress itself has not seen fit to override.

The Court nevertheless contends that the "rationale" of our prior cases supports its approach. *Ante*, at 11. As support for that contention, it relies heavily on the views espoused in Justice Goldberg's separate opinion in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965). At five critical junctures in its opinion, see *ante*, at 4–5, 10, 15, the Court invokes that separate concurrence to explain why, for purposes of applying the nonstatutory labor exemption, labor law policy admits of no distinction between collective employer action taken in response to labor demands, and collective employer action of the kind we consider here.

It should be remembered that *Jewel Tea* concerned only the question whether an *agreement* between employers and a union may be exempt, and that even then the Court did not accept the broad antitrust exemption that Justice Goldberg advocated. Instead, Justice White, the author of *Pennington*, writing for Chief Justice Warren and Justice Brennan, explained that even in disputes over the lawfulness of agreements about terms that are subject to mandatory bargaining, courts must examine the bargaining process to determine whether antitrust scrutiny should obtain. *Jewel Tea*, 381 U. S., at 688–697. "The crucial determinant is not the form of the agreement—e. g., prices or wages— but its relative impact on the product market *and the interests of union members*." *Id.*, at 690, n. 5 (emphasis added). Moreover, the three dissenters, Justices Douglas, Clark, and Black, concluded that the union was entitled to no immunity at all. *Id.*, at 735–738.

It should also be remembered that Justice Goldberg used his separate opinion in *Jewel Tea* to explain his reasons for *dissenting* from the Court's opinion in *Pennington*. He explained that the Court's approach in *Pennington* was unjustifiable precisely because it permitted "antitrust courts" to reexamine the bargaining process. The Court fails to explain its apparent substitution in this case of Justice Goldberg's understanding of the exemption, an understanding previously endorsed by only two other Justices, for the one adopted by the Court in *Pennington*.

The Court's silence is all the more remarkable in light of the patent factual distinctions between *Jewel Tea* and the present case. It is not at all clear that Justice Goldberg himself understood his expansive rationale to require application of the exemption in circumstances such as those before us here. Indeed, the main theme of his opinion was that the antitrust laws should not be used to circumscribe bargaining over union demands. *Meat Cutters* v. *Jewel Tea*, 381 U. S., at 723–725. Moreover, Justice Goldberg proved himself to be a most unreliable advocate for the sweeping position that the Court attributes to him.

Not long after leaving the Court, Justice Goldberg served as counsel for Curt Flood, a professional baseball player who contended that major league baseball's reserve clause violated the antitrust laws. *Flood* v. *Kuhn*, 407 U. S. 258 (1972). Although the *Flood* case primarily concerned whether professional baseball should be exempt from antitrust law altogether, see *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), the labor law dimensions of the case did not go unnoticed.

The article that first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse was written shortly after this Court granted certiorari in *Flood*, see Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), and the parties to the case addressed the very questions now before us. Aware of both this commentary, and, of course, his own prior opinion in *Jewel Tea*, Justice Goldberg explained in his brief to this Court why baseball's reserve clause should not be protected from antitrust review by the nonstatutory labor exemption.

"This Court has held that *even* a labor organization, the principal intended beneficiary of the so-called labor exemption, may not escape antitrust liability when it acts, not unilaterally and in the sole interests of its own members, but in concert with employers `to prescribe labor standards outside the bargaining unit,' And this is so even when the issue is so central to bargaining as wages. *Mine Workers* v. *Pennington*, 381 U. S. at 668. Compare *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676. See *Ramsey* v. *Mine Workers*, 401 U. S. 302, 307 (1971). . . .

"The separate opinion on which respondents focus did express the view that `collective bargaining activity on mandatory subjects of bargaining' is exempt from antitrust regulation, without regard to whether the union conduct involved is `unilateral.' *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. at 732 (concurring opinion). But the author of that opinion agreed with the majority that agreements between unions and nonlabor groups on hard core restraints like `price fixing and market allocation' were not exempt. 381 U. S. at 733. And there is no support in any of the opinions filed in *Meat Cutters* for Baseball's essential, if tacit, contention that unilateral, hard core anticompetitive activity by employers acting alone—the present case—is somehow exempt from antitrust regulation." Reply Brief for Petitioner in *Flood* v. *Kuhn*, O. T. 1971, No. 71–32, pp. 13–14.

Moreover, Justice Goldberg explained that the extension of antitrust immunity to unilateral, anticompetitive employer action would be particularly inappropriate because baseball's reserve clause predated collective bargaining.

"This case is in fact much clearer than *Pennington*, *Meat Cutters*, or *Ramsey*, for petitioner does not challenge the fruits of collective bargaining activity. He seeks relief from a scheme—the reserve system— which Baseball admits has been in existence for nearly a century, and which the trial court expressly found was `created and imposed by the club owners long before the arrival of collective bargaining.'" *Id.*, at 14.

I would add only that this case is in fact much clearer than *Flood*, for there the owners sought only to *preserve* a restraint on competition to which the union had not agreed, while here they seek to *create* one.

Adoption of Justice Goldberg's views would mean, of course, that in some instances "antitrust courts" would have to displace the authority of the Labor Board. The labor laws do not exist, however, to ensure the perpetuation of the Board's authority. That is why we have not previously adopted the Court's position. That is also why in other contexts we have not thought the mere existence of a collective-bargaining agreement sufficient to immunize employers from background laws that are similar to the Sherman Act. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985).[‡‡]

[‡‡] In *Teamsters* v. *Oliver*, 358 U. S. 283 (1959), we held that a state antitrust law could not be used to challenge an employer-union agreement. Justice White's opinion in *Jewel Tea* explains, however, that *Oliver* held only that "[a]s the agreement did not embody a `"remote and indirect approach to the subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract,' [358 U. S.], at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law." *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S., at 690, n. 5.

Moreover, in the petition for certiorari in *Flood*, Justice Goldberg explained that *Oliver* was not controlling.

IV.

Congress is free to act to exempt the anticompetitive employer conduct that we review today. In the absence of such action, I do not believe it is for us to stretch the limited exemption that we have fashioned to facilitate the express statutory exemption created for labor's benefit so that unions must strike in order to restore a prior practice of individually negotiating salaries. I therefore agree with the position that the District Court adopted below.

> "Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the nonstatutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, *H. K. Porter Co.* v. *NLRB*, 397 U. S. at 108 . . . (one of fundamental policies of NLRA is freedom of contract), but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually acceptable to employer and labor union alike. Labor unions would be unlikely to sign collective bargaining agreements with employers if they believed that they would be forced to accept terms to which they never agreed." 782 F. Supp. 125, 139 (D.C. 1991) (footnote omitted).

Accordingly, I respectfully dissent.

"Petitioner has not addressed the contention advanced by respondents at trial but not reached by the courts below, that the reserve system is a matter for collective bargaining and hence exempt from state and federal antitrust laws under *Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959), and *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965). Neither of these decisions holds that an employer conspiracy to restrain trade is exempted from antitrust regulation where an employee group has been implicated in the scheme. No Justice participating in *Meat Cutters* dissented form the proposition that hard core `anticompetitive commercial restraint[s]' like `price-fixing and market allocation'—and petitioner would add group boycotts—were subject to antitrust regulation even where bargained about. 381 U. S. 732–33 (concurring opinion). As this Court unanimously warned in 1949, `Benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of antitrust fires.' *United States* v. *Women's Sportswear Mfr's Ass'n*, 336 U. S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 747 (1945). Similar arguments by football were rejected by this Court in *Radovich* v. *National Football League*, 353 U. S. 445 (1957), as `without merit,' and the reserve systems of other sports are now regulated by state and federal antitrust laws." Pet. for Cert. in *Flood* v. *Kuhn*, O. T. 1971, No. 71–32, p. 21, n. 9.

Annex IV

In the United States Court of Appeals For the Seventh Circuit

Nos. 95-1341, 95-1376, 95-3935 & 95-4021

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY,

Plaintiffs-Appellees, Cross-Appellants,

v.

NATIONAL BASKETBALL ASSOCIATION,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 6247--Hubert L. Will, Judge.

ARGUED JUNE 4, 1996--DECIDED SEPTEMBER 10, 1996

Before BAUER, CUDAHY, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge. In the six years since they filed this antitrust suit, the Chicago Bulls have won four National Basketball Association titles and an equal number of legal victories. Suit and titles are connected.

The Bulls want to broadcast more of their games over WGN television, a "superstation" carried on cable systems nationwide. The Bulls' popularity makes WGN attractive to these cable systems; the large audience makes WGN attractive to the Bulls. Since 1991 the Bulls and WGN have been authorized by injunction to broadcast 25 or 30 games per year. 754 F. Supp. 1336 (1991). We affirmed that injunction in 1992, see 961 F.2d 667, and the district court proceeded to determine whether WGN could carry even more games--and whether the NBA could impose a "tax" on the games broadcast to a national audience, for which other superstations have paid a pretty penny to the league. After holding a nine-week trial and receiving 512 stipulations of fact, the district court made a 30-game allowance permanent, 874 F. Supp. 844 (1995), and held the NBA's fee excessive, 1995-2 Trade Cas. para. 71,253. Both sides appeal. The Bulls want to broadcast 41 games per year over WGN; the NBA contends that the antitrust laws allow it to fix a lower number (15 or 20) and to collect the tax it proposed. With apologies to both sides, we conclude that they must suffer through still more litigation.

Our 1992 opinion rejected the league's defense based on the Sports Broadcasting Act, 15 U.S.C. secs. 1291-95, but our rationale implied that the NBA could restructure its contracts to take

advantage of that statute. 961 F.2d at 670-72. In 1993 the league tried to do so, signing a contract that transfers all broadcast rights to the National Broadcasting Company. NBC shows only 26 games during the regular season, however, and the network contract allows the league and its teams to permit telecasts at other times. Every team received the right to broadcast all 82 of its regular-season games (41 over the air, 41 on cable), unless NBC telecasts a given contest. The NBA-NBC contract permits the league to exhibit 85 games per year on superstations. Seventy were licensed to the Turner stations (TBS and TNT), leaving 15 potentially available for WGN to license from the league. It disdained the opportunity. The Bulls sold 30 games directly to WGN, treating these as over-the-air broadcasts authorized by the NBC contract--not to mention the district court's injunction. The Bulls' only concession (perhaps more to the market than to the league) is that WGN does not broadcast a Bulls game at the same time as a basketball telecast on a Turner superstation.

Back in 1991 and 1992, the parties were debating whether the NBA's television arrangements satisfied sec. 1 of the Sports Broadcasting Act, 15 U.S.C. sec. 1291. We held not, because the Act addresses the effects of "transfers" by a "league of clubs," and the NBA had prescribed rather than "transferred" broadcast rights. The 1993 contract was written with that distinction in mind. The league asserted title to the copyright interests arising from the games and transferred all broadcast rights to NBC; it received some back, subject to contractual restrictions. Section 1 has been satisfied. But the league did not pay enough attention to sec. 2, 15 U.S.C. sec. 1292, which reads:

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing at home.

The NBA-NBC contract permits each club to license the broadcast of its games, and then, through the restriction on superstation broadcasts, attempts to limit telecasts to the teams' home markets. Section 2 provides that this makes sec. 1 inapplicable, so the Sports Broadcasting Act leaves the antitrust laws in force.

Our prior opinion observed that the Sports Broadcasting Act, as a special-interest exception to the antitrust laws, receives a beady-eyed reading. A league has to jump through every hoop; partial compliance doesn't do the trick. The NBA could have availed itself of the Sports Broadcasting Act by taking over licensing and by selling broadcast rights in the Bulls' games to one of the many local stations in Chicago, rather than to WGN. The statute offered other options as well. Apparently the league did not want to use them, in part for tax reasons and in part because it sought to avoid responsibilities that come from being a licensor, rather than a regulator, of telecasts. Such business decisions are understandable and proper, but they have consequences under the Sports Broadcasting Act. By signing a contract with NBC that left the Bulls, rather than the league, with the authority to select the TV station that would broadcast the games, the NBA made its position under the Sports Broadcasting Act untenable. For as soon as the Bulls picked WGN, any effort to control cable system retransmission of the WGN signal tripped over sec. 2. The antitrust laws therefore apply, and we must decide what they have to say about the league's effort to curtail superstation transmissions.

Three issues were left unresolved in 1992. One was whether the Bulls and WGN, as producers, suffer antitrust injury. 961 F.2d at 669-70. The NBA has not pursued this possibility, and as it is not jurisdictional (plaintiffs suffer injury in fact), we let the question pass. The other two issues are related. We concluded in 1992 that the district court properly condemned the NBA's superstation rule under the quick-look version of the Rule of Reason, see National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S.85 (1984), because (a) the league did not argue that it

should be treated as a single entity, and (b) the anti-freeriding justification for the superstation rule failed because a fee collected on nationally telecast games would compensate other teams (and the league as a whole) for the value of their contributions to the athletic contests being broadcast. 961 F.2d at 762-76. Back in the district court, the NBA argued that it is entitled to be treated as a single firm and therefore should possess the same options as other licensors of entertainment products; outside of court, the league's Board of Governors adopted a rule requiring any club that licenses broadcast rights to superstations to pay a fee based on the amount the two Turner stations pay for games they license directly from the league.

Plaintiffs say that the single-entity argument was for feited by its omission from the first appeal, but we think not. As our 1992 opinion observed, the case went to initial trial and decision within seven weeks, 961 F.2d at 676, a salutary development made possible in part by judicial willingness to entertain in subsequent rounds of the case arguments that could not be fully developed in such short compass. If defendants in complex cases feared that any arguments omitted from the first phase of the case would be lost forever, they would drag their heels in order to ensure that nothing was overlooked, a step that would benefit no one. Cf. Schering Corp. v. Illinois Antibiotics Co., No. 96-1359 (7th Cir. July 10, 1996). That is why we noted that the argument would be available in the ensuing stages of the case, 961 F.3d at 672-73, and why the district court properly entertained and resolved it on the merits.

