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I. INTRODUCTION

Professional sports are built around competition, but the industry would not exist without collusion.[1] Sport does not produce anything tangible to be imported and exported; yet, it is a substantial business presence. Because of its economic impact, both the United States ("US") and the European Union ("EU") have had to reconcile their antitrust laws with sport's commercial collusion. This article examines the special treatment sport receives under the antitrust laws in the US and the EU and the possibility that a *de facto* sporting exemption still exists in both jurisdictions.

Professional sports leagues and governing bodies (collectively, "sports organizations") are composed of clubs that are separate, yet economically interdependent, business entities.[2] Clubs must cooperate on a business level to maintain competitive balance between them. By cooperating economically instead of competing with one another, clubs are apparently violating antitrust laws in both the US and EU. In light of this, sports organizations in both jurisdictions have tried to justify their collusive and monopolistic actions with various levels of success.

Generally, monopolies are considered negative for economies and consumers because they misallocate resources. Both the US and Europe have developed significant industries in and around professional sports whose cooperative actions often lead them to

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1. *See generally* Ryan M. Rodenberg & Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. 191 (2013) (discussing language in collective bargaining agreements that give way to collusion in professional sports).

2. *See generally* Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213 (2006) (arguing that some professional leagues should be restructured for purposes of regulation and consumer demand).

behave like monopolies.[3] Due to the inefficiencies created by monopolies in any sector and their effect on consumers, an industry is rarely excluded from the reach of antitrust laws.

In the US, three of the four major professional sports leagues do not have any general exemption from federal antitrust laws.[4] In a court challenge, all major leagues except baseball would be subject to the antitrust laws under the Rule of Reason analysis, but generally not under the much stricter *per se* rule. Because of this, leagues and clubs are able to counter an accusation of anticompetitive behavior with a justification based on the special circumstances inherent in maintaining a professional league.

On the European level, the parties most often facing antitrust scrutiny in the sports industry are not leagues, but governing bodies. Sports governing bodies ("SGBs") create rules affecting professional sports in Europe that could violate European competition laws if they adversely affect economic competition. Like US leagues, SGBs assert that they must be allowed to regulate sports unencumbered by competition laws because their purpose is not economic. Despite this reasoning, professional sports generally are not exempt from the application of EU competition laws.[5] However, sports are not treated like all other industries; the European Commission ("Commission") and the European Court of Justice ("ECJ") have both been receptive to the argument that sports are different and must be treated accordingly.[6] The legal justification for this special treatment remains murky.

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3. *See* Claudio G. Catalano, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. FED. 2d 1, § 2 (2003).

4. Professional baseball, football, hockey, and basketball are statutorily exempt from US antitrust laws for the purpose of collectively selling the rights to television broadcasts of games. *See* Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-95 (1961). Broadcasting rights are beyond the scope of this Article. All four are also exempt as far as labor relations are concerned, baseball by statute and the remaining three by the non-statutory labor exemption for collective bargaining agreements. For a brief summary of the non-statutory labor exemption in sports, see Walter T. Champion, Jr., *The Second Circuit Takes a Second Look at the Non-statutory Labor Exemption in Professional Sports*, 27 HOFSTRA LAB. & EMP. L.J. 83, 85-88 (2009).

5. *See* An Vermeersch, *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, 3 J. CONTEMP. EUR. RES. 238, 253 (2007), *available at* http://www.jcer.net/index.php/jcer/article/viewFile/48/70 (discussing impact of antitrust law on sporting associations in European Union).

6. *See* Student Comment, *European Sports Law is Incapable of Recognising the 'Specificities of Sport'*, LAW TEACHER, http://www.lawteacher.net/sports-law/essays/european-sports-law.php (last visited Jan. 25, 2015) (noting European Court of Justice's 'specificity of sport as recognized in *Donà v. Mantero* (citing Case 13/76, Donà v. Mantero, 1976 E.C.R. 1333)).

The US and the EU have approached the question of how to apply antitrust laws to sports organizations on a similar trajectory. In the US, precedents developed sport-by-sport as each operation was challenged. In the EU, sports rules were exempt under an ECJ ruling, but that exemption has since become an affirmative defense to competition law violations. The European cases have involved individual and team sports and have gone beyond professional leagues.

This Article will examine the relationship between professional sports and antitrust laws in the US and EU, as well as suggest that neither jurisdiction has truly eliminated their sports exemptions. Section II will explain the actions of sports organizations that subject them to scrutiny under US and EU antitrust laws. Sections III and IV will describe the origin and parameters of the antitrust exemption for professional sports in the US and Europe, respectively. These sections will also demonstrate the difficulty that each jurisdiction has experienced in determining the extent to which sports organizations' actions and rules ought to be excluded from the application of antitrust laws. Finally, Section V will conclude that both jurisdictions maintain a *de facto* exemption for professional sports.

II. THE BUSINESS OF PROFESSIONAL SPORTS

In the business of professional sports, clubs act as both buyers and sellers. For example, they sell not only tickets to matches, but also other related products, such as team-branded merchandise and broadcasting rights. When a sports organization controls access to all of its matches and fulfills all of the demand for that product, it can prevent other entities from becoming competitors; this is monopoly power.[7] As buyers in the professional sports market, clubs purchase the services of athletes, other labor, and the use of sporting venues like arenas and stadiums. When there is only one buyer amongst many sellers, otherwise known as a monopsony, that buyer can dictate terms to sellers, because the sellers have no other consumers. In professional sports, if an athlete wants to compete in a league, he or she must abide by the rules of that league, the sole buyer for his skills. When teams collectively decide not to do business with someone, they are exercising their monopsony powers.[8]

7. *See generally* Catalano, *supra* note 3 (discussing ways antitrust law applies to sports organizations, specifically control of market power).

8. *See generally* Catalano, *supra* note 3 (applying antitrust to professional sports).

Professional sports organizations create monopolies and monopsonies within their respective sports through agreements between the teams made primarily to maintain competitive balance between teams. Because the product offered for consumption is the match itself,[9] an economically monopolistic club will not be successful because, if it effectively eliminates the existence of weaker teams, as a monopoly does, it will be left with no on-field competitors. This infeasibility is because the value of what any one team has to offer to consumers cannot be delivered on its own, and the more equally matched the teams are the more valuable the match is.[10] Economic cooperation between clubs is done with the purpose of maintaining athletically balanced competition between them. Without such balance, there is no product for sale.[11] Thus, economic cooperation—instead of economic competition—between clubs is necessary for the continued existence of both the leagues and the individual clubs.[12] Such economic cooperation is the part of professional sports that is forbidden by antitrust laws.

A. The U.S. Model

Through an economic joint venture structure,[13] leagues collude to achieve competitive balance by imposing three kinds of rules: "(1) rules governing the ownership and acquisition of player contracts, (2) rules governing territorial rights, and (3) rules governing television and radio contracts."[14] Agreements to behave collectively in each of these areas replace, for example, individual teams competing for the most talented players who are new to the league. By cooperating economically, a professional sports league

9. *See* Jeffery Borland & Robert MacDonald, *Demand for Sport*, 19 OXFORD REV. OF ECON. POL'Y 478, 479 (2003).

10. *See* Stefan Szymanski, *The Assessment: The Economics of Sport*, 19 OXFORD REV. OF ECON. POL'Y 467, 471 (2003) ("[D]emand is increasing in the degree of uncertainty of the contest outcome, a claim which is largely supported by the very limited demand for delayed transmission of sports broadcasting rights—once the outcome of contest is known, viewers have quite limited interest in watching the match . . . .").

11. *See* Walter C. Neale, *The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition*, 78 Q.J. OF ECON. 1, 3 (1964) (discussing product of professional sports). *But see* Borland & MacDonald, *supra* note 9, at 487 (quoting Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. OF ECON. LITERATURE 1137, 1156 (2003)).

12. *See* Neale, *supra* note 11, at 2 (discussing need for competition and collusion in professional sports).

13. *See* Ross, *supra* note 2 (discussing traditional structure of professional sports leagues).

14. Mohamed Eh-Hodiri & James Quirk, *An Economic Model of a Professional Sports League*, 79 J. OF POL. ECON. 1302, 1304 (1971).

"is a unique business, containing an unusual but necessary mixture of interparticipant competition and cooperation not found in any other kind of partnership or joint venture."[15] The joint venture structure alone does not insulate league actions from the antitrust laws—agreements completed through a joint venture can constitute illegal cartel behavior if they unreasonably constrain competition.[16]

B. The European Model

Leagues are the main actors in antitrust actions in the US, but in Europe, SGBs are accused of acting anti-competitively more often than are Europe's professional leagues. SGBs, similar to leagues, regulate the competitive balance between teams or competitors. Like leagues, they promulgate rules dictating the rules of the game (*lex ludica*), eligibility for participating athletes, and transfer rules dictating when and how athletes may change teams. Because SGBs operate hierarchically, their rules apply to everyone participating in a sport, including professionals, thereby affecting the business of professional sports and not simply the sport itself. Therefore, SGBs have a monopoly over their respective sports in Europe.[17]

Due to their apparent monopoly power, the actions of professional sports organizations in the US and Europe have consistently been challenged on the basis that their agreements harm others, usually athletes. In response, the organizations have sought special treatment or exemption from their respective antitrust laws based on their structure and the special characteristics of professional sports.[18]

III. PROFESSIONAL SPORTS UNDER THE US ANTITRUST LAWS

In the US, the Sherman Act is the primary federal antitrust statute. It "prohibits unreasonable restraints on trade and monopo-

15. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 29 (1991) (noting one argument of single-entity defense advocates to application of antitrust in professional sports).

16. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984) [hereinafter *Board of Regents*] ("[J]oint ventures have no immunity from the antitrust laws . . . .").

17. *See, e.g.*, *FIFA Regulations on the Status and Transfer of Players*, 7-8 (2012), *available at* http://www.fifa.com/mm/document/affederation/administration/01/95/83/85//regulationsstatusandtransfer_e.pdf (stating that regulations are global, binding, and applicable to all soccer players).

18. *See* Szymanski, *supra* note 10, at 1178-89.

lization" that affect trade between the states.[19] Since its enactment in 1890, the Sherman Act's purpose has evolved. Today it primarily serves to "promote consumer welfare by enhancing economic efficiency in commerce."[20]

Anyone harmed by the actions of a sports team or league in the US can challenge that team or league's anticompetitive behavior under the Sherman Act as an illegal restraint of interstate trade.[21] Courts consider certain types of agreements to be *per se* violations of the Sherman Act, whereas in other cases they will apply the Rule of Reason and consider the market circumstances of an agreement. The Rule of Reason demands that courts balance the anticompetitive effects of an agreement with its pro-competitive benefits.[22] Professional sports leagues have benefitted from the application of the Rule of Reason when their actions have been challenged as anticompetitive with courts refusing to apply the *per se* rule.[23]

Among the four major professional sports leagues in the US, the National Football League ("NFL"), National Hockey League ("NHL"), Major League Baseball ("MLB") and the National Basketball Association ("NBA"), only baseball enjoys a general exemption from the Sherman Act.[24] These leagues have highly similar joint-venture structures.[25] However, baseball gained a non-statutory exemption in an early case now considered a legal anomaly, but which has nevertheless been upheld for nearly a century.[26] Baseball's exemption is rooted in an antiquated interpretation of "trade and commerce,"[27] but was perpetuated by sentiment for its place in soci-

19. Christian Dennie, *Is Clarett Correct? A Glance at the Purview of the Antitrust Labor Exemption*, 6 TEX. REV. ENT. & SPORTS L. 1, 10 (2005) (citing Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (2004)).

20. *See id.* at 10.

21. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890).

22. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695-96 (1978) (discussing competitive bidding in relation to Sherman Act).

23. *See* Lacie L. Kaiser, *The Flight from Single Entity Structured Sports Leagues*, 2 J. OF SPORTS L. & CONTEMP. PROBS. 1, 3-4 (2004), *available at* http://laworgs.depaul.edu/journals/sports_law/Documents/Kaiser%20leagues.pdf (discussing application of rule of reason analysis to professional sports).

24. It is worth noting that MLB, NHL, and the NBA (and Major League Soccer) have teams in the United States and Canada, making their operations international. However, under the Foreign Antitrust Improvements Act of 1982, 15 U.S.C. sec. 6a (1988), they remain subject to U.S. antitrust laws if their activities affect the U.S. market.

25. *See* Szymanski, *supra* note 10, at 1150.

26. For a further discussion of baseball's antitrust exemption, see *infra* Section III.B.

27. *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 684-685 (D.C. Cir. 1920) [hereinafter *Federal Baseball*] (holding

ety.[28] Based on judicial precedents, the remaining three leagues enjoy no antitrust exemption.[29] Yet newer leagues, like Major League Soccer ("MLS"), could be exempt from antitrust scrutiny based on their structure.

A. Professional Sports are Generally Subject to the Sherman Act

Because the Supreme Court decisions of *Federal Baseball*,[30] *Toolson*,[31] and *Flood*, discussed *infra*,[32] only apply to baseball, courts have only addressed the antitrust status of other professional sports as disputes have arisen. The Federal District Court for the District of Massachusetts stated in 1972 that it is "highly probable and wellnigh a certainty, that all professional sports operating interstate eventually will be ruled by the Supreme Court to be subject to the federal antitrust statutes."[33] Professional basketball conducts interstate trade and is therefore subject to the Sherman Act.[34] *Radovich v. National Football League* found that the business of professional football is interstate in nature, and thus was subject to the Sherman Act.[35] Professional hockey is also presumed (without a Supreme Court ruling) to be subject to the Sherman Act in its collusive actions through the NHL.[36] All of these professional sports leagues' actions fall under the Sherman Act because they affect interstate commerce, and are therefore capable of affecting competition by behaving like a cartel or a monopoly.

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baseball exempt from antitrust violation), *aff'd*, 259 U.S. 200 (1922), *reh'g granted*, 42 S. Ct. 587 (1922).

28. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

29. *See* Dennie, *supra* note 19, at 11.

30. Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922) (ruling Sherman Antitrust Act does not apply to professional baseball).

31. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (upholding baseball's antitrust exemption).

32. For a further discussion of the Court's decision in *Flood*, see *infra* Section III.B.

33. Bos. Prof'l Hockey Ass'n. v. Cheevers, 348 F. Supp. 261, 265 (D. Mass. 1972) (citing to Court's decision in *Flood v. Kuhn*, which notes that professional sports, other than baseball, operating in interstate commerce are not exempt from federal antitrust law).

34. *See* Washington Prof'l Basketball Corp. v. Nat'l Basketball Ass'n, 147 F. Supp. 154, 155 (S.D.N.Y. 1956) (denying defendant's motion to dismiss and declaring professional basketball is subject to federal antitrust laws).

35. *See* Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (holding that professional football is in business of interstate commerce, thus subject to federal antitrust laws).

36. *Bos. Prof'l Hockey Ass'n*, 348 F. Supp. at 267-68 (refuting professional hockey team's argument that Standard Player Contract in question is exempt from Sherman Act).

This series of cases have not put to rest the argument from professional sports leagues that their industry is unique in ways that ought to exempt it from the application of the Sherman Act.[37] One prominent argument is that professional sports leagues are single entities and therefore not capable of collusive behavior. This proposition has been extensively discussed.

1. *Is a Professional Sports League More Like a Cartel or a Single Entity?*

The need for any antitrust exemption for sports leagues and clubs in the US hinges largely on whether the economic structure of a league is considered a collection of independent firms or a single entity. Cartel behavior is contrary to Section 1 of the Sherman Act. However, if the clubs are considered a single entity under the league's umbrella, their actions would not be subject to Section 1 of the Sherman Act.[38] Treating sports leagues as single entities for the purpose of antitrust laws arises from *Copperweld Corporation v. Independence Tube Corporation*, which held that firms cannot collude in violation of Section 1 of the Sherman Act when their relationship is that of a parent company and its subsidiary.[39]

Gary Roberts advocates that sports leagues should be treated as a single entity because "member teams in a sports league are inherently incapable (so long as they remain members of any league) of having legitimate economic interests independent of and in conflict with those of the league."[40] Since they would cease to exist without a league, clubs cannot be considered independent firms, only the league can be the entity that engages in "anticompetitive" business decisions that sports antitrust cases address.[41] Roberts has

37. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 519 F. Supp. 581 (C.D. Cal. 1981) (holding NFL is not single economic entity for purposes of Sherman Act); Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 874 F. Supp. 844 (N.D. Ill. 1995) (holding NBA is joint venture of teams capable of collusion under Section 1 of Sherman Act); Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691 (S.D.N.Y. 1975) (concluding joint venture structure does not make NBA immune from antitrust laws); American Needle v. Nat'l Football League, 506 U.S. 183 (2010). *See also infra* Section III.A.2.

38. Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 119-20 (1989) (discussing single-entity defense and proper way to frame issue of antitrust laws as applied to professional sports). Leagues may still be subject to Section 2 of the Sherman Act for abuses of monopoly power. *See id.*

39. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 778 (1984) (determining antitrust violation in relation to parent and subsidiary company).

40. *See* Roberts, *supra* note 38, at 126.

41. *See id.* at 119-20.

interpreted *Copperweld* to mean that "single entity" includes commercial relationships more decentralized than a parent and subsidiary relationship, including those of a league and member teams as long as the "group of related 'persons' has a common interest" regardless of the "organizational form adopted in the pursuit of optimal efficiency."[42]

On the contrary, Michael Jacobs argues that this interpretation of *Copperweld* is too broad because the case only applies to parent-subsidiary relationships and nothing further.[43] Under Jacobs' view, most professional sports leagues are joint ventures, and, since the clubs still have separate ownership and management and are separate legal entities, they are not linked closely enough to escape section 1.[44]

Federal courts in the US have been divided on whether leagues are single entities or cartels under antitrust laws.[45] Recently, though, the US Supreme Court has decided that the NFL is not a single entity, a decision that is almost certainly applicable to the NBA and NHL, as well.