The district court was unimpressed by the NBA's latest arguments. It held that a sports league should not be treated as a single firm unless the teams have a "complete unity of interest"--which they don't. The court also held the fee to be invalid. Our opinion compelled the judge to concede that a fee is proper in principle. 961 F.2d at 675-76. But the judge thought the NBA's fee excessive. Instead of starting with the price per game it had negotiated with Turner (some $450,000), and reducing to account for WGN's smaller number of cable outlets, as it did, the judge concluded that the league should have started with the advertising revenues WGN generated from retransmission on cable (the "outer market revenues"). Then it should have cut this figure in half, the judge held, so that the Bulls could retain "their share" of these revenues.

The upshot: the judge cut the per game fee from roughly $138,000 to $39,400.

The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates. Yet the antitrust laws do not deputize district judges as one-man regulatory agencies. The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act. See Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 9-10, 19-20, 22 n.40 (1979); Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917 (2d Cir. 1984). WGN and the Bulls argue that the league's fee is excessive, unfair, and the like. But they do not say that it will reduce output. They plan to go on broadcasting 30 games, more if the court will let them, even if they must pay $138,000 per telecast. Although the fee exceeds WGN's outer-market revenues, the station evidently obtains other benefits--for example, (i) the presence of Bulls games may increase the number of cable systems that carry the station, augmenting its revenues 'round the clock; (ii) WGN slots into Bulls games ads for its other programming; and (iii) many viewers will keep WGN on after the game and watch whatever comes next. Lack of an effect on output means that the fee does not have antitrust significance. Once antitrust issues are put aside, how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how much (if any) of the live gate goes to the visiting team, who profits from the sale of cotton candy at the stadium, and how the clubs divide revenues from merchandise bearing their logos and trademarks. Courts must respect a league's disposition of these issues, just as they respect contracts and decisions by a corporation's board of directors. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978); cf. Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986).

According to the league, the analogy to a corporate board is apt in more ways than this. The NBA concedes that it comprises 30 juridical entities--29 teams plus the national organization, each a separate corporation or partnership. The teams are not the league's subsidiaries; they have separate ownership. Nonetheless, the NBA submits, it functions as a single entity, creating a single product ("NBA Basketball") that competes with other basketball leagues (both college and professional), other sports ("Major League Baseball", "college football"), and other entertainments such as plays, movies, opera, TV shows, Disneyland, and Las Vegas. Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful incentive to field a better team, which makes the contests more exciting and thus more attractive. These functions of independent team ownership do not imply that the league is a cartel, however, any more than separate ownership of hamburger joints (again useful as an incentive device, see Benjamin Klein & Lester F. Saft, The Law and Economics of Franchise Tying Contracts, 28 J.L. & Econ. 345 (1985)) implies that McDonald's is a cartel. Whether the best analogy is to a system of franchises (no one expects a McDonald's outlet to compete with other members of the system by offering pizza) or to a corporate holding company structure (on which see Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)) does not matter from this perspective. The point is that antitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers. To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it: the producers of Star Trek may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market, just as the NBA's superstation rule does.

The district court conceded this possibility but concluded that all cooperation among separately incorporated firms is forbidden by sec. 1 of the Sherman Act, except to the extent Copperweld permits. Copperweld, according to the district court, "is quite narrow, and rests solely upon the fact that a parent corporation and its wholly-owned subsidiary have a 'complete unity of interest' " (quoting from 467 U.S. at 771). Although that phrase appears in Copperweld, the Court offered it as a statement of fact about the parent-subsidiary relation, not as a proposition of law about the limits of permissible cooperation. As a proposition of law, it would be silly. Even a single firm contains many competing interests. One division may make inputs for another's finished goods. The first division might want to sell its products directly to the market, to maximize income (and thus the salary and bonus of the division's managers); the second division might want to get its inputs from the first at a low transfer price, which would maximize the second division's paper profits. Conflicts are endemic in any multi-stage firm, such as General Motors or IBM, see Robert G. Eccles, Transfer Pricing as a Problem of Agency, in Principals and Agents: The Structure of Business 151 (Pratt & Zeckhauser eds. 1985), but they do not imply that these large firms must justify all of their acts under the Rule of Reason. Or consider a partnership for the practice of law (or accounting): some lawyers would be better off with a lockstep compensation agreement under which all partners with the same seniority have the same income, but others would prosper under an "eat what you kill" system that rewards bringing new business to the firm. Partnerships have dissolved as a result of these conflicts. Yet these wrangles--every bit as violent as the dispute among the NBA's teams about how to generate and divide broadcast revenues-- do not demonstrate that law firms are cartels, or subject to scrutiny under the Rule of Reason their decisions about where to open offices or which clients to serve.

Copperweld does not hold that only conflict-free enter-prises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the "unilateral" side in light of those functions. Like a single firm, the parent-subsidiary combination co-operates internally to increase efficiency. Conduct that "deprives the marketplace of the independent centers of decisionmaking that competition assumes", 467 U.S. at 769, without the efficiencies that come with integration inside a firm, go on the "concerted" side of the line. And there are entities in the middle: "mergers, joint ventures, and various vertical agreements" (id. at 768)

that reduce the number of independent decisionmakers yet may im- prove efficiency. These are assessed under the Rule of Reason. We see no reason why a sports league cannot be treated as a single firm in this typology. It produces a single product; cooperation is essential (a league with one team would be like one hand clapping); and a league need not deprive the market of independent centers of decisionmaking. The district court's legal standard was therefore incorrect, and a judgment resting on the application of that standard is flawed.

Whether the NBA itself is more like a single firm, which would be analyzed only under sec. 2 of the Sherman Act, or like a joint venture, which would be subject to the Rule of Reason under sec. 1, is a tough question under Copperweld. It has characteristics of both. Unlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in NCAA, the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams. After this case was last here the NBA created new teams in Toronto and Vancouver, stocked with players from the 27 existing teams plus an extra helping of draft choices. All of this makes the league look like a single firm. Yet the 29 clubs, unlike GM's plants, have the right to secede (wouldn't a plant manager relish that!), and rearrange into two or three leagues. Professional sports leagues have been assembled from clubs that formerly belonged to other leagues; the National Football League and the NBA fit that description, and the teams have not surrendered their power to rearrange things yet again. Moreover, the league looks more or less like a firm depending on which facet of the business one examines. See Phillip E. Areeda, 7 Antitrust Law para. 1478d (1986). From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet. But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports (as even Michael Jordan learned) the league looks more like a group of firms acting as a monopsony. That is why the Supreme Court found it hard to characterize the National Football League in Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2126 (1996): "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.

. . In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us." To say that the league is "more like a single bargaining employer" than a multi-employer unit is not to say that it necessarily is one, for every purpose.

The league wants us to come to a conclusion on this subject (six years of litigation is plenty!) and award it the victory. Yet as we remarked in 1992, "[c]haracterization is a creative rather than exact endeavor." 961 F.2d at 672. The district court plays the leading role, followed by deferential appellate review. We are not authorized to announce and apply our own favored characterization unlessthe law admits of only one choice. The Supreme Court's ambivalence in Brown, like the disagreement among judges on similar issues, implies that more than one characterization is possible, and therefore that the district court must revisit the subject using the correct legal approach.

Most courts that have asked whether professional sports leagues should be treated like single firms or like joint ventures have preferred the joint venture characterization. E.g., Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994); North American Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978). But Justice Rehnquist filed a strong dissent from the denial of certiorari in the soccer case, arguing that "the league competes as a unit against other forms of entertainment", NFL v. North American Soccer League, 459 U.S. 1074, 1077 (1982), and the

fourth circuit concluded that the Professional Golf Association should be treated as one firm for antitrust purposes, even though that sport is less economically integrated than the NBA. Seabury Management, Inc. v. PGA of America, Inc., 878 F. Supp. 771 (D. Md. 1994), affirmed in relevant part, 52 F.3d 322 (4th Cir. 1995). Another court of appeals has treated an electric cooperative as a single firm, Mt. Pleasant v. Associated Electric Cooperative, 838 F.3d 268 (8th Cir. 1988), though the co-op is less integrated than a sports league. These cases do not yield a clear principle about the proper characterization of sports leagues--and we do not think that Copperweld imposes one "right" characterization. Sports are sufficiently diverse that it is essential to investigate their organization and ask Copperweld's functional question one league at a time--and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities. Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players. See Jesse W. Markham & Paul V. Teplitz, Baseball Economics and Public Policy (1981); Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, The National Collegiate Athletic Association: A Study in Cartel Behavior (1992).

However this inquiry may come out on remand, we are satisfied that the NBA is sufficiently integrated that its superstation rules may not be condemned without analysis under the full Rule of Reason. We affirmed the district court's original injunction after applying the "quick look" version because the district court had characterized the NBA as something close to a cartel, and the league had not then made a Copperweld argument. After considering this argument, we conclude that when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms. This means that plaintiffs cannot prevail without establishing that the NBA possesses power in a relevant market, and that its exercise of this power has injured consumers. Even in the NCAA case, the first to use a bobtailed Rule of Reason, see Diane P. Wood, Antitrust 1984: Five Decisions in Search of a Theory, 1984 Sup. Ct. Rev. 69, 110-12, the Court satisfied itself that the NCAA possesses market power. The district court had held that there is a market in college football telecasts on Saturday afternoon in the fall, a time when other entertainments do not flourish but college football dominates. Only after holding that this was not clearly erroneous did the Court cast any burden of justification on the NCAA. 468 U.S. at 111-13; see also International Boxing Club v. United States, 358 U.S. 242 (1959).

Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason. Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 761 (7th Cir. 1996); Sanjuan v. American Board of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994); Hardy v. City Optical, Inc., 39 F.3d 765, 767 (7th Cir. 1994); Chicago Professional Sports Limited Partnership v. National Basketball Association, 961 F.2d 667, 673 (7th Cir. 1992); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670-74 (7th Cir. 1985); Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co., 758 F.2d 203, 210 (7th Cir. 1985). During the lengthy trial of this case, the NBA argued that it lacks market power, whether the buyers are understood as the viewers of games (the way the district court characterized things in NCAA) or as advertisers, who use games to attract viewers (the way the Supreme Court characterized a related market in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)). College football may predominate on Saturday afternoons in the fall, but there is no time slot when NBA basketball predominates. The NBA's season lasts from November through June; games are played seven days a week. This season overlaps all of the other professional and college sports, so even sports fanatics have many other options. From advertisers' perspective--likely the right one, because advertisers are the ones who actually pay for telecasts--the market is even more competitive. Advertisersseek viewers of certain demographic characteristics, and homogeneity is highly valued. A homogeneous audience facilitates targeted ads: breakfast cereals and toys for cartoon shows,

household appliances and detergents for daytime soap operas, automobiles and beer for sports. If the NBA assembled for advertisers an audience that was uniquely homogeneous, or had especially high willingness-to-buy, then it might have market power even if it represented a small portion of airtime. The parties directed considerable attention to this question at trial, but the districtjudge declined to make any findings of fact on the subject, deeming market power irrelevant. As we see things, market power is irrelevant only if the NBA is treated as a single firm under Copperweld; and given the difficulty of that issue, it may be superior to approach this as a straight Rule of Reason case, which means starting with an inquiry into market power and, if there is power, proceeding to an evaluation of competitive effects.

Perhaps this can be accomplished using the materials in the current record. Although the judge who presided at the trial died earlier this year, the parties may be willing to agree that an assessment of credibility is unnecessary, so that a new judge could resolve the dispute after eviewing the transcript, exhibits, and stipulations, and entertaining argument. See Fed. R. Civ. P. 63. At all events, the judgment of the district court is vacated, and the case is remanded for proceedings consistent with this opinion. Pending further proceedings in the district court or agreement among the parties, the Bulls and WGN must respect the league's (and the NBC contract's) limitations on the maximum number of superstation telecasts.

CUDAHY, Circuit Judge, concurring:

Although I agree with the majority's firm conclusion that the "quick look" doctrine does not apply to these complex facts, I must indicate some differences in significant matters that are reached in the course of the majority opinion. Thus, in arriving at its conclusion that a full Rule of Reason analysis is required, the majority seems to be extrapolating from its discussion of whether the NBA may be a "single entity." Classification as a "single entity" means immunity from Sherman Act, sec. 1, considerations, a distinction much more drastic than the conclusion that the conduct in question here deserves a "quizzical look" rather than a mere "quick look." So, although it is not entirely clear, the majority seems to be saying that, since the NBA may be a single entity, its conduct certainly merits more than a quick look. Perhaps so, but, since the single entity question is unresolved, I would prefer to address the problem from a slightly different direction.

For the "quick look" approach should have a narrow application, reflecting its recent and sharply delimited origin in the NCAA case. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984). That case, involving a loose alliance of colleges which had agreed on price and output restrictions on broadcast of their football games, held that under some circumstances a full analysis of market power is not required to determine that an agreement is anticompetitive. This framework should not be extended to the more highly integrated and economically unitary NBA.

The colleges which made up the NCAA were entirely separate economic entities, competing with each other in many areas unrelated to their athletic encounters. There is, of course, a sort of continuum of economic integration, with entities at different points along the continuum warranting differing levels of antitrust concern. At one end are loose alliances of economic actors having independent concerns (like the NCAA), the anticompetitive nature of whose agreements is obvious from a "quick look." At the other end are fully-integrated entities in which the economic interests of the participants are so completely aligned that antitrust scrutiny of their policies is unnecessary except where sec. 2 of the Sherman Act is violated. In the center is the broad range of organizations (generally like the NBA) whose separate constituents are individually owned but are closely but not completely tied economically to their organizations. These entities are capable of anticompetitive agreements, but a full Rule of Reason analysis is necessary to ensure that productive cooperation is not mistaken for anticompetitive conduct. Single

entity aside, there is certainly enough concern here for the efficiency of the league as a competitor in the entertainment market to require full Rule of Reason analysis.