2. *Despite Special Characteristics, Leagues Are Not Single Entities*

In *American Needle*, a licensed manufacturer of NFL team-branded hats claimed that the NFL's decision to exclusively license its intellectual property to Reebok to put on apparel unlawfully restrained trade in violation of Section 1 of the Sherman Act.[46] The NFL argued that National Football League Properties (NFLP), the organization formed to market the teams' individually owned intellectual property, was a single entity for the purposes of the Sherman Act and, thus, the NFLP was exempt from its application.[47] Both the trial court and the Court of Appeals for the Seventh Circuit accepted this argument, finding that *Copperweld* applied and

42. *See id.* at 139.

43. Jacobs, *supra* note 15, at 35-44 (discussing *Copperweld*); *see also* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 924 (1999) (arguing that courts and commentators have "failed to recognize that in a joint venture, competition and cooperation are not mutually exclusive.").

44. Jacobs, *supra* note 15, at 40 (arguing that professional sports, as joint-ventures, fail to satisfy *Copperweld* test and post-*Copperweld* tests).

45. *See* Piraino, *supra* note 43, at 893, nn.15-17 (citations omitted) (citing to relevant case law discussing professional sports leagues use of single-entity defense).

46. American Needle v. Nat'l Football League, 560 U.S. 183, 187-88 (2010) (discussing background of case and relevant claims).

47. *See id.* at 187 (discussing how teams have own intellectual property).

the NFLP was a single entity.[48] The issue before the Supreme Court was whether NFLP was acting as a single entity when it gave an exclusive, 10-year contract to Reebok, or if this was actually an agreement or combination in restraint of trade.[49]

The Court overturned the Seventh Circuit and held that the Sherman Act applies to cooperative acts between NFL teams because they are not a single entity when they join together into a league or the NFLP.[50] The decision recognizes that sports have "special characteristics" that require cooperation between clubs without which the product (matches and championships) could not exist;[51] however, it finds that the marketing of intellectual property is not an area that requires such cooperation in order for the league to exist.[52] Therefore, it concludes, agreements between competing NFL teams are subject to the Sherman Act under the "flexible Rule of Reason."[53] That is, the NFL will have the opportunity to defend its monopolistic actions as necessary to market its product.[54] The NFL, and likely the NBA and NHL, cannot be exempt from the Sherman Act as a single entity, but its decisions can fall short of violating it based on the special characteristics of the industry.

American Needle represents a rejection of the argument that sports leagues ought to be considered single entities under *Copperweld*, as Roberts and his supporters advocate. Professional clubs in the US, organized as independent firms jointly creating leagues, are not single entities, despite sharing some common economic interests. Under the Rule of Reason any agreements made between

48. The Seventh Circuit determined that *Copperweld* demands that "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." It furthermore found that "only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football," and therefore that the NFL was "a single entity for the purpose of licensing." *See American Needle*, 538 F.3d at 742-44.

49. *American Needle*, 560 U.S. at 195 (applying antitrust law to facts of case).

50. *See id.* at 200 (discussing single-entity). Justice Stevens wrote for the unanimous Court: "The question is whether the agreement joins together 'independent centers of decision making.' If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id.* at 196 (citations omitted).

51. *See id.* at 200 (discussing single-entity).

52. *See id.* at 200 n.7 ("[E]ven if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.").

53. *Id.* at 203.

54. *See id.* (elaborating upon rule of reason analysis)

teams, like other joint ventures, must be judged on their competitive effects.[55]

American Needle is a very sound and reasoned opinion. The language of *Copperweld* might have left open the possibility that any two persons acting with a unity of interests ought to be considered a single entity, but the Court wisely decided that was simply too broad of a conclusion. Had the Court not narrowed *Copperweld*, all cartels could be exempt from the Sherman Act, not just sports-related agreements, rendering the statute useless. As such, an interpretation limiting the reach of *Copperweld* to sports, and other potentially anticompetitive agreements, was necessary and correct. Roberts' proposed expansion of the single entity doctrine to include professional sports leagues is fascinating, but its implications would have simply been too broad: virtually any joint venture would have sought protection for their cartel behavior from the Sherman Act based primarily on their corporate form.

B. Professional Baseball is Generally Exempt From Antitrust Laws

Baseball holds a special place in American culture. Nowhere is this more blatant than the beginning of the Supreme Court's majority opinion in *Flood v. Kuhn*.[56] Titled "The Game," it is a sentimental retrospective of baseball in America's cultural history, tracing baseball's origins, listing its most famous players, referencing famous poems about the game, and eventually acknowledging that all of these things have made baseball the "national pastime."[57] *Flood* sends a message through its dicta that the Court views professional sports (or at least baseball) as something beyond a mere business and actually as a reflection of national identity.

Partly due to this attitude towards baseball, the Court has granted and upheld baseball's non-statutory exemption from the Sherman Act, which originated in *Federal Baseball Club v. National League*, decided in 1922.[58] *Federal Baseball* arose out of the failure of the Federal League, created to compete with the combined Na-

55. Meir Feder, *Is There Life After Death for Sports League Immunity*? American Needle *and Beyond*, 18 VILL. SPORTS & ENT. L.J. 407, 408 (2011) (discussing Court's decision in *American Needle*).

56. *See* Flood v. Kuhn, 407 U.S. 258, 260-4 (1972) (celebrating history of professional baseball).

57. *Id.* at 264 (expanding upon baseball's special place in hearts of Americans).

58. *See generally Federal Baseball*, 259 U.S. 200 (addressing application of antitrust law to professional baseball).

tional and American baseball leagues (later known collectively as Major League Baseball) at the highest level of baseball inside the US. In *Federal Baseball*, the court decided that, even though baseball teams travel over state lines to play each other, the travel was merely incidental and the commerce that occurred in the act of the games themselves was not interstate in nature. Therefore, the business of professional baseball was not subject to the prohibitions laid out in the Sherman Act.[59] As such, none of the actions between the clubs that might otherwise be considered monopolistic or collusive were subject to federal antitrust law.

The Supreme Court upheld baseball's antitrust exemption thirtys years later in *Toolson v. New York Yankees, Inc.*[60] Although *Toolson* upheld the exemption, it was a *per curiam* decision in which Justice Burton wrote a short dissent pointing out that the characterization of professional baseball's activities as being only incidentally interstate was not, in 1953, an accurate depiction of the business of baseball.[61] It is important to highlight that Burton seemed to agree with the majority, though, that due to "the high place [baseball] enjoys in the hearts of our people, and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress."[62] Congress, subsequently, took no action.

The *Flood* case subsequently addressed baseball's antitrust exemption by challenging baseball's standard, league-wide reserve clauses in player contracts—clauses that acted as an agreement between teams that restrained competition between them for players.[63] In its decision, the Supreme Court "acknowledged that the doctrine [of baseball's antitrust exemption in *Federal Baseball*] was 'an exception and an anomaly,' and repudiated the original justification for the exemption by holding that 'baseball is a business and

59. *See id.* at 208-09 (holding professional baseball exempt from federal antitrust law because interstate commerce is "incidental").

60. *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (citing Congress's 30 years of inaction after *Federal Baseball* as tacit acceptance of baseball's exemption.).

61. *See id.* at 360 (Burton, J., dissenting) (referring to Court's discussion of interstate commerce in *Flood*).

62. *Id.* at 364 (Burton, J., dissenting) (noting that Congress did not explicitly exempt baseball from Sherman Act).

63. Szymanski, *supra* note 10, at 472 (discussing baseball's reserve clause, which prevents players from moving to another team unless current team expressly consents to the move).

it is engaged in interstate commerce.'"[64] In spite of this, the Court found that, in the interest of *stare decisis* and due to Congress's continued inaction on the subject, it would respect the *Federal Baseball* precedent, uphold baseball's antitrust exemption, and rule against Curt Flood's request to no longer be bound by the reserve clause in his contract. The Court held that *Federal Baseball* is wrong, but the wrong had lasted so long—50 years—that the Court could no longer make it right.[65]

In response to this decision, as well as to a specific provision in the 1995 players' contract with the league that requested congressional intervention, Congress passed the Curt Flood Act of 1998. The Flood Act eliminated baseball's antitrust exemption, but only as it applies to labor relations with players.[66] Baseball players' reserve clauses were eliminated in the 1970s, allowing players to become free agents after 6 years of playing under a contract.[67] Though these were major steps forward in the critical area of labor relations with players, the antitrust exemption for baseball remains in effect as to labor relations with other groups, like umpires, and in all other respects.[68] In short, it remains law that the Sherman Act does not apply to the actions of MLB, except with respect to the players' union.

Baseball's exemption does not currently provide any substantial economic advantages over other major league sports in the US, as evidenced by the revenues of the four largest leagues,[69] so main-

64. *See* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 214 (2012) (quoting *Flood*, 407 U.S. at 282).

65. *See* Roger I. Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 312 (1999) (noting Congress's role in baseball's antitrust exemption).