On a more clear-cut point, I think it was appropriate for Judge Will to examine the size of the NBA's fee for the WGN broadcasts of Bulls games. In this connection, the majority rejects considerations of fairness "and the like" and asserts that, "The core question in antitrust is output." Maj. Op. at 5, 6. For better or for worse, under the highly reductive view that currently prevails in antitrust matters, this somewhat grating aphorism appears to be correct. The Holy Grail of consumer welfare means that more is better no matter how the more is distributed. Taking these principles as a given, it is still difficult for me to understand how output can be disjoined from cost under the circumstances of this case. In fact, Judge Will found as a fact that, "[the NBA's proposed fee] may well at some future date decrease output and distribution of Bulls games on WGN . . . ." Dist. Ct. Findings of Fact, Conclusions of Law and Opinion, NBA App. at 77a. But, particularly since output is currently constrained to 30 games, rather than whatever the market would produce, it is difficult to ascertain whether the fee is high enough to reduce output below the competitive level. Since it is not clear to me that the magnitude of Judge Will's adjustment was justified by antitrust considerations alone, I would include this issue with other matters to be considered on remand. That said, I turn to the single entity issue, where the discussion of the majority is deserving of comment both as to substance and to procedure. My first reservation is procedural and concerns whether this issue may be reached at all. The majority announces an exception--without precedent to my knowledge--from the usual rules of waiver of issues on appeal. The exception applies, according to the majority, to "defendants in complex cases" without elaboration. Why we should have more forgiving policies for highly skilled and highly compensated counsel in big corporate cases than for pro se litigants or appointed counsel of perhaps lesser qualification is certainly unclear to me. Our earlier opinion in this case states that "the NBA did not contend in the district court that the NBA is a single entity, let alone that it is a single entity as a matter of law." Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 673 (7th Cir. 1992), cert. denied, 506 U.S. 954 (1992). We also stated that:

Characterization is a creative rather than exact endeavor. Appellate review is accordingly deferential. The district court held a trial, heard the evidence, and concluded that the best characterization of the NBA is the third we have mentioned: a joint venture in the production of games but more like a cartel in the sale of its output. Whether this is the best characterization of professional sports is a subject that has divided courts and scholars for some years, making it hard to characterize the district judge's choice as clear error. Id. at 672. No one seems to have argued that the basic structure of the NBA has changed since that opinion. I think, therefore, that, despite dicta in our earlier opinion speculating that "[p]erhaps the parties will join issue more fully [regarding the single entity status of the NBA] in the proceedings still to come in the district court," id. at 673, there is a real question whether we can reach the single entity issue--fascinating though it may be. However, on the assumption that the "single entity" question may be reached (and presumably will be reached on remand) a number of considerations will be relevant. Assuming as I must that the sole goal of antitrust is efficiency or, put another way, the maximization of total societal wealth, the question whether a sports league is a "single entity" turns on whether the actions of the league have any potential to lessen economic competition among the separately owned teams[1]. The fact that teams compete on the floor is more or less irrelevant to whether they compete economically--it is only their economic competition which is germane to antitrust analysis. In principle, of course, a sports league could actually be a single firm and the individual teams could be under unified ownership and management. Such a firm would, of course, be subject to scrutiny only under sec. 2 of the Sherman Act and not under sec. 1. From the point of view of wealth maximization, a league of independently-owned teams, if it isno more likely than a single firm to make inefficient management decisions, should be treated as a single entity. The single entity question thus would boil down to "whether member clubs of a sports league have legitimate economic interests of their own, independent of

the league and each other." Sports Leagues Revisited at 127. It follows that a sports league, no matter what its ownership structure, can make inefficient decisions only if the individual teams have some chance of economic gain at the expense of the league.

Another form of the same question is whether a sports league is more like a single firm or like a joint venture. With efficiency the sole criterion, a joint venture warrants scrutiny for at least two reasons--(1) the venture could possess market power with respect to the jointly produced product (essentially act like a single firm with monopoly power) or (2) the fact that the venturers remain competitors in other arenas might either distort the way the joint product is managed or allow the venturers to use the joint product as a smokescreen behind which to cut deals to reduce competition in the other arenas. The most convincing "single entity" argument involving the NBA is that the teams produce only the joint product of "league basketball" and that there is thus no significant economic competition between them. NBA Br. at 25-27. If this is the case, the argument goes, type (2) concerns drop out and only type (1) concerns remain. Type (1) concerns, of course, are exactly those appropriate for sec. 2 analysis of a single firm.

There are, however, flaws in this single entity argument. The assumption underlying it is that league sports are a different and more desirable product than a disorganized collection of independently arranged games between teams. For this reason, it is contended that joining sports teams into a league is efficiency-enhancing and desirable. I will accept this premise.[2] It is perhaps true, as argued by the NBA and many commentators, that sports are different from many joint ventures because the individual teams cannot, even in principle, produce the product--league sports. However, the fact that cooperation is necessary to produce league basketball does not imply that the league will necessarily produce its product in the most efficient fashion. There is potential for inefficient decisionmaking regarding the joint product of "league basketball" even when the individual teams engage in no economic activity outside of the league. This potential arises because the structure of the league is such that all "owners" of the league must be "owners" of individual teams and decisions are made by a vote of the teams. This means that the league will not necessarily make efficient decisions about the number of teams fielded or, more generally, the competitive balance among teams. Thus, the fact that several teams are required to make a league does not necessarily imply that the current make up of the league is the most desirable or "efficient" one. The NBA's justification for its restriction of Bulls broadcasts centers on the need to maintain a competitive balance among teams. Such a balance is needed to ensure that the league provides high quality entertainment throughout the season so as to optimize competition with other forms of entertainment. Competitive balance is not the only contributor to the entertainment value of NBA basketball, however. Fan enjoyment of league sports depends on both the opportunity to identify with a local or favorite team and the thrill of watching the best quality of play. A single firm owning all of the teams would presumably arrange for the number of teams and their locations efficiently to maximize fan enjoyment of the league season. There is, however, no reason to expect that the current team owners will necessarily make such decisions efficiently, given their individual economic interests in the financial health of their own teams.

It's not surprising that farflung fans want to watch the Bulls' superstars on a superstation. The NBA argues that the broadcasting of more Bulls games to these fans will disturb the competitive balance among teams. However, one can also speculate that, since sports viewing has become more of a television activity than an "in the flesh" activity, these fans might prefer to have a league composed of fewer, better teams (like the Bulls). If this were the case, league policies designed to shore up all of the current teams would be inefficient. The point, of course, is not that this speculation is necessarily correct, but that the efficient number of teams (or, more generally, the efficient competitive balance) may not be obtained as a matter of course given the current league ownership framework.

The team owners thus retain independent economic interests. This would be the case even if they did not compete for the revenues of the league. Teams do compete for broadcast revenues, however. "A conflicting economic interest between the league and an individual club can exist only when league revenues are distributed unequally among the member clubs based on club participation in the games generating the revenue." Sports Leagues and the Sherman Act at 297-99. When teams receive a disproportionate share of the broadcast revenues generated by their own games, such a situation exists.

The analysis of this issue is tricky, however, since decisions about how to allocate broadcasting revenues are made by the league. It may be that "member clubs of a league do not have any legitimate independent economic interests in the league product" and "each team has an ownership interest in every game" (including an equal a priori ownership interest in the broadcast rights to every game). Sports Leagues Revisited at 135-36. If this assump- tion is correct, then whatever arrangements for revenue distribution the league decides to make will be, like bonuses to successful salespeople in an ordinary firm, presumptively efficient. If, however, broadcast rights inure initially to the two teams participating in a particular game and if, as is certainly the case, some games are more attractive to fans than others, the league cannot be presumed to have made decisions allocating those broadcast revenues efficiently.

The analogy, within the context of an ordinary firm, is to allow the salespeople to vote on the bonuses each is to get. Each salesperson has some incentive, of course, to promote the overall efficiency of the firm on which his or her salary, or perhaps the value of his or her firm stock, depends and therefore to award the larger bonuses to the most productive salespersons. However, in this scenario each salesperson has two ways of maximizing personal wealth--increasing the overall efficiency of the firm and redistributing income within the firm.[3] The result of the vote might not be to distribute bonuses in the most efficient fashion. The potential for this type of inefficiency is particularly great when, as with the NBA, the league is "the only game in town" so that a team does not have the option of going elsewhere if it is not receiving revenues commensurate with its contribution to the overall league product.[4] In any event, a group of team owners who do not share all revenues from all games might well make decisions that do not maximize the profit of the league as a whole.[5]

As this discussion demonstrates, determining whether the potential for inefficient decisionmaking survives within a joint venture because of the independent economic interests of the partners is extraordinarily complex and confusing. For this reason, a simple, if not courageous, way out of the problem might be to establish a legal presumption that a single entity cannot exist without single ownership. To avoid the complexities and confusions of attempted analysis, one might simply ordain that combinations that lack diverse economic interests should opt for joint ownership of a single enterprise to avoid antitrust problems. On the other hand, judges may want to play economist to the extent of resisting simplifying assumptions.

In any event, sports leagues argue that they must maintain independent ownership of the teams because separate ownership enhances the appearance of competitiveness demanded by fans. But the leagues cannot really expect the courts to aid them in convincing consumers that competition exists if it really does not. If consumers want economic competition between sports teams, then independent ownership and preservation of independent economic interests is likely an efficient choice for a sports league. But that choice, as with other joint ventures, brings with it the attendant antitrust risks. The NBA cannot have it both ways.

Relating all of this to the majority's treatment of the single entity issue, I see two problems with the majority analysis. First, as already noted, divorcing the question of single entity from the question of ownership is likely to lead to messy and inconsistent application of antitrust law. The bottom line may

be that the inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis.

Second, some of the majority's discussion of independent interests is puzzling. The majority contends that the district court "concluded that all cooperation among separately incorporated firms is forbidden by sec. 1 of the Sherman Act, except to the extent Copperweld permits." Maj. Op. at 7, citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984). Copperweld concluded that a parent corporation and its wholly-owned subsidiary have a "complete unity of interest" and hence should be treated as a single entity. Here the district court simply concluded that the NBA, because it involved cooperation between separately-owned teams, was subject to antitrust analysis. Dist. Ct. Findings of Fact, Conclusions of Law and Opinion, NBA App. at 34a. This conclusion is a far cry from deciding that all cooperation among separately incorporated firms is forbidden.

I also cannot agree with the majority's analysis of the type of "unity of interest" required for single entity status. The majority states, Maj. Op. at 7, that "[e]ven a single firm contains many competing interests." The opinion goes on to cite the competition for salary and bonuses between division managers as an example. However, when Copperweld talks about unity of interests in the single entity context, I think it must be taken to mean unity of economic interests of the decisionmakers. See Copperweld, 467 U.S. at 769. A single firm does not evidence diverse economic interests to the outside world because final decisions are made by the owners or stock holders, who care only about the overall performance of the firm. Only because this is the case can single firms be assumed to behave in the canonical profit-maximizing fashion. The diverse interests mentioned in the majority opinion seem as irrelevant to the antitrust analysis as is the on-court rivalry between teams in the NBA.

Thus, when Copperweld refers to conduct that "deprives the marketplace of the independent centers of decision making that competition assumes," it does not refer to "decisionmakers" whose economic independence is only potential. The antitrust issue is really whether, as a result of some cooperative venture, economic interests which remain independent coordinate their decisions. As Copperweld notes, "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests . . . ." Id. Therefore, their joint decisionmaking is of no antitrust concern. Employees or divisions within a firm, on the other hand, may remain separate economic actors pursuing separate economic interests but they do not make the final decisions governing the firm's operations. They may compete for shares of the firm's revenues, but they do not decree how that revenue will be shared. Thus their conflict or cooperation does not pose antitrust issues either. Joint ventures, on the other hand, are subject to antitrust scrutiny precisely because separate economic interests are joined in decisionmaking, with the potential for distorted results.

As long as teams are individually owned and revenue is not shared in fixed proportion, the teams both retain independent economic interests and make decisions in concert. Where this is the case, there is a strong argument that sports leagues should be treated as joint ventures rather than single entities because there remains a potential that league policy will be made to satisfy the independent economic interests of some group of teams, rather than to maximize the overall performance of the league. Thus, it is possible, if more Bulls games were broadcast, league profits might increase. But, if the revenue from the broadcast of Bulls games goes disproportionately to the Bulls, the other league members may not vote for this more efficient result. There may, of course, be cases in which independent ownership of the partners in a joint venture does not pose any real possibility of inefficient decisionmaking. This would be the case if the parties did not compete in any other arena and if all revenues were shared in fixed proportions among the partners. In general, however, a plausible case can be made for the proposition that independent ownership should presumptively preclude treatment as a single entity. This certainly does not mean, of course, that "all cooperation among separately incorporated firms is forbidden by sec. 1 of the

Sherman Act," Maj. Op. at 7. It would mean only that such cooperation must ordinarily be justified under the Rule of Reason. Justification might not be more difficult than the elusive search for treatment as a single entity sports leagues because of the diverse economic interests of the partners, the economically correct solution is still to treat sports leagues as joint ventures. A mere analogy to law firms is not convincingly invoked by those seeking to defend their arguments on purely economic (rather than precedential) grounds.