66. *See* Grow, *supra* note 64, at 240-41 (discussing Curt Flood Act).

67. *Id.* at 241-42 (discussing free agency imposed after passage of Curt Flood Act).

68. *See* James B. Dworkin & Richard A. Posthuma, *Professional Sports Collective Bargaining in the Spotlight*, *in* COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 217, 230 (Paul F. Clark et al., eds., 2002) (discussing collective bargaining in sports). It should also be noted that umpires have collective bargaining rights within the league. *See id.*; *see also Radovich*, 352 U.S. at 451 ("[W]e now specifically limit the rule there established [in *Toolson* and *Federal Baseball*] to the facts there involved, i.e., the business of organized professional baseball.").

69. *See* Cork Gaines, *Sports Chart of the Day: NFL Revenue is Nearly 25% More Than MLB*, BUS. INSIDER (Oct. 9, 2012), http://www.businessinsider.com/sports-chart-of-the-day-nfl-revenue-still-dwarfs-other-major-sports-2012-10 (stating 2012 league revenues: NFL: $9.5 billion, MLB: $7.7 billion, NBA: $4.3 billion, NHL: $3.2 billion); *see also Stern Estimates NBA Revenue Up 20 Percent to $5B*, NBA.COM (Nov. 13, 2012), http://www.nba.com/2012/news/11/13/stern-nba-revenue.ap/index.html (stating league revenues for 2012 season as NFL: $9 billion, MLB: $7.5 billion, NBA: $5 billion, and NHL $3.3 billion).

taining it seems pointless. However, eliminating its exemption actually could harm consumers because of baseball's minor league system. Freed of the constraints of the Sherman Act, including decisions allowing baseball to protect minor league club territories and subsidies, MLB has created a development system for future big-leaguers that restricts vertical and horizontal economic competition between major and minor league clubs.[70] If MLB's exemption were to be eliminated, the minor leagues could crumble, ultimately reducing the output of professional baseball games available to consumers, producing the opposite result than what is desired in antitrust cases.[71] Though baseball's exemption is based on an entirely outdated interpretation of interstate commerce and simply remains a curiosity in the Supreme Court's jurisprudence,[72] in at least this one substantial respect, its reversal would harm consumers, and therefore it should not be eliminated.[73]

C. MLS May Avoid Antitrust Scrutiny as a Single Entity

Major League Soccer has utilized *Copperweld* and the single entity doctrine to help shield its operations from antitrust scrutiny.[74] The MLS was designed to conform to the single entity exception to Section 1 of the Sherman Antitrust Act.[75] Among other features, the League itself owns all of the teams (allowing investors only to operate teams, not own them), all intellectual property connected to MLS and the teams, the tickets to games, and the broadcast rights.[76] "This gives them centralized control over nearly all profits generated by the league. Additionally, the league controls all of the revenues and is responsible for paying the salaries of league person-

70. Grow *supra* note 64, at 256-57, 256 n.234 (discussing NBA, NHL, and MLB minor leagues).

71. *See id.* at 257-59 (discussing difficulty of applying antitrust law to minor league baseball).

72. *See Cheevers*, 348 F. Supp. 261, 265 (D. Mass. 1972) ("The opinions of the Court make it more than abundantly clear that the granting of immunity under the antitrust laws to the sport of baseball is a historical accident and an anomaly based on historical rather than legal or even rational grounds.").

73. *See* Grow, *supra* note 64, at 255-59. *But see* Morgen A. Sullivan, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1304 (1999) (stating that Supreme Court should dispose of baseball exception).

74. *See* Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 56 (1st Cir. 2002) [hereinafter "*Fraser II*"]; *see also Copperweld*, 467 U.S. 752, 777 (1984) (holding that a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of §1 of Sherman Act).

75. *See* Bryan A. Green, *Can Major League Soccer Survive Another Antitrust Challenge? Emerging Threats to its Single Entity Treatment*, 4 INT'L SPORTS L. REV. 79, 80-82 (2009) (discussing formation of Major League Soccer).

76. *See id.* at 82 (defining important aspects of MLS structure).

nel, referees, and players."[77] Players also negotiate their salaries with MLS, not their respective teams, which gives the league extensive control over which team each individual player will play for and ensures a competitive balance.[78] These features make it unnecessary for the teams to create agreements among themselves that may unreasonably restrain competition.

After its formation in the 1990s, MLS faced an antitrust test in *Fraser v. MLS*, where the Court of Appeals for the First Circuit stopped short of determining whether MLS could have violated Section 1 based on its structure.[79] However, the trial court, in a decision for partial summary judgment, decided MLS could not have violated Section 1 as a matter of law, holding there was "an insufficient basis in the record for concluding that operators have divergent economic interests within MLS's structure," and thus, the League should be treated as a single entity.[80]

Despite MLS being a single entity, some of its new endeavors might threaten that characterization in the future, though it is not clear where the line between single entity and joint venture may lie for professional soccer in the US.[81] Learning from all of the antitrust challenges professional sports leagues have faced in the past, MLS has managed to avoid similar consequences by structuring itself as quite a novel arrangement for US professional sports thus far. MLS is thereby exempting itself from the effective application of antitrust laws to its actions as a league.

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77. *Id.* at 82-83.

78. *See id.* at 83 (explaining best example of MLS's centralized control that sets it apart from other leagues).

79. *Fraser II*, 284 F.3d at 59 ("[E]ven if we assume that section 1 applies, it is clear to us that the venture cannot be condemned by *per se* rules and presents at best a debatable case under the rule of reason").

80. Green *supra* note 75, at 85 (quoting Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 137 (D. Mass. 2000) [hereinafter "*Fraser I*"]). The district court in *Fraser I* held that MLS and its investors should be treated as a single entity. *See id.*

81. *See id.* at 87-91 (citing *Fraser II*, 284 F.3d at 58) ("Perhaps the most persuasive factor that the court considered is that the investor-operators are able to sell the rights to their team (though limitations do apply). This is significantly different from common shares in the league as a whole, and as a result, the court determined that the investor-operators do not act with the same unity of interests that was controlling in the *Copperweld* case. This led the court to state that the structure of the league was closer to a collaborative joint venture as opposed to a single entity.").

D. The Rule of Reason as a *De Facto* Exemption from Antitrust Scrutiny

Because of the *Federal Baseball* decision and the special treatment professional baseball has since received under the Sherman Act,[82] and due to the structure of MLS,[83] each sports league is subject to individual antitrust analysis.[84] After *American Needle*, though, it appears to be settled that the NFL, NHL, and NBA's decisions and agreements (excluding those pertaining to broadcasting rights and collective bargaining) are subject to Rule of Reason scrutiny.[85] The Rule of Reason is an alternative to declaring that a particular action is anticompetitive on its face. US law applies the Rule of Reason in sports cases because of a general recognition that without horizontal agreements between clubs, no club could produce its product.[86] This is an adoption of Judge Bork's enduring and sensible argument cited in the *Board of Regents* case: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."[87] Thus, in complicated situations necessitating horizontal cooperation, the application of the relatively simple *per se* rule would be inappropriate because it cannot take into account the complexities of sports leagues.

The Rule of Reason is not easily applied to sports either. It was created in early decisions that applied the Sherman Act,[88] and was

82. For a further discussion of *Federal Baseball*, see *supra* Section III.B. and accompanying notes.

83. For a further discussion of the structure of the MLS and the application of the Sherman Act to the MLS, see *supra* Section III.C, and accompanying notes.

84. *See supra* Section III.A. and accompanying notes.

85. *See supra* note 53 and accompanying text.

86. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all").

87. *Id.* (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 278 (1978)).

88. *See* Standard Oil v. United States, 221 U.S. 1, 67 (1911) (finding application of rule of reason that dates back 100 years prior to this decision); *see also* Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1557 (11th Cir. 1983) (applying Rule of Reason to alleged Sherman Act violation regarding employment contract).

> Notwithstanding the vastness and variety of cases, the touchstone of this analysis has not varied since the grandfather case of *Mitchell v. Reynolds*. . . . Lord Macclesfield applied a "reasonableness" or balancing test which has survived, with many enlightening applications, to this day. We thus sail into that cherished legal haven, "Is it reasonable under the circumstances?"

described with great care by Justice Brandeis in *Chicago Board of Trade v. United States*:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.[89]

Over the ensuing decades, the detailed examination described by Brandeis was reduced to a question of "whether the challenged agreement is one that promotes competition or one that suppresses competition."[90] The difference is profound: this test only considers the economic impacts of a decision and disregards any "facts peculiar to the business" or "the purpose or end sought to be attained" by the restraint as *Chicago Board of Trade* encouraged. By eliminating these elements of the Rule of Reason, it appeared that US courts were not applying antitrust laws fairly to professional sports.[91] The *American Needle* case may have restored the special treatment that sports receive under the antitrust laws.

In *American Needle*, Justice Stevens cites to *Professional Engineers* as authority for the Rule of Reason, but he quotes Justice Brandeis' previously noted description of the rule from *Chicago Board of Trade* as the guide for what the Rule of Reason ought to entail. The Su-

Id.

89. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

90. *See Prof'l Eng'rs*, 435 U.S. 679, 691 (1978).

91. *See* Barry Wertheimer, *Rethinking the Rule of Reason: From* Professional Engineers *to* NCAA, 6 DUKE L. J. 1297, 1321 (1984) (noting that mechanical application of *Prof'l Eng'rs* led to disregard for non-economic justifications for restraints of trade in sports cases, and therefore overbroad application of antitrust law under Rule of Reason).

preme Court did not have occasion to apply the Rule of Reason to the facts in *American Needle*, instead the Court ordered the lower court to do so on remand, but the reference to *Chicago Board of Trade* indicates a swing back towards a more comprehensive Rule of Reason analysis for antitrust sports cases.[92] Furthermore, affording all sports antitrust cases the benefit of Rule of Reason scrutiny greatly decreases the chances that any plaintiff will succeed in an antitrust challenge against the leagues.[93] Therefore, by virtually automatically granting sports comprehensive Rule of Reason scrutiny in antitrust cases due to their unusual features, US courts may have re-established the sporting exemption that leagues were expecting to enjoy after *Federal Baseball* and *Toolson*, but was eliminated for all but baseball in *Radovich*.[94] By its method of analysis, the ECJ and Commission have also managed to carve out a special place for sports in Europe.

IV. PROFESSIONAL SPORTS AND EU COMPETITION LAW

The Treaty on the Functioning of the European Union ("TFEU") forbids anticompetitive behaviors amongst undertakings in Article 101(1).[95] Article 101(1) is always applicable to anticom-

92. *See, e.g.*, Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. National Football League*, 16 STAN. J.L. BUS. & FIN. 183, 203 (2011) (predicting NFL will probably not be found liable under Sherman Act).

93. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) ("[P]laintiffs almost never win under the rule of reason. In 221 of 222 cases . . . the defendant won.").

94. *See generally* Philip R. Bryce, *The Sherman Act and Professional Team Sports: The NFL Rozelle Rule Invalid Under the Rule of Reason: Mackey v. National Football League,* 543 F.2d 606 (8th Cir. 1976), 9 CONN. L. REV. 336, 337 (1977) (acknowledging that *Toolson* exemption only applied).

95. Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter "TEFU"] (noting prohibited anti-competitive agreements and practices). The general language of section 101 states:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . .

Id. .; *see also* TFEU art. 102 (prohibiting abuse of undertaking's dominant position). It is also important to note that the TFEU renumbered many articles. *See generally* The Lisbon Treaty: A Guide for In-House Lawyers, OUT-LAW.COM (Dec. 1, 2009), http://www.out-law.com/page-10566 (acknowledging renumbering of articles and highlighting some main changes). This Article will refer to them by the current numbers. Similarly, past cases and scholarship refer to European Community (EC) Law; for the purposes of this Article the term is interchangeable with EU law.

petitive agreements, and is subject only to the exceptions described in Article 101(3).[96] Those exceptions apply when an agreement improves the production or distribution of goods, shares the benefit of the efficiency with consumers, all while not imposing any restrictions that are "not indispensable to the attainment of these objectives" and that do not eliminate competition.[97] EU competition law applies to commercial activities, including the commercial activities of sporting activities. It follows that Article 101 restrains any governing body that makes rules affecting professional sports, despite a desire to remain autonomous.[98] The Commission and the ECJ recognize the special characteristics and societal place of sports in Europe. On these bases, the ECJ has recently determined that sports rules that potentially violate Article 101(1) should be treated with more leniency, despite eliminating the pure sporting rule exemption.

A. EU Law Applies to Sports

The question of whether EU competition law provides for any exemption for sports must begin with the broader inquiry of whether any EU law applies to the actions of sports organizations. Early cases dealt with the applicability of all of European Community ("EC") law to sports, not only the competition laws, but they remain relevant to the place of sports under EU competition law. As the European Commission and the ECJ have addressed cases

96. *See* TFEU art. 101(3).

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Id.

97. Communication from the Commission Guidelines on the Application of Article 81(3) of the Treaty, 27 April 2004, O.J. (C 101) para. 9, at 97, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)&from=EN (explaining exceptions and their application).

98. Alfonso Rincón, *EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal*, 3 J. CONTEMP. EUR. RES. 224, 226 (2007) (citing Borja Garcia, *From Regulation to Governance and Representation: Agenda-setting and the EU's Involvement in Sport*, 5 ENT. & SPORTS L. J. 1 (2007)) (describing argument that sport as civil movement on fringe of public authority regulation should remain self-governed).

concerning athletes, sports clubs, and governing bodies, the applicability of EU law has shifted. When it first encountered a sports rule that came up against EC law, the ECJ determined that certain activities and decisions were purely of a sporting nature and non-economic; therefore, EC law could not reach them.[99] This was the first example of a sports exemption under European law. Subsequently, however, the state of that exemption for sporting activities has eroded. Currently, EU law contains no exemptions to its competition laws for sports or sporting activities.[100] Competition laws, as part of European law, are applicable to sport only as far as their commercial activities are concerned.[101] Developments in EU law and policy indicate that the Commission and the ECJ will apply EU law to sports, but they are willing to consider broadly sport's characteristics in evaluating sporting rules under the competition laws. Consequently, sports organizations enjoy a non-statutory method of analyzing competition laws that takes into account non-commercial considerations.

B. *Meca-Medina* Establishes Where Sports Organizations Stand Under EU Competition Law

In *Meca-Medina and Majcen v. Commission*,[102] the ECJ first directly addressed the applicability of EU competition laws to sports.[103] The facts concerned doping rules in long-distance swimming competitions. Two swimmers who had finished first and second at a race tested positive for a banned substance in excess of the limit set by the International Olympic Committee ("IOC") and the International Swimming Federation ("FINA"), and were suspended from competition for four years each.[104] Their appeal at the Court

99. *See* Case 36/74, Walrave and Koch v. UCI, 1974 E.C.R. 1405, para. 4 ("The practice of sport is subject to community law only in so far as it constitutes an economic activity . . .").

100. *See* Christine Stix-Hackl & Alexander Egger, *Sports and Competition Law: A Never-ending Story?*, 23 EUR. COMPETITION L. REV. 81, 83 (2002).

101. *See* Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB), 2000 E.C.R. I-2681, para. 32 (citing *Walrave*, 1974 E.C.R. at 1417).

102. Case C-519/04 P, Meca-Medina and Majcen v. Comm'n, 2006 E.C.R. I-06991.

103. *See* Robert Siekmann, *The Specificity of Sport: Sporting Exceptions in EU Law*, 49 COLLECTED PAPERS OF THE FAC. OF L. IN SPLIT 697, 714 (2012), *available at* http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=138869&lang=en (discussing court's confirmation that economic activities of sports fall within scope of EC law).

104. *See Meca-Medina and Majcen*, 2006 E.C.R. at I-7006 para. 3 (providing background information on case).

of Arbitration for Sport was denied. Instead of exercising their right of appeal to the Swiss courts, they brought a claim to the European Commission alleging that the anti-doping rules at issue were the result of anticompetitive actions by the IOC, FINA, and the labs that test for banned substances, in violation of TFEU Articles 101 and 102.[105] The Commission found no violation of the competition laws, and held that the anti-doping rules did not violate Articles 101 and 102.[106] The Court of First Instance ("CFI") upheld that denial on appeal, finding that doping rules are of a purely sporting nature and solely within the discretion of sport's governing bodies.[107] Furthermore, it determined that anti-doping rules are not economic in nature and, therefore, the Commission's conclusion that Articles 101 and 102 did not apply to them was correct.[108]

The ECJ took a decidedly different view of the case and disagreed with the conclusions reached by both the Commission and the CFI. The Court rejected its prior case of *Walrave*, which held that pure sporting rules fall outside the jurisdiction of EU law (then EC law). It found no basis for any exemption based on actions being of a purely sporting interest: ". . . [T]he mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[109] A sporting activity falls within the scope of the Treaty and is subject to the entire TFEU when it is performed by professional or semi-professional athletes.[110] Therefore, professional sports are subject to the entire TFEU, including Articles 101 and 102.[111] However, professional sports can escape violation of Article 101 based on their special characteristics.

According to *Meca-Medina*, a sporting rule will not violate Article 101 if it is related to the objectives of the rule, inherent to the pursuit of those objectives, and proportional to the aim it seeks to accomplish.[112] In considering whether a sporting activity is in violation of the competition laws, the ECJ found that the method of

105. *See id.* at para. 2 (discussing plaintiff's claims).

106. *Id.* at I-7012 (noting court rejected applicants' complaint).

107. *Id.* at para. 9 ("[T]he prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration.").

108. *See id.*

109. *Meca-Medina*, 2006 E.C.R. at para. 27.

110. *See id.* at para. 23, 28.

111. *See id.* at para. 30.

112. *See id.* at para. 42.

analysis utilized by the Commission and CFI was based on a principle of sporting activities being immune from competition law. Instead, they ought to have only considered the sporting nature of the rule later in their analyses as a possible defense to the application of competition laws.[113] Any analysis of a sporting rule therefore requires a court to examine the rule itself under the competition laws and not simply assume that its apparent sporting nature places it outside the reach of the TFEU. This rejects the notion established in *Walrave* that "purely sporting rules" even exist when it comes to European law.[114]

Applying this reasoning to the anti-doping rules at issue in the case, the ECJ held the following:

> [E]ven if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article [101 TFEU], *since they are justified by a legitimate objective . . . inherent in the organisation and proper conduct of competitive sport* and its very purpose is to ensure healthy rivalry between athletes.[115]

Meca-Medina's significance stems from its conclusion that the entirety of the TFEU applies to the activities of professional athletes and their governing bodies regardless of their economic impact. Yet, if a professional sporting rule is proportional and "inherent" to a sporting objective, it could still avoid running afoul of the competition rules. To pass muster under this standard, sports organizations "do not need to demonstrate a lack of economic impact [from the sporting rules], merely that they were *not primarily motivated by* economic considerations."[116] The judgment is clearly "of paramount importance for the application of [European] competition

113. *See id.* at paras. 33-34.

114. *See* Arnout Geeraert, *Limits to the Autonomy of Sport: EU Law*, *in* ACTION FOR GOOD GOVERNANCE IN INTERNATIONAL SPORTS ORGANISATIONS 151, at 162 (Jens Alm ed., 2013), *available at* http://www.playthegame.org/fileadmin/documents/AGGIS_Geeraert_-_Limits_to_the_autonomy_of_sport.pdf (discussing free competition in EU sport).

115. *Meca-Medina*, 2006 E.C.R. I-7006, para. 45 (emphasis added) (noting rules do not constitute restraint on trade).

116. Samuli Miettinen & Richard Parrish, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home Grown Player Rule)*, 5 ENT. AND SPORTS L.J., para. 9 (2007) (emphasis added) *available at* http://go.warwick.ac.uk/eslj/issues/volume5/number2/miettinen_parrish (citing Stephen Weatherill, *Anti-Doping Revisited* –

law to the sport sector."[117] The full significance of *Meca-Medina* is illuminated with a review of the history of sports under EU law before this ECJ decision.

C. Pure Sporting Rules Under European Law

The *Walrave* designation of purely sporting rules was established to distinguish certain actions of sports organizations from their economic activities and was the basis for certain actions to be fully outside the reach of EC law. Over the decades since the *Walrave* decision, the economic reach of sports in Europe expanded, as has the EU's legal reach; and, consequently, the notion of a purely sporting rule fell away. Understanding the nature of the sporting exemption rejected by *Meca-Medina* is important because it elucidates the significance of the current approach.

1. *The ECJ Once Exempted Pure Sporting Rules as Non-economic in Nature*

The *Walrave* case established the exemption for sports rules under EU law.[118] The case concerned a rule requiring that the pacemaker for a competing cyclist in a cycling event must be the same nationality as the cyclist. Mr. Walrave challenged this rule as being contrary to EC law, but the ECJ decided that sport was subject to EC law only when it constitutes an economic activity.[119] Furthermore, the Court declared that rules governing the composition of a national team, like the one at issue, are a question of a purely sporting nature, and that European law does not reach such questions of "purely sporting interest and as such [have] nothing to do with economic activity."[120] The ECJ was attempting to sort the actions of sporting organizations into two groups: purely sporting rules and economic activities. In determining whether a rule is of a purely sporting interest, the court examines the intended impact of the rule. Was the rule in question imposed to regulate the sport itself or sporting competitions, or was it enacted in order to impact an economic outcome?[121] Concluding that the nationality rule was im-

The Demise of the 'Purely Sporting' Rule, 27 EUR. COMPETITION L. REV. 645, 645-57 (2006)).

117. Siekmann, *supra* note 103 at 714 (discussing *Meca-Medina* decision).

118. *See generally Walrave*, 1974 E.C.R. 1405 (applying competition law to prohibition on discrimination in EU sporting context).

119. *See Walrave*, 1974 E.C.R. at 1417, para 4 (discussing background of case)

120. *See Walrave*, 1974 E.C.R. 1418, para 8 (stating prohibition does not involve economin activity).

121. Rincón, *supra* note 98, at 227 (examining framework of exemption).

posed to regulate the sport itself, not to impact an economic outcome, the ECJ that applying European law to the rule was inappropriate.[122] Subsequently, *Donà* upheld the *Walrave* exemption based on the intent of the rule, which was that those rules adopted for non-economic reasons and related to the "nature and context of [sport] matches" are "of sporting interest only" and, therefore, not subject to EC law.[123]

The ECJ judgments' bases for this exemption were not entirely clear, as even an ECJ Advocate General was unsure, stating "[n]either the basis of the 'exception' nor its extent can be deduced with certainty from the [*Walrave* and *Donà*] judgments."[124] Despite this uncertainty, the ECJ Advocate General nevertheless recognized that an "exception" for sports exists in ECJ jurisprudence.[125] The uncertainty in analyzing the *Walrave* and *Donà* precedents is based on the struggle of distinguishing between economic and non-economic activity in sports activities, as the two are often very closely interrelated. This is especially true when the criteria with which to make that distinction between activities are obscure or nonexistent. In *Walrave* and *Donà*, the difficulty of determining between economic and non-economic activity in sports became apparent and subsequent decisions concerning the application of EU law to sports gradually eliminated the concept of pure sporting rules and exemptions.

Since *Walrave*, the economic aspect of sports in Europe has increased, leading to new treatment under European law.[126] Specifically, the *Bosman* decision arose out of the economic growth of

122. *See Walrave*, 1974 E.C.R. at Ruling para. 2 (discussing ECJ's finding regarding application of EU law to present rule).

123. Case 13/76, Donà v. Mantero, 1976 E.C.R. 1333, para. 14 (discussing ruling upholding Walrave exception).

124. Op. of Advocate Gen., Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. I-04921, para.139 [hereinafter "AG Lenz"], *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414253241070&uri=CELEX:61993CC0415.

125. *See id.* ("[I]t appears to be a sort of limited exception as to scope.").

126. *See* Stephen Weatherill, *Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European Sport Model,' in* L. AND SPORT IN CONTEMP. SOC'Y 157, 171 (Steve Greenfield & Guy Osborn eds., 2000) ("Increasingly visible subjugation to [European] law flows naturally from the rising economic significance of sport."); *see also* RICHARD PARRISH, SPORTS L. AND POLICY IN THE EUR. UNION 9 (Simon Bulmer et al eds., 2003).

> The Commission appeared keen to avoid confrontation with the sports world. A number of factors altered this position. The ruling in *Bosman* acted as an important watershed. Even though in *Bosman* the ECJ did not address the question of competition law and sport, instead focusing on free movement principles, the Commission used the ruling to justify greater scrutiny of sporting activity. Furthermore, competition law of-

sports, primarily soccer, in Europe. Jean-Marc Bosman, a Belgian professional soccer player, challenged the UEFA's international transfer rules.[127] Bosman claimed the international transfer rules violated the Treaty's freedom of movement for workers and antitrust rules. Although it declined to rule on the antitrust claims, the court still set important precedents in applying European law to sports.[128] The court held that the transfer rules violated Bosman's freedom of movement for employment purposes, because the transfer fees were not connected closely enough to their stated purpose: the cost of training young players.[129] Thus, as Stephen Weatherill points out, *Bosman* is an example of how individuals can force change despite the lack of European Commission intervention: "Bosman the litigant broke open, not simply a cartel within football, but also a cartel between the football authorities and the Community's regulatory authorities."[130]

While *Bosman* recognized the existence of the sporting exemption, it did not extend that exemption to all sporting activities. Yet, the court failed to justify the bounds of the exemption.[131] The judgment acknowledged that European law applies to sports only so far as economic activity is concerned; however, in determining whether a rule concerns economic activity,[132] the court shifted focus to the sporting organization's justification of the rule instead of analyzing the rule's impact, thus, reaffirming *Walrave*.[133] Weatherill believes the court was "[building] a justification test into the application of EC rules" in order to accommodate the soccer industry by permitting some leeway in its restraint of competition in Europe.[134] Contrarily, Alfonso Rincón believes the judgment is silent when it comes to clarifying "when the conditions for granting the sporting

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fered individual litigants a more cost-effective venue for redress than the private enforcement route via national courts and the ECJ.

Id.

127. *See Bosman*, 1995 E.C.R. I-04921, paras. 6-19 (elaborating upon transfer rules).

128. *See id.* para. 138 (noting decision not to interpret Treaty).

129. *See id.* para. 109 (discussing difficulty surrounding fees of training young players).

130. *See* Weatherill, *supra* note 126, at 161-62 (

131. *See* Rincón, *supra* note 98, at 229 (discussing holding).

132. *See Bosman*, 1995 E.C.R. para. 73 (distinguishing *Walrave*).

133. *See id.* para. 76 ("[If] rules or practices [are] justified on non-economic grounds which relate to the particular nature and context of certain matches," then they are not reached by community law.").