NOTES

1. See, e.g., Michael S. Jacobs, Professional Sports Leagues, Antitrust and the Single-Entity Theory: a Defense of the Status Quo, 67 Ind. L.J. 25 (1991); Gary R. Roberts, The Antitrust Status of Sports Leagues Revisited, 64 Tul. L. Rev. 117 (1989); Myron C. Grauer, The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act, 64 Tul. L. Rev. 71 (1989); Lee Goldman, Sports, Antitrust, and the Single Entity Theory, 63 Tul. L. Rev. 751 (1989); Gary R. Roberts, Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry, 32 UCLA L. Rev. 219 (1984), for discussions of this issue.

2. But the Green Bay Packers and the Chicago Bears played, presumably before enthusiastic crowds, before there was a National Football League.

3. Those favoring the single entity treatment of sports leagues frequently compare them to law firms, making the argument that sports leagues are like law firms, law firms are single entities, therefore sports leagues are single entities. See, e.g., Myron C. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich. L. Rev. 1, 23-35 (1983); Maj. Op. at 7-8. This argument is only valid, however, if law firms should be treated as single entities. If law firms do, in fact, have some of the same potential for inefficiencies as sports leagues because of the diverse economic interests of the partners, the economically correct solution is still to treat sports leagues as joint ventures. A mere analogy to law firms is not convincingly invoked by those seeking to defend their arguments on purely economic (rather than precedential) grounds.

   Applying the same logic in reverse, there is considerable precedent for treating sports leagues as joint ventures. Nat'l Collegiate Athletic Assoc. v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984); Sullivan v. National Football League, 34 F.3d 1091, 1099 (1st Cir. 1994), cert. denied, 115 S. Ct. 1252 (1995); Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1388-90 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984); North American Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982), cert. denied, 459 U.S. 1074 (1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); Levin v. National Basketball Ass'n, 385 F.Supp. 149, 150 (S.D.N.Y. 1974). Therefore, one might equally well argue that sports leagues have never been treated as single entities and, to the extent that law firms are like them, law firms should not be treated as single entities either.

4. The hypothetical example of a team taking its broadcast rights elsewhere does seem to suggest, however, that broadcast rights are at bottom the property of the teams participating in a given game. Indeed, if the team does not own the broadcast rights to the games in which it participates, it is hard to understand what it means to own a team at all.

5. See Herbert Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1 (1995), for a general discussion of the ways in which joint ventures can act inefficiently either by excluding members (or, here perhaps, overincluding members) or by excluding products (superstation broadcasts, perhaps?).

UNION EUROPEENNE

Obstacles à l'entrée : Normes et contrats d'exclusivité

Depuis la fin des années 80, la Commission est confrontée à des plaintes portant sur des prétendues infractions aux règles communautaires de concurrence dans le secteur des articles de sports. Ces plaintes concernaient au début des affaires relatives aux balles de tennis, et, ensuite, des produits tels que les balles de football ou de volley-ball ainsi que des produits pour le squash, le Hockey en salle et le tennis de table.

Accords visant l'utilisation exclusive de certains produits de sport conclus entre une Fédération nationale et des producteurs/distributeurs

Historiquement, la première plainte a été celle introduite par un importateur parallèle de balles de tennis au Danemark. La plainte avait pour objet un accord d'exclusivité conclu entre la Fédération danoise de tennis (FDT) et certains producteurs/importateurs de balles de tennis au Danemark, en vue de l'utilisation de la mention "balles officielles de la FDT" sur les balles livrées au Danemark. Seules les balles munies de cette mention pouvaient être utilisées dans les tournois organisés par la FDT, à l'exclusion de toutes autres. Etaient également exclues les balles, même portant l'une des marques ayant conclu le contrat d'exclusivité avec la FDT, ayant été importées par le réseau parallèle et non par les canaux officiels.

Si lors d'un tournoi, un match organisé par la FDT n'était pas disputé avec une "balle officielle de la FDT", le match était déclaré perdu pour la partie qui avait proposé de ne pas utiliser les balles sélectionnées.

Cette affaire, qui a amené la Commission à envoyer une communication de griefs à la FDT et cette dernière à notifier ses accords en la matière, a fait l'objet de longues discussions entre la Commission et la FDT. Les éléments essentiels de cette affaire sont repris dans la communication Art. 19§3 jointe en annexe.

Selon toute vraisemblance l'affaire se terminera avant la fin de 1996 par l'envoi d'une lettre administrative de la Commission approuvant l'accord notifié.

Entretemps, la Commission avait eu l'occasion d'intervenir dans trois affaires substantiellement analogues, même si elles revêtaient une importance mineure. Il s'agissait respectivement de plaintes contre les Fédérations nationales britannique, belge et luxembourgeoise, toujours dans le secteur du tennis. L'élément commun à ces plaintes était la passation d'un contrat d'exclusivité entre la Fédération et un ou plusieurs producteurs/distributeurs de balles de tennis, réservant à ces derniers la possibilité de se présenter sur le marché comme "fournisseurs officiels" et interdisant l'utilisation de balles autres que celles faisant l'objet des accords d'exclusivité.

Dans les trois cas, les affaires ont pu être réglées à l'amiable, les parties mises en cause ayant accepté de renoncer au recours à la mention "fournisseur officiel", remplacé par des formules du type

"membre du pool de sponsors" et d'ouvrir une procédure d'appel d'offres en vue de permettre aux intéressés de soumissionner pour l'obtention du contrat de sponsorisation.

Imposition de standards de la part de Fédérations nationales ou internationales en ce qui concerne l'utilisation de produits de sport

Une nouvelle phase dans l'approche des services de la Commission en cette matière s'est ouverte avec l'introduction en 1994 d'une plainte de la World Federation of the Sporting Goods Industry (WFSGI) à l'encontre du système de licences que la FIFA envisageait d'introduire.

Cette affaire étant actuellement pendante devant la Commission, nous nous limiterons ici à en exposer les éléments factuels.

Initialement la FIFA, qui est l'organe régulateur du football au niveau mondial et qui dicte les "Laws of the Game" et qui en tant que telle est en mesure de prescrire des standards pour l'équipement sportif et même d'interdire certains équipements, avait proposé l'adoption de nouvelles spécifications techniques pour les ballons de football, une nouvelle règle du jeu ainsi qu'un nouveau système de licences FIFA relatif aux nouvelles spécifications et règles du jeu. D'après ce système de licences, à partir du 1 juillet 1995, seuls les ballons portant le label "FIFA approved" auraient pu être utilisés dans toutes les compétitions régies par les règles de la FIFA. Tous les ballons auraient dû être testés exclusivement par un institut suisse, l'EMPA, choisi par la FIFA, et cette dernière aurait exigé une redevance de 3 FS par ballon approuvé. S'agissant de compétitions non régies par les règles de la FIFA, les standards existants (Law II of the game) seraient restés d'application.

A la suite de l'intervention des services de la Commission qui avaient fait état de leurs doutes quant à la compatibilité de ce système avec l'article 86 du Traité CEE, la FIFA a accepté de modifier le système de licences initialement envisagé.

Le nouveau système de licences se caractérise, selon la FIFA, par sa nature non obligatoire. A côté des mentions "FIFA approved" et "FIFA inspected" une troisième mention a été introduite "International Matchball Standard". Tous les ballons utilisés dans les compétitions organisées par la FIFA et dans les compétitions internationales organisées par les Confédérations continentales doivent obligatoirement porter l'une des trois mentions. L'obtention de la mention présuppose la réussite d'une série d'essais. Les fabricants qui souhaitent pouvoir utiliser la mention "FIFA approved" ou "FIFA inspected" doivent conclure un accord de licence d'une durée de quatre ans avec la FIFA et payer une redevance, respectivement de deux et un FS par ballon à la FIFA.

Les services de la Commission sont actuellement en train d'examiner si ce nouveau système est compatible avec les règles en matière de concurrence du Traité CE. En particulier, l'examen porte sur l'existence d'une réelle possibilité de choix entre les trois mentions et sur le niveau des redevances exigées.

Annexe

Communication en application de l'article 19 paragraphe 3 du règlement n° 17[1] du Conseil

Affaire n° IV/F-1/33.055 - Fédération danoise de tennis

A. Introduction

En avril 1994, la fédération danoise de tennis (ci-après DTF) a, conformément à l'article 4 du règlement n° 17 du Conseil, notifié à la Commission le texte d'un accord en vue d'obtenir une attestation négative ou une exemption au titre de l'article 85 paragraphe 3 du traité.

Cet accord notifié a pour objet de mettre sur pied un parrainage permettant aux distributeurs de balles de tennis d'obtenir, en contrepartie de leur contribution financière, le droit de fournir leurs produits lors des tournois officiels de tennis au Danemark.

D'après les termes de l'accord notifié, tous les fabricants peuvent devenir membres d'un "pool de balles" (ci-après pool), à condition de remplir certains critères objectifs. Chacun des members obtient ainsi le droit de se présenter comme membre du pool, de se servir de ce titre et d'utiliser le logo du pool. La DTF quant à elle, procédera à des appels d'offres parmi les membres du pool pour la fourniture de balles lors des tournois qu'elle organise; celui qui sera retenu aura le droit de se présenter comme "fournisseur" des tournois de la DTF et de signaler que ses produits ont approvisionné des tournois pour lesquels son offre a été retenue.

La DTF est la plus importante fédération de clubs de tennis au Danemark, elle contrôle sept unions et est affiliée à la Dansk Idræts Forbund, première fédération danoise d'associations sportives. Une des fonctions de la DTF consiste à organiser des tournois nationaux et internationaux. En 1989, la DTF comptait au total 113 000 membres.

B. Contexte

L'affaire remonte au 17 novembre 1988, date à laquelle un importateur parallèle danois de balles de tennis, P.T.D. Sport, informe la Commission qu'il rencontre des difficultés pour vendre des balles de tennis sur le marché danois. P.T.D Sport affirme que ses problèmes sont liés au système de sélection des "balles officielles de la DTF" instauré par cette fédération.

a) La DTF a passé des accords en 1986 et en 1988 avec Hammergaard Hansen Sport A/S, L.S. Sport A/S (anciennement D.S. Sport) et Tretorn A/S, respectivement distributeurs des marques de balles de tennis Penn Slazenger et Tretorn au Danemark. Ces accords étaient conclus pour trois ans. En échange de leur aide financière à la DTF, les sociétés de parrainage susmentionnées étaient autorisées à apposer un autocollant sur leurs emballages, indiquant que ces balles étaient des "balles officielles de la DTF" et reproduisant son logo. L'"autocollant officiel" devait être physiquement apposé sur l'emballage par les distributeurs exclusifs au Danemark et non par les

fabricants; ce système garantissait ainsi la distribution exclusive des balles par le réseau des commanditaires participant à l'accord et excluait de ce fait tous les autres fabricants et distributeurs. Ceci empêchait très efficacement toute importation parallèle de balles de tennis destinées aux tournois couverts par cet accord.

b) Outre la possibilité d'apposer l'autocollant sur l'emballage, les commanditaires étaient autorisés, dans leur publicité, à préciser qu'il s'agissait de balles "sélectionnées" ou "approuvées" par la DTF. Cette mention et le fait que l'autocollant figurait sur l'emballage devaient influencer les joueurs et les inciter à croire, à tort, que ces balles étaient techniquement supérieures à d'autres balles de tournoi.

c) De plus, par une communication parue dans chaque édition du magazine de la DTF "tennis avisen", la DTF avait explicitement interdit l'utilisation de marques autres que celles sélectionnées ainsi que celle de balles de tennis ayant fait l'objet d'importations parallèles.

d) Si lors d'un tournoi, un match organisé par la DTF n'était pas disputé avec une "balle officielle de la DTF", le match était déclaré perdu pour la partie qui avait proposé de ne pas utiliser les balles sélectionnées.

e) À l'issue d'un premier examen, la Commission a, en octobre 1990, averti la DTF que ces accords constituent une infraction aux articles 85 et 86 du traité. La DTF a répondu qu'elle modifierait ses pratiques mais, en réalité, elle n'a pas mis fin à l'infraction. Le 28 juillet 1992, la Commission a par conséquent adressé officiellement une communication des griefs à la DTF ainsi qu'aux fabricants et aux distributeurs susmentionnés.

f) À la suite de discussions avec la Commission, la DTF lui a soumis un nouvel accord le 26 octobre 1992 en affirmant que celui-ci était conforme à un accord conclu par la fédération anglaise de tennis, qui avait été autorisé par la Commission. La Commission a malgré tout estimé que certains éléments de cet accord n'étaient pas satisfaisants. En janvier 1993, la DTF a soumis de manière informelle un accord modifié qui, à première vue, a paru acceptable pour la Commission. La DTF a cependant attendu avril 1994 avant de notifier officiellement cet accord.

La DTF a notamment accepté, à la suite de l'intervention de la Commission, de modifier comme suit l'accord notifié:

a) Durée de validité

L'accord notifié est désormais conclu pour un an.

b) Droits d'un membre du pool et d'un membre désigné comme fournisseur:

L'utilisation de l'autocollant portant la mention "balle officielle de la DTF" a été supprimée. Celui-ci était apposé par les distributeurs, ce qui garantissait que seules les balles sélectionnées étaient utilisées lors des tournois.

C. Appréciation du nouvel accord

La Commission est d'avis que les deux accords présentent de grandes différences: L'accord notifié est à présent conclu pour une période d'un an, de sorte que les nouveaux membres du pool, comme les anciens, auront

la possibilité de soumissionner chaque année pour être choisi comme fournisseur de balles de tennis lors des tournois de la DTF. La DTF est tenue d'accepter la meilleure offre, sous réserve uniquement d'une vérification du type et de la qualité des balles de tennis et autres matériels; tous les fabricants peuvent par ailleurs devenir membres du pool. Le droit de fournir des "balles officielles de la DTF" par l'utilisation d'un "autocollant officiel" et, partant, de faire de la publicité pour des balles "sélectionnées" et "approuvées", a fait place au droit de se présenter comme "fournisseur", de signaler que les produits ont été fournis lors de tournois et d'utiliser le logo du pool sur ces produits.

La différence réside dans la suppression du mot "officiel", qui sous-entendait une sélection et une approbation et signalait ainsi que les "balles officielles de la DTF" étaient de meilleure qualité que les autres balles de tennis, ce qui n'était, en réalité, pas le cas.

Étant donné la suppression des mesures adoptées en vue d'exclure l'utilisation de balles de tennis provenant d'importations parallèles et d'empêcher d'autres distributeurs de fournir des balles de tennis d'autres marques lors des tournois de la DTF, la Commission estime que l'accord notifié ne constitue pas une infraction.

D. Intentions de la Commission

Puisqu'il a été remédié aux principaux griefs exposés par la Commission, la Commission a l'intention de rendre une décision favorable en ce qui concerne l'accord notifié le 18 avril 1994 et de délivrer une attestation négative.

Auparavant, la Commission invite toutefois les parties intéressées à faire part de leurs observations sur cette affaire dans un délai d'un mois à compter de la date de publication de la présente communication, sous la référence IV/33.055 - Fédération danoise de tennis -, à l'adresse suivante:

NOTE

1. JO No 13 du 21.02.1962, p. 204/62.

AIDE-MEMOIRE OF THE DISCUSSION

Introduction

Introducing the round table, the Chairman remarked that the number of contributions from Delegates indicated both the great interest in this subject as well as the large number of complex issues that had arisen in the cases dealt with or in the process of being decided in this area in Member countries. He referred in particular to the United Kingdom's paper which noted how the perception of sports broadcasting agreements had changed radically in recent years with the advent and expansion of satellite television with dedicated sports channels which had considerably increased the market for sports broadcasts. Sports bodies and event organisers came to realise that they now enjoyed market power over their sports and were able to influence competition among TV channels and the market for sports equipment. At the same time, the sports federations and leagues had considerable powers to regulate the activities of sports professionals. He also referred to the Australian contribution which noted the difficulty of reconciling the unique aspects of sport with competition policy and the co-operation and restrictions that sports leagues and clubs claim are necessary for their operations but which are inherently anti-competitive.

In the Chairman's view, there were five basic competition questions raised in the country notes:

i) the nature of sports federations (should they be considered as normal commercial enterprises subject to competition law or as private non profit-making bodies which merely regulate the sports?)

ii) the relationship between sports federations or leagues and the constituent clubs (should the federations or leagues be viewed as cartels of clubs or as bodies independent of the clubs?)

iii) the nature of the product or service provided by professional sports (should the matches be viewed as separate events or is there a positive externality in that a championship is more than a set of matches?)

iv) the nature of the relevant market (are different sports substitutable for one another or within the same sport are different competitions substitutable, particularly from the broadcasting perspective?)

v) the relationship between players and clubs (should the contracts be viewed as contracts of employment excluded from competition laws or should they fall within the purview of such laws?)

He suggested that the roundtable should focus on four areas of concern: the sale of exclusive broadcasting rights; competition between different leagues; sponsoring and exclusive supply arrangements between manufacturers of sports equipment and clubs, including the use of standards for equipment; and the retain and transfer system used in players' contracts.

Exclusive broadcasting rights

There would seem to be two issues that have frequently come up in this area - the ownership of the broadcasting rights and the exclusivity arrangements between the leagues and the TV channels which exclude other TV operators.

Mr. van Gent (Netherlands) referred to the case in the Netherlands where the Dutch Football Association sold the exclusive rights to broadcast league matches and home games played by the Dutch national team to a newly established sports channel for a period of seven years. One of the football clubs objected to the sale and complained to the Dutch cartel authorities, maintaining that the rights belonged to the individual football clubs in whose stadia the matches were being played and not to the Association. The Association is challenging this view, maintaining that it is the league as a whole which owns the rights. This ownership issue is currently being decided in the civil courts. Depending on the outcome of this case, the cartel authorities will have to decide whether to take any action under the Netherlands cartel law.

Mr. Fink (Germany) noted that the German case was very similar to the Dutch one with similar arguments being advanced. In the German case, the Federal Cartel Office prohibited the German Football Association(GFA) from centrally marketing the television broadcasting rights to European Cup home matches of German football clubs as a violation of the ban on cartels contained in the Act against Restraints of Competition. Up to 1987, it was the individual clubs who sold the broadcasting rights. From 1989, the clubs agreed that the GFA would be responsible for selling the rights with the revenue from the sale being allocated between the European Football Association(UEFA) and the German Football League, particularly to the clubs that were the most successful in European competitions. In its assessment of the agreement, the Federal Cartel Office came to the conclusion that the broadcasting rights were owned by the individual clubs and not by the GFA since it was they who were primarily responsible for organising the matches and who bore the financial risks involved. Thus the central marketing of the rights was not considered as indispensable for securing the organisation of the European games. The GFA appealed the decision to the Berlin Court of Appeals which rejected the appeal. The case now goes before the German Supreme Court.

Mrs. Sainz (Spain) reported on a case in which the National Football League concluded in 1989, on behalf of Spanish clubs, an agreement to grant the exclusive television broadcasting rights of transmission for Spanish first division and cup matches as well as for other matches involving Spanish teams for initially five (subsequently extended to eight) years to a company which sold these rights to regional public television channels. The League was empowered to act on behalf of its clubs under the relevant sports law. However the agreement had the effect of excluding other private television channels from the market for a relatively long period of time. The Spanish competition authority found that the arrangement constituted an abuse of a dominant position by the Spanish Football League in that it prevented access to the televised broadcasting of matches for an excessive period of time and that it contained other restrictive features. The Tribunal did not condemn the exclusive contracts *per se* but considered that the rights should not be sold in one package but in several groups, that they should not be sold for an excessively long period of time and that summaries should be available to other operators. One of the main difficulties in the case was the definition of the relevant market. The Tribunal found that Spanish football was a distinct market, especially for advertising purposes, given the large number of people watching televised football.

Mr. Howe (United Kingdom) pointed out that for many years agreements relating to the televised broadcasting of sports had been considered by the Office of Fair Trading but had not been considered to raise any significant competition issues until the emergence of satellite broadcasting which was quick to

acquire the rights to broadcast sports, especially the premier league football matches for an initial period of five years. The main competition issues that came up related to the definition of the relevant market. The Office of Fair Trading decided somewhat controversially that there was a separate market for televised soccer on the basis of intuitive reasoning as well as analysis of the game based on its popularity compared with other sports and the lack of close substitutes, so that any restrictions in that market were likely to be significant. Taking a lead from the German case, the Office also considered the issue of whether the broadcasting rights should be sold collectively or whether the individual clubs should be free to negotiate their own arrangements. The amount of money that the specialist channels were prepared to pay for televising football led the Office to the conclusion that monopoly rents were being obtained by some operators. The Office considered that competition would be increased if the collective sale of the rights was struck down as anti-competitive and proceedings have therefore been initiated in the Restrictive Practices Court. The Football League has a number of legitimate arguments to justify their arrangements such as the possible disarray to the organisation of matches that would be caused by individual clubs negotiating their rights and the effect of the abolition of revenue-sharing between the rich and poorer clubs entailed by individual rights negotiation on the improvement of facilities and the development of the game at grassroots level. He pointed out that this was a controversial case which would have implications for similar agreements in other sports.

Mr. Westh (Denmark) and Mr. Hyltoft (Denmark) reported on a similar case involving the sale of all television rights for a period of eight years by the Danish Football Association to the two main public television broadcasters. Mr. Westh pointed out that the question of ownership of rights was not considered in the case, however, though this would be considered at a later date. While the Competition Council considered that the parties had a dominant influence on the Danish football market, they did not consider that the agreement had harmful effects on competition. One important mitigating factor was that the agreement did not preclude the sale of television rights to third parties. However he emphasised that the decision to allow the agreement did not prevent further consideration of its effects of competition, particularly if a complaint is made. The decision could also be appealed by any of the parties to the Appeals Tribunal.

Mr. Tenkate (Mexico) pointed out that it was the individual clubs in Mexico which owned broadcasting rights so that problems related to collective ownership and how the proceeds should be divided if owned collectively had not arisen in Mexico. The general view taken by the Competition Commission was that the authority should not interfere in the negotiation of these rights. However the Commission had looked informally at some of the provisions in the exclusive agreements between the clubs and the television companies. One concern was the possible foreclosure of one of the smaller television companies from the televising of football matches. However the Commission considered that the short duration of the contracts permitted clubs to switch from one television channel to another.

Competition between different leagues

Introducing this second topic which was indirectly related to broadcasting, Mr. Jenny referred to the Australian "Superleague" case in which one company, News Limited, tried to establish a Superleague to replace the national rugby league competition run by the Australian Rugby League and by the New South Wales Rugby League to be shown on pay TV in Australia and overseas. The Leagues sought to forestall this new Superleague by seeking loyalty and commitment agreements from the major clubs to their own competitions which News Limited challenged as anti-competitive. The trial court found in favour of the League but this was reversed on appeal.

Mr. Justice Lockhart (Australia), who presided over the appeal court case, recalled the structure of rugby league in Australia and the aim of News Limited to obtain the services of the major players for the purposes of showing the Superleague on Pay TV. The League did not like this and therefore sought loyalty agreements with players and clubs. News Limited brought an action for breach of the Commerce Act. The League brought in a counterclaim of breach of contract. The trial judge who found in favour of the League took the view that the TV interests were incidental to the game itself whereas the Appeal Court found that the game could not be separated from the financial interests involved and that there was no question that the Act applied to this large commercial activity. In particular, the Appeal Court found that News Limited had established that Section 4d of the Act, which prohibits agreements being made for the purpose of preventing or restricting the supply of services by persons in competition with each other. This finding meant that the Appeal Court did not have to decide other competition issues raised such as market definition and substantial lessening of competition and misuse of market power, though arguments were put by all parties, claiming on the one hand that rugby league constituted a separate market and on the other that it was part of a wider sports market and an even wider entertainment market.

Sponsoring and exclusive supply arrangements involving sportswear and goods, including the use of standards

Mr. Massey (Ireland) referred to two cases where potential competition issues arose. The first concerned an agreement involving sponsorship of a professional snooker tournament which included a restriction on participating players playing within a 50 mile radius during the week of the tournament. The Authority found that this agreement was not anti-competitive since other firms could sponsor tournaments at any other time of the year and the number of players involved was relatively small.

The second more interesting case concerned an agreement between Adidas and the Football Association of Ireland (FAI) under which the FAI granted Adidas the exclusive right to supply it with sportswear for all of its international teams and to market replicas of this sportswear and other sportswear using the official FAI crest for a period of four years. The FAI also agreed to ensure that all team members and officials of the FAI would wear the sportswear for all fixtures and in training sessions and use Adidas footballs for home fixtures. In return Adidas agreed to pay royalties to the FAI. In simple terms therefore only Adidas could supply the FAI with equipment for the four years of the contract. The Authority considered that the agreement did not of itself raise implications for competition given the amount of equipment involved. However the main issue was the marketing method of Adidas. The Authority did not think that this was anticompetitive since other suppliers were free to bid for the contract after its expiration. Secondly, other teams in Ireland could enter into agreements with other manufacturers. Also the Authority took the view that the agreement did not prevent other suppliers from supplying their shirts to the sports shops so that there was no significant restriction of competition. A negative clearance was therefore granted to Adidas.

Mr. Tercier (Switzerland) mentioned two cases involving ice hockey sticks and volley-ball balls. In the case of ice hockey, the Swiss Cartels Commission considered an agreement between suppliers of ice hockey sticks(the pool) and the Swiss Ice Hockey League under which the League guaranteed the use by all players in the Swiss championship of hockey sticks supplied by a member, in return for which the pool agreed to pay substantial annual royalties to the League. The main competition issue was that the pool had very restrictive membership conditions for suppliers wishing to enter and in practice a ban on parallel imports of ice hockey sticks. Following a complaint by a firm which was not a member of the pool the League decided to terminate its agreement so that the enquiry was discontinued.

As regards volley-ball, the Cartels Commission had had also occasion to consider an agreement between the Swiss Volley-ball Association and an importer, under which for a five-year period, the latter would be the exclusive supplier of volleyballs authorised in the Swiss championship and in matches played in Switzerland by the national team. This case was illustrative of a number of others where the sporting activity in question attempted to standardise the equipment used in the interests of guaranteeing uniform conditions for all participants. The agreement in question contained the important exclusive provision that only this type of volleyball could be used even in training sessions. The same issue had arisen as regards badminton shuttlecocks. The Commission had provisionally suspended its enquiry due to the change in the Swiss law.

Mr. Pons (European Commission) reported on several cases of exclusive arrangements in the supply of sports equipment which had attracted the attention of the Commission normally because of the highly restrictive nature of these arrangements which resulted in only one type of ball being used in official matches in a variety of sports such as tennis, football, volleyball, table tennis etc. He noted also that there appeared to be very little international trade between EU countries due to these arrangements. The first case concerned the use of only one type of ball in official tennis matches which led to a complaint by a Danish manufacturer against the Danish Tennis Federation. After a discussion between the Commission and the Danish Tennis Federation, the latter agreed to withdraw the mention "official" as a condition for using tennis balls. The Commission did find that there was an abuse of a dominant position by the Danish Federation. Similarly, in the case of footballs, the Commission was concerned about the practice employed by FIFA of approving or authorising footballs in return for a fee with the mention "FIFA approved". The original licensing agreement was changed by FIFA and the new agreement which modifies the obligatory nature of the licence system is under investigation to see whether it is compatible with the rules of competition.