134. Weatherill, *supra* note 126, at 164.

exemption are met."[135] Thus, although the court indicated that there are sports rules that European law does not reach,[136] it made no effort to specify how to distinguish them. Furthermore, the application of Articles 101 and 102 to sports in Europe has still not been addressed by the ECJ.

Assuredly, the transfer rules did distort the market for soccer players in Europe and restricted their legal right to cross borders in search of better employment opportunities. This direct impact on the commercial aspect of soccer and the livelihood of players, justifies the court's decision to strike the transfer rules down under European law. The rules were also erecting national barriers, going against a major goal of European integration. Notwithstanding, the court still missed an opportunity to more clearly establish the parameters for applying European law to sporting activities. Subsequently, the Commission stepped in to try and clarify the boundaries.

2. *Commission Applied the Sporting Exemption to Competition Cases*

After *Bosman*, the Commission heard many cases concerning sporting rules and the Treaty's antitrust rules.[137] Due to the ECJ's vague guidance on when sports fall outside the scope of European law, and despite its attempts to clarify the law,[138] the Commission struggled to determine how best to apply competition law to sports. Eventually, the Commission embraced and expanded the sporting exemption within competition law.[139] Through the Directorate General for Competition, the Commission clarified the "gray area" left by the *Bosman* decision and gave sports organizations better guidance on which activities may be subject to restraint under Articles

135. Rincón, *supra* note 98, at 228 (discussing exemption application since *Walrave* and *Donà*).

136. *See id.* at 228-29 (analyzing sporting exemption further). "The sporting exemption created by the ECJ in Walrave accords with what the sporting bodies have in mind when they ask for autonomy. The substantiation of this line of reasoning would place the sporting bodies out of the reach of the EC Treaty." *Id.* at 226 (footnote omitted).

137. *See id.* at 229 (discussing breadth of cases examined by Commission).

138. *See* Commission of the European Communities, *Report from the Commission to the European Council with a View to Safeguarding Sports Structures and Maintaining the Social Significance of Sport within the Community Framework,* COM (1999) 644 final, Oct. 12, 1999, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF (discussing attempts of ECJ to clarify law) (suggesting ways to "reconcil[e] the economic dimension of sport with its popular, educational, social and cultural dimensions").

139. *See* Rincón, *supra* note 98, at 229-30 (discussing Commission's acceptance and application of exemption).

101 and 102 TFEU.[140] In doing so, the Commission established precedents by explaining which sporting rules and activities would be exempted from application of EU competition laws.[141]

First, the Commission recognized that sports organizations are entitled to enact and enforce non-economic regulations that are, therefore, outside the reach of European competition law because such rules are "linked to the specific nature of sport."[142] Second, it determined that "the rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not, in principle, caught by the Treaty's competition rules."[143] Third, the Commission said it would not investigate cases for competition law violations if they do not appear to significantly affect trade between member states.[144]

Going forward, then-Commissioner Mario Monti said the Commission would draw a bright line between sporting actions that fall either outside or inside of Articles 101 and 102 with its future decisions, and also determine which actions are exempt from competition laws, though on a case-by-case basis.[145] In a 2002 speech, Monti specifically described the Commission's role in enforcing competition laws in the sporting sector, even referring to *Meca-Medina*:

> Sporting regulations such as the way championships are organised, the way a coach structures his football team, how a referee rules the field, whether a judo player is selected to represent his or her country at the Olympic Games or the suspension of a swimmer for having taken doping substances is not the business of the Commission's

140. Press Release, European Commission, Limits to Application of Treaty Competition Rules to Sport: Commission Gives Clear Signal IP/99/965 (Dec. 9, 1999) [hereinafter IP/99/965], *available at* http://europa.eu/rapid/press-release_IP-99-965_en.htm#PR_metaPressRelease_bottom (discussing clarification of Commission's "grey area").

141. *See id.* (discussing Commission's guidelines).

142. *See id.* (discussing one aspect of Commission's decision).

143. *Id.* (discussing second aspect of Commission's decision).

144. *See id.* (discussing third aspect of Commission's decision). These precedents were established in an unpublished commission decision, The Mouscron Case, concerning the UEFA "at home and away from home" rule applicable to soccer matches. *See Commission White Paper on Sport*, Annex I: Sport and EU Competition Rules, at 2.2.1.2 (2007), *available at* http://ec.europa.eu/sport/white-paper/swd-annex-i-sport-and-eu-competition-rules_en.htm#top.

145. IP/99/965, *supra* note 140 (summarizing framework application for different categories).

> competition department and when we have received complaints we rejected them.[146]

Despite this intention, in *Meca-Medina,* the ECJ decided that the European competition laws do, in fact, reach precisely those types of sporting regulations. The full impact of the decision has been debated.

D. Interpreting *Meca-Medina*

Commentators appear divided on whether the *Meca-Medina* decision preserves the sports exemption or eliminates it. Marios Papaloukas proposes that it only slightly modifies the ECJ's special treatment of sports under European law, including competition law, with the main adjustment being that sporting rules now must be proportional to their aims.[147] Similarly, Robert Siekmann writes that *Meca-Medina* signaled that the ECJ would no longer justify exemption from EU law based on the "purely sporting nature" of a rule. As evidence, Siekmann points out that the Court applied the proportionality test from a non-sport case, *Wouters*, to a case about sporting rules, demonstrating that "it finally could and should be concluded that sport is not 'special' *per se*!"[148]

By contrast, Rincón is quite clear on the significance of *Meca-Medina* with respect to the sporting exemption: "What it represents, in fact, is a rejection of the sporting exemption as framed in Walrave."[149] The decision eliminates the concept of exempting sporting activities because they are not economic in nature, making a general sporting exemption no longer possible.[150] The *Meca-Medina* decision represents the ECJ's "converging analysis of sporting practices under internal market and competition law."[151] That is,

146. Prof. Mario Monti, European Commissioner for Competition Policy, Competition and the Consumer: What are the Aims of European Competition Policy?, Speech at European Competition Day in Madrid 5 (Feb. 26, 2002).

147. *See* Marios Papaloukas, *The Sporting Exemption Principle in the European Court of Justice's Case Law*, 3-4 INT'L SPORTS L.J. 7, 10 (2008) ("After the Meca-Medina case it is safe to say that a principle of relative sporting exemption from the European Internal Market and Competition Rules has set a precedent in the ECJ's case law that will be followed in the future even if some further modifications are accepted.").

148. Robert Siekmann, *The European Union and Sport: Is Sport "Special" in EU Law and Policy?*, at 10, *available at* sportslaw.ru/data/files/siekmann.doc (referring to Case C-309/99, Wouters v. Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577).

149. Rincón, *supra* note 98, at 235 (discussing benefits of Court's decision in *Meca-Medina).*

150. *See id.* (examining Court's decision in relation to *Walrave* and *Donà*).

151. *See id.* at 237 (interpreting Court's conclusions in *Meca-Medina*).

the Court now accounts for sport's special characteristics, not with an exemption, but instead, with something more akin to an affirmative defense: all sports rules are subject to the TFEU, but they can be excepted from its application if they are proportional and not commercially motivated. This determination can be made only after a court or the Commission has examined the rules themselves and the sports organization has explained its intent. This change has baffled some onlookers.

Writing on behalf of UEFA, Gianni Infantino is highly critical of the decision. Among other problems, he asserts that the ECJ now holds that non-economic rules and actions are subject to EU competition law "despite the fact that these . . . [t]reaty provisions are only concerned with the economic relationships of competition. It is very difficult to find logic in this."[152] By subjecting sporting rules to EU competition law, the ECJ is reaching into the workings of sports organizations, governing bodies, and the Court of Arbitration for Sport, eroding their authority in what used to be their sole purview.[153] Overall, the Court

> has shown little interest in defining more clearly the scope of the sporting exception and has . . . moved in the opposite direction in such a way that is likely to increase the scope for legal uncertainty and result in more competition law claims being levelled against sports bodies, often on spurious grounds that have little if anything to do with the functioning of economic competition in the European Union.[154]

Contrary to Rincón's belief that *Meca-Medina* created greater certainty for sports organizations with respect to competition law, Infantino concludes that it has done precisely the opposite. Infantino is probably correct on this count: when a court declines to clearly state a legal rule and instead concludes that sports rules will be assessed case-by-case, it decreases legal certainty for sporting organizations.[155]

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152. Gianni Infantino, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* at 7, Oct. 2, 2006, *available at* http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf (providing perspective on *Meca-Medina* decision and its impact on anti-competitive law).

153. *See id.* at 8 (noting trend towards transferring normal regulatory functions).

154. *Id.* at 10 (stating policy implications and conclusions).

155. *See, e.g.*, Rincón, *supra* note 98, at 236 (discussing how ECJ's judgment lacks clarity and certainty).