Mr. Pons concluded by saying that he was struck in the discussion and through his own experience with the growing importance of international bodies in various sports attempting to control their sports without paying regard to the competition aspects of the rules or to the existence of other laws.

The retain and transfer system

Introducing the final part of the round table, the Chairman noted that in some jurisdictions the issue of players' contracts and the drafting or transfer system in force was not considered to be a competition issue but rather a matter for employment or contract law but that in others competition law had been held applicable to transfer systems.

Mr. Tenkate (Mexico) mentioned that the very restrictive draft system in operation in Mexico for football players was a subject of concern on the part of the Competition Commission. A club registering a player as a professional acquires exclusive rights over the player's services for the whole of his professional career. This gives the club enormous bargaining power over the player and results in keeping down wages and keeping transfer fees very high. This life-long exclusivity appears excessive and is under investigation. However no decision has yet been taken as to whether this issue can be tackled under the competition law. There were several possibilities under consideration. The draft system could be considered a form of horizontal price fixing which was prohibited *per se* under the Mexican law or the exclusive contracts could be challenged as a relative monopolistic practice which would have to be evaluated under a rule of reason approach.

Mr. Tercier (Switzerland) recalled that the new Swiss Competition Law applied to enterprises only and not to employment relations. However, the Swiss Federal Court had recently considered a case

involving a player who had brought a civil action against his club for refusing him a "letter of departure" to enable him to join another club. The Court decided that refusal to allow a player to leave his club was an inadmissible restriction on the right of a football player to freely exercise his occupation and declared this contractual clause null and void. Since this decision, the Swiss Football League has abolished the "letter of departure" requirement to permit a player to leave his club.

Mr. Lockhart (Australia) reported on a case concerning the internal draft rules of the New South Wales Rugby League relating to the transfer of players (the Adamson case). The draft system allowed players to lodge applications to be placed on an internal draft if they did not reach agreement with their current club at the end of their contracts. The scheme operated also as a cap on players' salaries. Over 200 players commenced an action in the Federal courts claiming that the rules contravened section 45 of the Trade Practices Act, which prohibits agreements which contain exclusionary provisions or which have the purpose or effect of substantially restraining competition, and were also invalid as constituting an unreasonable restraint of trade. The Full Court found that the internal draft operated as an unreasonable restraint of trade but that it did not contravene section 45 of the TPA Act since it did not involve the supply of services within the meaning of the Act, which excludes employment contracts. It was interesting to note that in the Superleague case (mentioned above) this argument that the players were under employment contracts was also invoked to exclude consideration under the competition legislation. However the issue was not decided.

General Discussion

Mr. Melamed (United States) stated that the United States had faced many of the issues that had been discussed at the round table. The cases had not completely clarified the issues because many of them went beyond the concerns of antitrust law itself. As regards employment contracts, for instance, there was considerable scepticism about the application of the antitrust rules to labour markets. However he thought that US cases could be analysed according to two broad themes that reflected all competition issues. The first theme concerned the question of under what circumstances teams or other holders of property rights may insist that parties deal with the holders as a collective unit. Some cases have determined that teams should be considered as separate entities and that they may not combine their forces but a recent decision in the Basketball case suggests that there may be scope for considering leagues as a single entity. The analysis turns on who has the bulk of the economic risk - the individual clubs or the league - the nature of the transaction in which they are united. There is some suggestion in the cases decided that the collective unit might be able to deal with outsiders, such as in the labour market and where the collective body did not comprise all teams in the relevant market.

The second set of issues concerns the situation where holders of property rights might violate the antitrust laws in their contracts with commercial partners such as broadcasters. The law was not clear on this. In his view, the analysis showed that if the acquirer of the rights did not acquire more market power than the seller of the rights had in the relevant market, it would be very unlikely that a competition problem would arise. A competition problem should arise only when the telecaster or merchandiser of the rights accumulates rights in an individual market from a multiplicity of upstream rights holders and thereby obtains more market power than any one of the rights holder had itself.

Mr. Connor (New Zealand) stated that the Commerce Commission had recently had a transfer case in rugby union in New Zealand which concerned a restriction on the ability of the provinces to buy an unlimited number of players. This restriction was justified by the argument that this would even out the competition for the best players. He wondered whether there was a strong rationale for this from a consumer surplus point of view in that the strongest clubs had the greatest support and therefore gave the

most pleasure to the greatest number of supporters. He also wondered about the rationale of the Irish Football Association in opposing the move of an English club to Dublin. Finally he took issue with Mr Tenkate (Mexico) over the restrictive transfer system in operation in Mexico on the grounds that the clubs which invested in developing good players could recoup their investment by appropriate contracts with the players.

Mr. Tenkate (Mexico) replied that the existence of transfer fees was not easy to justify except in terms of the long-term contracts which many young players entered into for the purpose of developing their talents with particular clubs. Once you had long-term contracts, this inevitably implied transfer fees if a player wished to change clubs.

Mr. Massey (Ireland), in answer to Mr. Connor, referred to a novel type of case reported in the news media but which had not been the subject of investigation by the Competition Authority. This was the attempt by a number of Irish businessmen to purchase an English club and move it to Dublin. He hastened to say that he did not know whether there would be competition issues involved if this transaction took place.

Mr. Goldman (BIAC) raised the issue of different legal provisions applying to a particular sport when leagues operated in more than one country. This applied in North America where there may be exemptions from the competition laws in one country which are not applicable in another, such as in baseball, which has long enjoyed an exemption in the United States but does not have one in Canada. This raises the question that, in an era of increasing internationalisation of sporting activities, it may make good sense for the CLP Committee to see whether there are desirable normative principles that could be recommended to all countries.

Mr. Heimler (Italy) wished to comment on the discussion on exclusivity. He agreed with the United States that exclusivity did not raise a competition issue if the right acquired by the licensee did not augment any existing market power. Assuming that the proprietary broadcasting rights are deemed to belong to the Federation and not to the individual clubs, the exclusivity clause is also valuable to the buyer. If such an exclusivity did not exist, the rights would have no value and the sport itself would suffer.

Mrs. Wachtmeister (European Commission) raised another question related to broadcasting rights and revenue sharing for broadcasting rights. In the Bosman case, the argument was brought forward that revenues from player transfers created a considerable source of finance which could be channelled to the poorer clubs and serve to develop the game generally at lower levels. The Commission was currently looking at several cases involving sharing of revenues from broadcasting and she would be interested in having the experience of other countries with cases of this type.

Mr. Sopocko (Poland) considered that the most important issue in the area of broadcasting rights was the question of who owned the rights - the individual clubs or the League and wondered what the exact legal status was in countries, namely whether the individual clubs or the Federation owned the broadcasting rights.

The Chairman pointed out that this issue was undecided in many countries.

Mr. Howe (United Kingdom) stated that in the United Kingdom there was a specific rule contained in the agreement between the League and its constituent clubs to the effect that the clubs may not allow the television companies on to their ground without the permission of the League.

Mr. Lesquins (France) commented on two of the issues raised in the round table. The first concerned the dividing-line between the decisions taken by Associations or Leagues for particular sports in the framework of their functions as regulatory bodies as delegated to them by the state and their possible subjection to general competition laws. The French Competition Council had taken a position in several cases on this issue and affirmed its jurisdiction when different Associations had attempted to extend their competence to requiring insurance to be included in the licensing system, to collectively market broadcasting rights, to requiring that certain firms pay royalties for having their installations and equipment approved by the sporting association in question. In all these cases, the Council has asserted its jurisdiction but has sometimes found it difficult to override the internal rules operated by the body in question. The second question related to the status of the associations vis-a-vis the individual clubs in the matter of broadcasting rights. In France, the law has granted broadcasting rights to the associations and leagues. But in all other cases the clubs are considered as enterprises under the competition law and are subject to the rules of competition. Consideration was being given to a variety of solutions to determine what activities should remain in the hands of the associations and what remain with the clubs.

The Chairman added that the French situation was somewhat unique in having a number of regulations which conferred the status of bodies with a public service mission on sporting associations.

Mr. van Hulst (Netherlands) asked the German Delegation whether the Federal Cartel Office made any distinction in the matter of ownership of broadcasting rights between different types of matches, i.e. those between domestic teams, those involving the national side and those between German and foreign clubs and what would be the position of the Office if the German Football Federation attempted to sell the TV broadcasting rights collectively for the domestic matches.

Mr. Wolf (Germany) replied that the FCO had initially acted only against European club matches and was awaiting the outcome of the actions which were still pending. After this decision of the courts had been taken, it was still an open question whether the collective selling of domestic matches would be attacked.

Mrs. Aubel (European Commission) noted that it would seem to emerge from the discussion that European competition authorities were moving towards a rather narrow market definition in the matter of football transmission rights. The Commission was interested in learning what criteria and factors were taken into consideration by the authorities in the matter of market definition and invited those countries which had taken a position on this to send them details of their analysis.

AIDE-MÉMOIRE DE LA DISCUSSION

En présentant la table ronde, le Président a fait remarquer que le nombre de contributions des délégués témoigne à la fois du grand intérêt porté à ce sujet et des multiples questions complexes soulevées dans les affaires traitées ou à l'occasion de la prise de décisions dans ce domaine par les pays Membres. Il a fait en particulier référence au document du Royaume-Uni où il est signalé à quel point la perception des accords de retransmission d'événements sportifs a évolué radicalement ces dernières années avec l'apparition et le développement des chaînes de télévision par satellite consacrées aux sports, qui ont considérablement élargi le marché de la télédiffusion sportive. Les organismes sportifs et les organisateurs de manifestations ont pris conscience qu'ils disposaient maintenant dans leurs disciplines d'un pouvoir sur le marché et pouvaient influer sur la concurrence entre les chaînes de télévision et le marché des équipements sportifs. Parallèlement, les fédérations et les ligues sportives disposent de pouvoirs considérables en matière de réglementation des activités des professionnels du sport. Le Président cite également la contribution australienne où il est fait mention de la difficulté de concilier les aspects propres au sport et la politique de la concurrence et de la coopération et des limites que les fédérations et les clubs sportifs prétendent nécessaires à leur fonctionnement, mais qui sont intrinsèquement anticoncurrentielles.

Selon le Président, les notes par pays font ressortir cinq questions fondamentales en matière de concurrence :

i) la nature des fédérations sportives (doivent-elles être considérées comme des entreprises commerciales classiques assujetties au droit de la concurrence ou comme des organismes privés à but non lucratif qui se contentent de réglementer les sports ?) ;

ii) les relations entre les fédérations ou ligues sportives et les clubs qui en sont membres (les fédérations ou les ligues doivent-elles être considérées comme des cartels de clubs ou comme des organismes indépendant des clubs ?) ;

iii) la nature du produit ou service fourni par les sports professionnels (les matchs doivent-ils être considérés comme des manifestations indépendantes ou existe-t-il une externalité positive dans le fait qu'un championnat est plus qu'une série de matchs ?) ;

iv) la nature du marché concerné (les différents sports peuvent-ils se substituer les uns aux autres ou, au sein d'une même discipline, les différentes compétitions sont-elles substituables, en particulier du point de vue de la radio-télédiffusion ?) ;

v) les relations entre les joueurs et les clubs (les contrats doivent-ils être considérés comme des contrats de travail ne relevant pas du droit de la concurrence ou doivent-ils au contraire relever de ce droit ?).

Il suggère que la table ronde concentre son attention sur quatre domaines critiques : la vente de droits exclusifs de radio-télédiffusion ; la concurrence entre les différentes fédérations ; les accords de parrainage et d'exclusivité de fourniture conclus entre fabricants de matériel sportif et clubs, et notamment le recours à des normes concernant le matériel ; et le système de maintien et de transfert utilisé dans les contrats des joueurs.

Droits d'exclusivité de radio-télédiffusion

Il semble que deux questions apparaissent fréquemment dans ce domaine -- la propriété des droits de radio-télédiffusion et les accords d'exclusivité passés entre les fédérations et les chaînes de télévision qui excluent les autres opérateurs de télévision.

M. van Gent (Pays-Bas) a signalé le cas aux Pays-Bas de la vente par la Fédération néerlandaise de football pour une période de sept ans des droits d'exclusivité de la radio-télédiffusion des matchs de la ligue et des matchs joués à domicile par l'équipe nationale néerlandaise à une chaîne sportive nouvellement établie. L'un des clubs de football s'est opposé à cette vente et a déposé plainte auprès de l'Office des ententes néerlandais, en soutenant que les droits appartenaient à chacun des clubs de football dans les stades desquels les matchs étaient joués et non à la Fédération. Celle-ci affirme pour sa part que c'est la ligue dans son ensemble qui détient les droits. Ce problème de propriété a été porté devant les tribunaux civils. Selon le résultat de cette affaire, l'Office des ententes devra décider s'il doit engager une action sur la base de la loi néerlandaise en matière d'ententes.

M. Fink (Allemagne) a fait remarquer qu'il existait en Allemagne un cas très proche du cas néerlandais et que des arguments similaires ont été avancés. Pour ce qui est de l'affaire allemande, le Bureau fédéral des ententes a interdit à la Fédération allemande de football de centraliser la commercialisation des droits de télédiffusion des matchs de la Coupe européenne joués à domicile par les clubs de football allemands, jugeant qu'il s'agissait d'une violation de l'interdiction des ententes énoncée dans la loi sur les restrictions à la concurrence. Jusqu'en 1987, les droits de radio-télédiffusion étaient vendus par chacun des clubs. Depuis 1989, les clubs ont décidé que la Fédération allemande de football serait responsable de la vente des droits, le produit de cette vente étant réparti entre l'Union des associations européennes de football (UEFA) et la Fédération allemande de football, une part plus importante étant réservée aux clubs ayant enregistré les meilleurs résultats dans les compétitions européennes. Dans son appréciation de cet accord, le Bureau fédéral des ententes a conclu que les droits de radio-télédiffusion appartenaient à chacun des clubs et non à la Fédération allemande de football, puisque c'était ces clubs qui étaient principalement chargés d'organiser les matchs et qui prenaient à leur compte les risques financiers encourus. Ainsi, la centralisation de la commercialisation des droits n'a pas été considérée comme indispensable pour veiller à l'organisation des compétitions européennes. La Fédération allemande de football a fait appel de cette décision devant la Cour d'appel de Berlin qui a rejeté sa demande. L'affaire a depuis été portée devant la Cour Suprême allemande.

Mme Sainz (Espagne) a signalé le cas d'un accord conclu au nom des clubs espagnols par la Fédération nationale de football en 1989, octroyant l'exclusivité des droits de télédiffusion des matchs de coupe et de première division espagnols, ainsi que ceux auxquels participeraient des équipes espagnoles pour une période fixée initialement à cinq ans (puis ultérieurement portée à huit) à une société qui a cédé ces droits à des chaînes de télévision publique régionales. Aux termes de la législation sportives en vigueur, la Fédération était habilitée à agir au nom des clubs qui en font partie. Toutefois, cet accord avait pour effet d'exclure d'autres chaînes de télévision privées du marché pour une période relativement longue. Les autorités chargées de la concurrence ont considéré que l'accord constituait un abus de position dominante de la part de la Fédération espagnole de football, en ce sens qu'il interdisait l'accès à la télédiffusion des matchs pour une période excessivement longue et qu'il comportait d'autres caractéristiques restrictives. Le Tribunal n'a pas condamné les contrats d'exclusivité en soi, mais il a considéré que la cession ne devait pas porter sur l'ensemble des droits mais sur quelques-uns d'entre eux, que ces droits ne devaient pas être cédés pour une période exagérément longue et que des résumés devraient être mis à la disposition des autres opérateurs. L'une des principales difficultés dans cette affaire a été de définir le marché concerné. Le Tribunal a jugé que le football espagnol constituait un marché

distinct, en particulier du point de vue de la publicité, compte tenu du grand nombre de téléspectateurs de matchs de football.

M. Howe (Royaume-Uni) a souligné que, pendant de nombreuses années, les accords concernant la télédiffusion d'événements sportifs examinés par le Bureau de la concurrence n'ont pas été considérés comme posant d'importants problèmes de concurrence, jusqu'à l'apparition de chaînes de télévision par satellite qui ont rapidement acquis les droits de diffusion de manifestations sportives et en particulier des matchs de première division pour une période fixée initialement à cinq ans. Les principaux problèmes de concurrence qui se sont posés touchent à la définition du marché concerné. Le Bureau de la concurrence a décidé, de façon quelque peu contestable, que le football télévisé constituait un marché distinct en s'appuyant sur un raisonnement intuitif, sur une analyse de ce sport fondée sur sa popularité comparée aux autres et sur l'absence de véritables substituts, de sorte que toute restriction sur ce marché serait vraisemblablement importante. S'inspirant de l'affaire allemande, le Bureau de la concurrence a également examiné la question de savoir si les droits de télédiffusion devaient être cédés collectivement ou si chacun des clubs devait être libre de négocier ses propres accords. La somme que les chaînes spécialisées étaient prêtes à verser pour retransmettre les matchs de football a amené le Bureau de la concurrence à conclure que certains opérateurs en retireraient des rentes de monopole. Il a jugé que la concurrence se trouverait accrue s'il était mis un frein à la vente collective des droits et a donc engagé une procédure devant le Tribunal des pratiques restrictives. La Fédération de football avance un certain nombre d'arguments légitimes pour justifier ces accords, comme l'éventuelle confusion dans l'organisation des matchs que provoquerait la négociation de leurs droits par chacun des clubs et les conséquences de la suppression du partage des recettes entre les clubs nantis et les plus pauvres qu'entraînerait cette négociation sur le plan de l'amélioration des installations et du développement de ce sport au niveau populaire. Elle a souligné qu'il s'agissait d'une affaire controversée qui présenterait des implications pour les accords similaires conclus dans d'autres disciplines.

M. Westh (Danemark) et M. Hyltoft (Danemark) ont fait état d'une affaire similaire concernant la cession par la Fédération danoise de football, et pour une période de huit ans, de la totalité des droits de télédiffusion aux deux principaux opérateurs publics de télévision. M. Westh a souligné que la question de la propriété des droits n'a pas été examinée à cette occasion, mais qu'elle le sera ultérieurement. Bien que le Conseil de la concurrence ait considéré que les parties exerçaient une influence dominante sur le marché du football danois, il n'a pas jugé que l'accord présentait des conséquences néfastes sur le plan de la concurrence. Une des circonstances atténuantes importantes était que l'accord n'excluait pas la cession de droits de télédiffusion à des tiers. Toutefois, le Conseil a souligné que la décision d'autoriser l'accord n'excluait pas un éventuel réexamen de ses conséquences sur la concurrence, en particulier si une plainte était déposée ; toute partie pouvant également faire appel de cette décision devant la Cour d'appel.

M. Tenkate (Mexique) a souligné qu'au Mexique les clubs possèdent individuellement les droits de radio-télédiffusion, de sorte que les problèmes touchant à la propriété collective et à la façon de répartir le produit de la vente des droits en cas de partage de la propriété ne se posent pas. De façon générale, la Commission de la concurrence considère que les autorités ne doivent pas intervenir dans la négociation de ces droits. Toutefois, elle a examiné de façon informelle certaines des dispositions figurant dans les accords d'exclusivité conclus entre les clubs et les sociétés de télévision. Une de ces craintes tenait à l'éventuelle exclusion de l'une des plus petites sociétés de télévision de la retransmission télévisée des matchs de football. Toutefois, elle a considéré que la courte durée des contrats permettait aux clubs de passer d'une chaîne de télévision à une autre.

Concurrence entre les différentes fédérations

En présentant le second thème qui est indirectement lié à la radio-télédiffusion, M. Jenny a cité l'affaire de la "Superleague" australienne, un nouveau championnat de rugby que la société News Limited souhaitait créer en replacement du championnat national des Fédérations de rugby australienne et du Nouveau pays de Galles, en vue de sa retransmission télévisée sur des chaînes payantes en Australie et à l'étranger. Les Fédérations ont cherché à devancer ce projet en tentant de s'assurer de la fidélité des principaux clubs participant à ses propres championnats par le biais d'engagements, démarche que News Limited a considéré comme anticoncurrentielle et qu'elle a attaquée en justice. Le tribunal a tranché en faveur des Fédérations, mais ce jugement a été contredit en appel.

Le Juge Lockhart (Australie), qui présidait le Tribunal d'appel, rappelle l'organisation des fédérations de rugby en Australie et le but de News Limited qui était de s'assurer les services des meilleurs joueurs en vue de diffuser les matchs de sa Superleague sur des chaînes de télévision payantes. Défavorables à ce projet, les fédérations ont cherché à conclure avec les joueurs et les clubs des accords de fidélisation. News Limited a porté l'affaire devant les tribunaux pour violation de la loi sur le commerce. Les fédérations ont de leur côté porté plainte pour rupture de contrat. Le Tribunal de première instance s'est prononcé en faveur des fédérations, considérant que les intérêts télévisuels étaient des accessoires des matchs eux-mêmes, alors que la Cour d'appel a jugé que les matchs ne pouvaient être distingués des intérêts financiers en jeu et que la loi s'appliquait sans aucun doute à cette importante activité commerciale. Elle a considéré en particulier que News Limited avait apporté la preuve d'une infraction à la Section 4d de la loi qui interdit tout accord conclu dans le but d'empêcher ou de limiter la prestation de services par des personnes en concurrence les unes avec les autres. De ce fait la Cour d'appel n'avait pas à juger des autres problèmes de concurrence tels que la définition du marché, la forte réduction de la concurrence et l'abus de position de marché, et ce, bien que toutes les parties aient fait valoir ces arguments, affirmant d'une part que les fédérations de rugby constituaient un marché distinct et, d'autre part, que ce marché faisait partie d'un marché du sport plus vaste et d'un marché du spectacle encore plus vaste.

Accords de parrainage et d'exclusivité de fourniture de vêtements et matériel sportifs, y compris ceux concernant l'application de normes

M. Massey (Irlande) a fait état de deux affaires soulevant d'éventuels problèmes de concurrence. La première concerne un accord de parrainage d'un tournoi professionnel de billard à poches comportant une clause restrictive interdisant aux joueurs inscrits de participer pendant la semaine du tournoi à d'autres compétitions dans un rayon de 50 milles. Les autorités ont jugé que cet accord n'était pas anticoncurrentiel, puisque d'autres sociétés pouvaient parrainer des tournois à toute autre époque de l'année et que le nombre de joueurs concernés était relativement restreint.

La seconde affaire, qui est plus intéressante, a trait à un accord entre Adidas et la Fédération irlandaise de football aux termes duquel cette fédération cédait à Adidas l'exclusivité de la fourniture des vêtements sportifs pour l'ensemble de ses équipes internationales et celle de la reproduction de ses vêtements et de ceux portant la marque de la Fédération pour une période de quatre ans. La Fédération s'engageait également à veiller à ce que tous ses joueurs et officiels portent ces vêtements à l'occasion de tous les matchs et pendant l'entraînement et utilisent des ballons Adidas pour les matchs à domicile. En retour, Adidas s'engageait à verser des redevances à la Fédération. En d'autres termes, seul Adidas pouvait fournir du matériel à la Fédération pendant les quatre années du contrat. Les autorités ont jugé que l'accord n'avait pas en lui-même d'implications du point de vue de la concurrence, compte tenu de la quantité de matériel en jeu. Toutefois, la principale question portait sur la méthode de commercialisation d'Adidas.

Les autorités ne l'ont pas considérée comme anticoncurrentielle, puisque les autres fournisseurs seraient libres de faire des propositions à l'expiration du contrat. Deuxièmement, d'autres équipes irlandaises pouvaient conclure des contrats avec d'autres fabricants. Les autorités ont également considéré que l'accord n'empêchait pas les autres fournisseurs d'approvisionner les magasins en vêtements à leurs marques et que, par conséquent, il n'existait pas de restrictions notoires à la concurrence. Ainsi une ordonnance de non-lieu a-t-elle été prononcée au bénéfice d'Adidas.

M. Tercier (Suisse) a signalé deux affaires concernant respectivement les crosses de hockey sur glace et des ballons de volley-ball. Dans la première affaire, la Commission helvétique des ententes a eu à connaître d'un accord conclu entre un groupement de fournisseurs de crosses de hockey sur glace et la Fédération helvétique de hockey sur glace aux termes duquel la Fédération garantissait l'utilisation de crosses fournies par un des membres du groupement par tous les joueurs participant aux championnats suisses, le groupement acceptant en contrepartie de verser à la Fédération des redevances annuelles substantielles. Le principal problème de concurrence tenait au fait que le groupement exigeait des fournisseurs souhaitant en faire partie des conditions d'adhésion extrêmement restrictives et interdisait dans la pratique toute importation parallèle de crosses de hockey. Suite à une plainte d'une entreprise non membre de ce groupement, la Fédération a décidé de résilier son accord de façon à mettre fin à l'enquête.

Pour ce qui est du volley-ball, la Commission des ententes a également eu l'occasion d'examiner un accord conclu entre la Fédération helvétique de volley-ball et un importateur qui prévoyait, pour une période de cinq ans, que cet importateur serait fournisseur exclusif des ballons officiels pour le championnat de Suisse et les matchs joués en Suisse par l'équipe nationale. Cette affaire est représentative d'un certain nombre d'autres cas dans lesquels les autorités sportives concernées ont tenté de normaliser le matériel utilisé dans le but de garantir des conditions uniformes à tous les participants. L'accord en question comportait une clause stipulant que seul ce type de ballons pourrait être utilisé, même pendant les séances d'entraînement. Le même problème s'est posé à propos des volants de badminton. La Commission a provisoirement suspendu son enquête en raison de la modification de la loi suisse.

M. Pons (Commission européenne) a fait référence à plusieurs affaires d'accords d'exclusivité pour la fourniture de matériel sportif ayant attiré l'attention de la Commission en raison de leur caractère extrêmement restrictif : un seul type de balles ou de ballons peut être utilisé dans les matchs officiels de divers sports tels que le tennis, le football, le volley-ball, le ping-pong, etc. Il a fait également remarquer qu'en raison de ces accords, il s'avère que le commerce international entre pays de l'UE est extrêmement modeste. La première affaire qui a donné lieu au dépôt d'une plainte contre la Fédération danoise de tennis par un fabricant danois concerne l'utilisation d'une seule catégorie de balles pour les matchs officiels. Suite à un entretien entre la Commission et la Fédération danoise de tennis, cette dernière a accepté de cesser d'exiger que les balles utilisées portent la mention "officiel". La Commission a jugé qu'il n'y avait pas abus de position dominante de la part de la Fédération. De même, dans le cas des ballons de football, la Commission s'est inquiétée de la pratique de la FIFA en matière d'agrément ou d'autorisation des ballons qui consiste à accorder la mention "agréé par la FIFA" en échange du versement d'une commission. La FIFA a modifié l'accord originel concernant le caractère obligatoire du système de licence, lequel fait actuellement l'objet d'une enquête afin de déterminer s'il est compatible avec les règles de la concurrence.

M. Pons a conclu en déclarant que, ce qui l'a frappé dans ce débat et au vu de son expérience, c'est la multiplication des organismes sportifs internationaux qui tentent de contrôler leurs disciplines sans se préoccuper des aspects des règles touchant à la concurrence ou de l'existence d'autres lois.