Romano Subiotto has also found great flaws in the ECJ's decision, concluding that the decision demonstrated an "overbroad application of European competition law in the [sports] sector."[156] The Court overreached by assuming the IOC and FINA were acting as undertakings when they imposed and enforced anti-doping rules for competitive swimming. In his opinion, the IOC and FINA were not acting as undertakings according to the ECJ's own jurisprudence, thus no balancing test ought to have been applied.[157] He proposes, based on ECJ jurisprudence, that there be "a nexus between the activity, the decision, or the rule and the entity's qualification as an undertaking."[158] The ECJ's decision demonstrated that "European competition law has been made to apply more in the sports sector than in other sectors," because the ECJ now assumes that sports organizations always act as undertakings, and it does not tailor its analysis to the allegedly anticompetitive action.[159] Subiotto's conclusion is compelling: the willingness of the ECJ to draw sports more explicitly into the domain of the TFEU, and specifically Articles 101 and 102, can only be considered a baseless erosion, if not elimination, of the sporting exemption.

E. The Commission White Paper on Sport and the European Rule of Reason Mean Sports Remain Special Under the TFEU

After decades of interaction between the European Commission, ECJ, and the sports community, the Commission published a White Paper on Sport in 2007, addressing the societal role sport plays in Europe, its economic dimension, and its organization.[160] The intersection of European competition law and sport is briefly addressed, but it is more comprehensively explored in the White Paper's attachment Staff Working Document, Annex I.[161] In this document, though not legally binding, the Commission declares dead immunity from competition laws for sporting organizations and rules: "A general exemption of sporting rules or of activities of

156. Romano Subiotto, *The Adoption and Enforcement of Anti-doping Rules Should not be Subjected to European Competition Law*, 31 EUR. COMPETITION L. REV. 323, 330 (2010) (criticizing ECJ's decision).

157. *See id.* at 327 (elaborating on criticisms).

158. *Id.* at 328 (proposing more specific application of test).

159. *See id.* at 330 (examining ECJ's decision).

160. *See Commission White Paper on Sport*, at 3, COM (2007) 391 final (July 11, 2007).

161. *See Commission White Paper on Sport Annex I: Sport and EU Competition Rules*, at para. 2, COM (2007) 391 final (July 11, 2007), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN

sports associations is neither possible nor warranted."[162] Nevertheless, a specific exception does remain under *Meca-Medina*, and the Working Document breaks down the proper line of reasoning as follows: First, is the sport association that adopted the rule an undertaking or association of undertakings? Note that an entity is an undertaking "to the extent it carries out an 'economic activity' itself."[163] Second, does the rule restrict competition under Article 101(1) or is it an abuse of a dominant position under Article 102? To answer the second question, one must consider the context in which the rule was adopted, produces its effects, and its objectives. Further, ask, are those restrictions inherent in the pursuit of those objectives, and is the rule proportional in light of the objectives? Third, is trade between member states affected? And lastly, does the rule fulfill the conditions of Article 101(3)?[164]

It is mainly in the second stage of this process where sports organizations must now actively defend themselves under competition law. When a sporting organization can show that it has adopted a rule with the purpose of promoting a sporting objective, that rule does not violate Article 101 or 102, even if its effect is anticompetitive. This exception was born in the *Wouters* case, which did not concern sports, and, therefore, is not exclusive to sports.[165] The court in *Meca-Medina* applied *Wouters* to a strictly sporting rule and brought sports into the fold of the "European rule of reason" as applied to Article 101.[166] Furthermore, this second stage is an exception to the very text of Article 101(1), which prohibits all agreements whose object *or* effect is anticompetitive. If an agreement's object is innocuous with respect to competition, but its effect is not, it is prohibited by Article 101, with the only exceptions being found in 101(3).

What the ECJ established in *Wouters* and applied in *Meca-Medina*—reasoning which has now been adopted in the White Paper—was read into Article 101(1) as a justification for an otherwise anticompetitive action on public policy grounds. Despite finding in *Wouters* that a regulation of The Netherlands Bar restricted competition under Article 101(1), the ECJ decided the regulation was not unlawful under 101(1) "on the ground of a non-economic argu-

162. *Id.* at para. 2.1.7 (summarizing application of Articles to sport).

163. *Id.* at para. 3.4 (discussing antitrust).

164. *See id.* para. 2.1.2 (discussing application of test).

165. Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde von Advocaten, 2002 E.C.R. I-01577 (ruling on exception in legal profession).

166. *See* KATALIN JUDIT CSERES, COMPETITION LAW AND CONSUMER PROTECTION 268 (2005).

ment . . . without applying Article [101(3) TFEU]."[167] This derogation from the prohibition in Article 101(1), without utilizing Article 101(3), is an application of what has been called the "European rule of reason."[168] Not surprisingly, this is an unpopular approach to European competition law by the ECJ because it introduces a "public interest objective into the wording of [Article 101(1) TFEU], which 'misconstrues the *ratio legis* and the structure of the Treaty provisions.'"[169] As structured, the prohibited action in Article 101(1) can only be counterbalanced by the exceptions listed in Article 101(3); *Wouters* is a court-made exception to this, and *Meca-Medina* expanded the application of the European rule of reason into the sports sector. Therefore, far from being a sports-exclusive exception from competition law, *Meca-Medina* represents the ECJ's confirmation of its own, judicially-created rule of reason and the Court's willingness to expand its application to sporting cases.

F. Europe's "Rule of Reason" Carves Out an Exception for Sports

The *Walrave* sports exemption did not appear to have a strict legal basis, especially considering that professional sporting rules undeniably have an impact on commercial activities in Europe.[170] After the elimination of the exemption in *Meca-Medina* and the subsequent Commission White Paper supporting that decision, sports are now afforded special treatment based partly on their place in European society, but primarily due to the features of the sports industry.

In an effort to differentiate the European antitrust legal regime from the US system, the term "rule of reason" has been disfavored in Europe.[171] The principles of that approach to antitrust cases have still managed to seep into European jurisprudence, *Wouters* being an example. Concerning the internal regulations of a professional organization, the case determined that rules that constrain competition under Article 101(1) could be justified by the overall context from which the rules arose, the rule's objectives,

167. *Id.* at 269 (discussing ECJ's decision).

168. *Id.* at 268 (elaborating on differentiation). .

169. *Id.* at 270 (quoting Opinion of Advocate General Léger in *Wouters*, 2002 E.C.R. I-1577, para. 107 (July 10, 2001)).

170. *See generally* AG Lenz, *supra* note 124 (discussing transfer rules).

171. Mel Marquis, *O2 (Germany) v Commission and the Exotic Mysteries of Article 81(1) EC*, 32 EURO. L. REV. 29, 45-46 (2007) (noting persistence of term "rule of reason").

and the proportionality of the rules to their objectives.[172] The similarities to the US rule of reason are plain: faced with the relatively broad language of Article 101, the ECJ has found it necessary to allow the party whose actions are anticompetitive to justify those decisions based on special circumstances. The availability of this affirmative defense to Article 101(1) applies nicely to a sports industry that has long sought to be free of European regulation. In *Meca-Medina*, the Court initially appeared to encroach on sports organization sovereignty in ruling that the entire TFEU applies, but then opens the escape hatch of *Wouters*, and makes all of the anticompetitive regulations justifiable.

V. CONCLUSIONS

Sports organizations act primarily with the intent of perpetuating their own existence, not necessarily in order to eliminate economic competition between teams or competitors, which tends to be an essential problem regarding both the US and EU antitrust law regulation. For them to exist, outcomes of matches and games must be unpredictable, so competition between teams or athletes must be as balanced as possible. Maintaining competitive balance between clubs and competitors is at the heart of the tension in the business of sports. Sports are built on competition, but economic competition must be restricted when it affects sporting contests.

Automatic rule of reason scrutiny for sports antitrust cases in the US means leagues are always afforded the opportunity to justify their anticompetitive actions based on the nature of their industry. Virtually nothing the leagues do can be considered *per se* anticompetitive. Because US professional sports leagues are strictly commercial endeavors with no higher societal role as in the EU, subjecting them to the antitrust laws is perfectly logical, and the necessarily unusual structure of the leagues justifies their rule of reason treatment.

By contrast, the current state of European competition law and professional sports is not as well-founded. Article 101 TFEU is worded more specifically than the Sherman Act, and the entirety of its exceptions are described in subsection 101(3). The European rule of reason, as it considers only the object of a rule and not its effect, and disregards Article 101(3) altogether, might turn out to be a doctrine just as baseless as the *Walrave* exemption for purely sporting rules. If so, it will also fall apart. Until then, this judicially

172. *Wouters*, 2002 E.C.R. I-1577, para. 97 (observing case-by-case nature of issue).

invented analysis could create unnecessary uncertainty for sporting organizations in Europe. Therefore, sports organizations must advocate for a more certain status under European law.

Finding the right balance between allowing sports organizations to govern themselves and their participants and interfering in their operations so they do not abuse their monopoly powers has been a constant struggle in the EU and US over decades. Both jurisdictions explicitly exempted sports from the reach of their antitrust laws in early cases. In both jurisdictions, the explicit sporting exemption is almost entirely a thing of the past, but professional sports organizations continue to receive special consideration when they face an antitrust challenge. And so the tension between competition and collusion in professional sports continues.