Le système de maintien et de transfert

En introduction à la dernière partie de la table ronde, le Président a fait remarquer que dans certaines juridictions, les contrats des joueurs et le système de recrutement ou de transfert en vigueur ne sont pas considérés comme des questions touchant au domaine de la concurrence, mais plutôt comme relevant du droit du travail ou des contrats, alors que dans d'autres, le droit de la concurrence est censé être applicable aux systèmes de transfert.

M. Tenkate (Mexique) a signalé que le système très restrictif de recrutement en vigueur au Mexique pour les joueurs de football est un sujet de préoccupation pour la Commission de la concurrence. Un club qui engage un joueur en tant que professionnel, acquiert le bénéfice de l'exclusivité de ses services pour l'ensemble de sa carrière professionnelle, ce qui donne au club un pouvoir de négociation énorme vis-à-vis du joueur et a pour conséquence de maintenir les salaires à des niveaux modestes et les commissions de transfert à des niveaux extrêmement élevés. Cette exclusivité à vie, qui apparaît excessive, a fait l'objet d'une enquête. Toutefois, aucune décision n'a encore été prise sur le fait de savoir si cette question pouvait être traitée en s'appuyant sur le droit de la concurrence. Plusieurs possibilités sont envisagées. Le système de recrutement pourrait être considéré comme une forme de tarification horizontale des prix, laquelle est interdite en tant que tel aux termes de la loi mexicaine, quant aux contrats d'exclusivité, ils pourraient être attaqués en tant que pratique relevant d'un monopole relatif qui devrait être appréciée sur la base de la légitimité du motif.

M. Tercier (Suisse) a rappelé que la nouvelle loi suisse en matière de concurrence n'est applicable qu'aux entreprises et non aux relations employeurs-employés. Toutefois, la Cour fédérale a récemment examiné une affaire dans laquelle un joueur avait engagé une action au civil contre son club pour lui avoir refusé la "lettre de départ" nécessaire pour qu'il puisse rejoindre un autre club. La Cour a décidé que refuser de permettre à un joueur de quitter son club était une restriction inadmissible du droit de celui-ci d'exercer librement son métier et a donc déclaré cette clause nulle et non avenu. Depuis cette décision, la Fédération helvétique de football a supprimé l'exigence d'une "lettre de départ" pour qu'un joueur puisse quitter son club.

M. Lockhart (Australie) a fait état d'une affaire concernant les règles de recrutement interne de la Fédération de rugby de la Nouvelle-Galles du Sud en matière de transfert (affaire Adamson). Le système de recrutement permet aux joueurs de faire une demande de transfert interne si, en fin de contrat, ils ne sont pas parvenus à un accord avec le club auquel ils appartiennent. Ce système fonctionne de telle façon qu'il a pour effet de plafonner les salaires des joueurs. Plus de 200 joueurs ont entamé une action auprès des tribunaux fédéraux soutenant que les règles contrevenaient à la section 45 de la loi sur les pratiques commerciales, laquelle interdit tout accord comportant des dispositions tendant à une exclusion ou ayant pour objet ou pour effet de limiter sensiblement la concurrence, et qu'elles étaient également nulles dans la mesure où elles constituaient une restriction excessive au commerce. Les Chambres réunies ont jugé que le système de transfert interne constituait une restriction abusive au commerce, mais qu'elle ne contrevenait pas à la section 45 de la loi sur les pratiques commerciales, puisqu'elle ne comportait pas la prestation de services au sens de la loi, laquelle exclut les contrats de travail. Il est intéressant de noter que dans l'affaire de la Superleague (mentionnée précédemment), cet argument selon lequel les joueurs étaient sous contrat de travail, a également été invoqué pour repousser l'examen de l'affaire sur le plan de la législation en matière de concurrence. Quoi qu'il en soit, la question n'est pas résolue.

Débat général

M. Melamed (Etats-Unis) a déclaré que son pays a été confronté à nombre des problèmes qui ont été examinés durant la table ronde. Les cas n'ont pas permis de préciser concrètement ces problèmes car beaucoup d'entre eux dépassent le champ d'application de la loi antitrust. En ce qui concerne les contrats de travail, par exemple, l'application des règles antitrust aux marchés du travail soulève un scepticisme important. Toutefois, il estime que les affaires américaines pourraient être analysées autour de deux grands thèmes qui reflètent l'ensemble des problèmes de concurrence. Le premier concerne la question de savoir dans quelles circonstances des équipes ou d'autres détenteurs de droits de propriété peuvent insister pour être considérées par les parties collectivement comme une unité. Dans certaines affaires, il a été jugé que les équipes devaient être considérées comme des entités distinctes qui ne pouvaient combiner leurs forces, mais une récente décision concernant une affaire dans le domaine du basket-ball laisse penser que l'on pourrait, dans une certaine mesure, considérer les fédérations comme une entité unique. L'étape suivante de l'analyse est de déterminer qui assume l'essentiel du risque économique -- chacun des clubs, individuellement, ou la fédération -- et la nature de la transaction qui les unit. On trouve dans les affaires jugées certains indices selon lesquels l'entité "collective" pourrait traiter avec des entités extérieures, comme c'est le cas sur le marché du travail, lorsque cette entité "collective" ne rassemble pas la totalité des équipes sur le marché concerné.

La seconde série de questions concerne le cas dans lequel les contrats conclus par les détenteurs des droits de propriété avec des partenaires commerciaux tels que des opérateurs de radio-télédiffusion, violeraient les lois antitrust. Sur ce point, la législation n'est pas précise. Selon M. Melamed, l'analyse montre que si l'acquéreur des droits n'obtient pas de ce fait sur le marché concerné plus de pouvoir que le vendeur n'en avait, il est fort peu probable qu'il s'ensuive un problème de concurrence. Un tel problème ne peut se poser que lorsque le télédiffuseur ou celui qui commercialise les droits profite sur un marché donné du pouvoir accumulé sur divers marchés en amont.

M. Connor (Nouvelle-Zélande) a déclaré que la Commission du commerce a récemment examiné une affaire de transfert dans une fédération de rugby néo-zélandaise portant sur une restriction à la possibilité pour les provinces de s'assurer les services d'un nombre illimité de joueurs. L'argument avancé pour justifier cette restriction était que sans elle, la concurrence entre les meilleurs joueurs disparaîtrait. Il s'est interrogé sur le point de savoir si du point de vue de l'avantage pour les consommateurs, ces arguments sont véritablement solides puisque ce sont les clubs les plus puissants qui bénéficient du soutien le plus important et qui par conséquent donnent le plus de plaisir au plus grand nombre de supporters. En outre, quels sont les motifs de l'opposition de la Fédération irlandaise de football à l'installation d'un club anglais à Dublin ? Enfin, il a manifesté son désaccord avec M. Tenkate (Mexique) sur le système restrictif de transfert en vigueur au Mexique en s'appuyant sur le fait que les clubs qui investissent dans la formation de bons joueurs doivent pouvoir rentabiliser leur investissement grâce à des contrats appropriés avec ces joueurs.

M. Tenkate (Mexique) a répondu que l'existence de frais de transfert est difficile à justifier, sauf lorsqu'il s'agit de contrats à long terme que nombre de jeunes joueurs concluent afin de développer leurs talents au sein d'un club particulier. Lorsqu'un joueur ayant signé un contrat à long terme souhaite changer de club, il en découle inévitablement des frais de transfert.

M. Massey (Irlande), répondant à M. Connor, a fait référence à un nouveau type d'affaire signalé dans la presse mais qui n'a pas fait l'objet d'enquête de la part des autorités chargées de la concurrence. Il s'agit de la tentative d'un certain nombre d'hommes d'affaires irlandais d'acheter un club anglais et de le transférer à Dublin. Il a, cependant, ajouté qu'il ne savait pas si la concrétisation de cette transaction poserait des problèmes de concurrence.

M. Goldman (BIAC) a soulèvé la question des différentes dispositions juridiques applicables à un sport particulier lorsque les fédérations opèrent dans plus d'un pays. C'est le cas en Amérique du Nord où le droit de la concurrence d'un Etat peut prévoir des dispenses qui ne sont pas applicables dans un autre et en particulier dans le domaine du base-ball qui a longtemps bénéficié d'une exonération aux Etats-Unis mais pas au Canada. Aussi, en cette époque d'internationalisation croissante des activités sportives, peut-être serait-il judicieux pour le Comité CLP de déterminer s'il existe des principes normatifs souhaitables qui pourraient être recommandés à l'ensemble des pays.

M. Heimler (Italie) s'est rangé à l'avis du représentant des Etats-Unis selon lequel l'exclusivité ne soulève pas de problème de concurrence si le droit acquis par le détenteur de licence n'augmente pas le pouvoir qu'il détient sur le marché. Supposons que les droits de propriété de télédiffusion soient censés appartenir à la Fédération et non aux clubs individuellement, la clause d'exclusivité vaut également pour l'acheteur. Si une telle exclusivité n'existait pas, les droits n'auraient aucune valeur et le sport lui-même en souffrirait.

Mme Wachtmeister (Commission européenne) a soulevé une autre question concernant les droits de radio-télédiffusion et le partage des recettes tirées de la vente de ces droits. Dans l'affaire Bosman, on a fait valoir que les recettes provenant des transferts de joueurs constituaient une source de financement considérable qui pourrait être mise à disposition des clubs les plus pauvres et servir à développer le sport en général et à tous les niveaux. La Commission examine actuellement plusieurs affaires concernant le partage des recettes générées par la radio-télédiffusion et elle aimerait connaître l'expérience d'autres pays concernant ce type d'affaires.

M. Sopocko (Pologne) a estimé que la question la plus importante en matière de droits de radio-télédiffusion est celle de savoir qui détient ces droits -- chacun des clubs ou la Fédération -- et il s'est demandé quelle est la situation juridique précise selon les pays, à savoir les droits de radio-télédiffusion appartiennent-ils à chacun des clubs, individuellement, ou à la Fédération.

Le Président a souligné que cette question n'est pas réglée dans de nombreux pays.

M. Howe (Royaume-Uni) a déclaré qu'au Royaume-Uni, il existe dans l'accord entre la Fédération et les clubs membres une règle spécifique qui précise que les clubs ne peuvent autoriser la présence de sociétés de télévision sur leur terrain sans l'autorisation de la Fédération.

M. Lesquins (France) a formulé des observations sur deux des questions soulevées au cours de la table ronde. La première concerne la ligne de démarcation entre les décisions prises par les Fédérations ou Ligues sportives dans le cadre de la fonction de réglementation qui leur est déléguée par l'Etat et leur éventuel assujettissement au droit de la concurrence en général. Le Conseil de la concurrence français s'est prononcé sur plusieurs affaires relatives à cette question et a réaffirmé ses compétences face aux tentatives de différentes fédérations d'élargir leurs propres compétences à l'exigence d'intégration d'une assurance dans le système de licence, à la commercialisation collective des droits de radio-télédiffusion et à l'obligation pour certaines entreprises de verser des redevances pour que leurs installations et équipements soient approuvés par la Fédération sportive en question. Dans toutes ces affaires, le Conseil a réaffirmé son autorité, mais a parfois rencontré quelques difficultés à s'opposer aux règles internes appliquées par les organismes concernés. La seconde question a trait au statut des fédérations vis-à-vis des clubs en matière de droits de radio-télédiffusion. En France, ces droits reviennent légalement aux fédérations et aux ligues. Mais dans tous les autres cas, les clubs sont considérés aux yeux du droit de la concurrence comme des entreprises assujetties aux règles en la matière. Diverses solutions visant à déterminer les activités qui devraient être du ressort des fédérations et celles relevant des clubs sont envisagées.

Le Président a ajouté que la situation française présente un caractère quelque peu unique du fait qu'un certain nombre de réglementations confèrent aux associations sportives le statut d'organismes ayant une vocation de service public.

M. van Hulst (Pays-Bas) a demandé à la délégation allemande si le Bureau fédéral des ententes fait, en matière de propriété des droits de radio-télédiffusion, des distinctions selon les différentes types de matchs, à savoir ceux opposant des équipes nationales et ceux opposant club allemand et club étranger, et quelle serait la position du Bureau si la Fédération allemande de football tentait de vendre collectivement les droits de télédiffusion des matchs nationaux.

M. Wolf (Allemagne) a répondu que le Bureau fédéral des ententes n'est jusqu'à présent intervenu qu'à propos de matchs de clubs européens et qu'il attend les résultats des actions engagées, lesquelles n'ont pas encore fait l'objet d'une décision. Quant au fait de savoir si la vente collective des droits pour les matchs nationaux serait contestée une fois que les tribunaux se seront prononcés, la question reste ouverte.

Mme Aubel (Commission européenne) a fait remarquer qu'il semblerait se dégager de la discussion que les autorités européennes chargées de la concurrence tendent à adopter une définition du marché relativement étroite en matière de droits de transmission des matchs de football. La Commission aimerait connaître les critères et facteurs pris en compte par les autorités en matière de définition des marchés et invite les pays qui ont pris position sur cette question à lui communiquer des précisions sur leur analyse.

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment (Roundtable in May 1995, published in 1996)	OCDE/GD(96)22
2.	Failing Firm Defence (Roundtable in May 1995, published in 1996)	OCDE/GD(96)23
3.	Competition Policy and Film Distribution (Roundtable in November 1995, published in 1996)	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements (Roundtable in November 1995, published in 1996)	OCDE/GD(96)65
5.	The Essential Facilities Concept (Roundtable in February 1996, published in 1996)	OCDE/GD(96)113
6.	Competition in Telecommunications (Roundtable in November 1995, published in 1996)	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations (Roundtable in November 1995, published in 1996)	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation (Roundtable in February 1996, published in 1996)	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets (Roundtable in April 1996, published in 1997)	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-Sized Enterprises (Roundtable in April 1996, published in 1997)	OCDE/GD(97)53